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# Notes and Comments

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# NOTES AND COMMENTS

**Attorneys—Unauthorized Practice of Law by Corporations**

In *State v. Pledger*[1] the North Carolina Supreme Court held that an employee of a shell homes corporation, who had prepared either directly or indirectly deeds of trust by filling in the blanks of printed forms in the course of the corporate business, was not guilty of the unauthorized practice of law.[2] The decision rested on the ground that the defendant did not prepare legal documents "for another person, firm or corporation" within the intent and meaning of G.S. § 84-4. The court interpreted this statute to mean that "a person, firm or corporation having a *primary interest, not merely an incidental interest,* in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating G.S. § 84-4."[3]

The court was quite correct in reversing conviction for violation of G.S. § 84-4 prohibiting the practice of law by individuals for *another.* The indictment in this case was against the individual defendant who was an agent of the corporation acting in the course

[1] 257 N.C. 634, 127 S.E.2d 337 (1962).

[2] Generally, the practice of law is not confined to performing services in court, but includes conveyancing, the preparation of legal instruments of all kinds, advice given to clients, and all actions taken for another in legal matters. See, *e.g.,* N.C. GEN. STAT. § 84-2.1 (1958); *In re* Duncan, 83 S.C. 186, 187, 65 S.E. 210, 211 (1909); 7 C.J.S. *Attorney & Client* § 3(g) (1937).

[3] 257 N.C. at 637, 127 S.E.2d at 339 (1962). (Emphasis added.) In preparing deeds of trust for a finance company, defendant was held guilty of violating G.S. § 84-4 because "as to the defendant, this corporation was 'another . . . corporation' within the meaning of the statute . . . ." *Id.* at 638, 127 S.E.2d at 340.

The defense used by some corporations who rely on the "incident-to-business" theory is the claim that no separate charge is made for the services. *E.g.,* Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954). However, other cases hold this defense to be invalid because there is still an indirect compensation to the corporation in the way of business. *E.g.,* State Bar Ass'n v. Northern N.J. Mortgage Associates, 32 N.J. 430, 161 A.2d 257 (1960). In still others the court found that there was an unauthorized practice of law because the total services for which the customer paid was so high as to include a fee for the legal services rendered. *E.g.,* Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959); *In re* Gore, 58 Ohio App. 79, 15 N.E.2d 968 (1937); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944); Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945).

of his employment; but since a corporation can act only through its agents, the corporation was, in effect, the defendant. However, G.S. § 84-5 prohibits the practice of law by corporations.[4] The court made no reference to this statute and expressed no opinion as to whether the defendant's acts were in violation of its command. It is clear, therefore, that *Pledger* does not preclude an indictment and conviction in North Carolina of persons who prepare deeds of trust in the course of their employment by a real estate corporation, unless the court's construction of G.S. § 84-4 be taken as a gloss on G.S. § 84-5 as well. Under G.S. § 84-4 as now interpreted a corporation may perform legal services so long as they are incidental to its usual course of business. If the two statutes are now construed *in pari materia* it may well be that the court has, perhaps inadvertently, laid the groundwork for a holding that G.S. § 84-5 also permits a limited practice of law by corporations "incident to business." This approach may be necessary to resolve the dilemma propounded when one statute confers a privilege which another purports to take away.[5]

The purpose of all suits to enjoin corporations from preparing legal documents allegedly constituting an unlawful practice of law is

> to protect the licenses, privileges and franchises granted to attorneys from encroachment and damage by reason of the alleged unauthorized acts of the defendant . . . [and] to protect the public and particularly those persons participating in

[4] "[N]o corporation shall . . . draw agreements, or other legal documents . . . or practice law, or give legal advice . . . by or through any person . . . ." N.C. GEN. STAT. § 84-5 (1958). The only corporations excepted from this statute are banks, and then only in specified circumstances. One cannot help but wonder why the indictment was drawn under G.S. § 84-4. It is a well known rule of criminal procedure that the indictment must state a crime. Even though the defendant may in fact be guilty under the facts of some crime, unless that crime is charged specifically in the indictment he must be found innocent. State v. Law, 227 N.C. 103, 40 S.E.2d 699 (1946); 42 C.J.S. *Indictments & Informations* §§ 137, 261 (1944). If the complexities of indicting corporations are insurmountable in a particular case it should be possible to obtain an injunction against further violations of the law. See Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, *supra* note 3, where injunction was used instead of indictment.

[5] The answering argument is that G.S. § 84-4 does not *confer* a right on corporations to practice law incident to their business, but merely does not prohibit it. Construed in this way G.S. § 84-4 as interpreted in the principal case and G.S. § 84-5 are corollary; that which is omitted from G.S. § 84-4 is prohibited by G.S. § 84-5. This would seem to be the best argument, but the language of the case gives the impression that the court would be inclined to the other line of reasoning.

real estate transactions through brokers, from the dangers inherent in the preparation of legal documents by persons unskilled in the intricacies of the law rather than by lawyers.[6]

Nearly all states, either by statute[7] or judicial decision,[8] forbid a corporation to practice law under any circumstances. Due to the nature of corporations it necessarily follows that "acts of officers of a corporation who are regular, salaried employees, performed in the course of their employment, are acts of the corporation as affecting the determination as to whether the corporation is engaged in the practice of law."[9] In spite of the flat prohibition of their statutes, several states allow certain corporations to transact their own legal business and to perform certain acts necessarily incident to the proper performance of their authorized business function, even though these very acts would constitute the unauthorized practice of law were they not so permitted.[10] These jurisdictions have avoided statutes similar to G.S. § 84-5 on two grounds: (1) such acts do not constitute the practice of law,[11] (2) public policy favors such activities by corpora-

[6] Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 413, 312 P.2d 998, 1006 (1957).

[7] *E.g.*, MASS. ANN. LAWS ch. 221, § 46 (1955); N.C. GEN. STAT. § 84-5 (1958); N.J. STAT. ANN. § 2A:170-78 (1953); N.Y. PENAL LAWS § 280 (1944); OHIO REV. CODE §§ 1701.03, 4705.01 (1954); PA. STAT. ANN. tit. 17, § 1608 (1930); S.C. CODE §§ 56-141, -142 (1962); TENN. CODE ANN. § 29-303 (1955); TEX. REV. CIV. STAT. ANN. art. 320a-1, § 3 (1959) (see note 16, *infra*).

[8] *E.g.*, State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914 (1942). In State *ex rel.* Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 504 (1936), the court held that the right to practice law is personal and, therefore, a corporation cannot do it either directly or indirectly by employing lawyers to practice for it.

[9] 19 C.J.S. *Corporations* § 956, at 404 (1940).

[10] See generally cases and statutes cited notes 11 & 12, *infra;* Annot., 157 A.L.R. 285 (1945); 19 C.J.S. *Corporations* § 956, at 406 (1940).

[11] Bar Ass'n v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959) held that even though activities of the title guaranty company constitute practice of law within the meaning of TENN. CODE ANN. § 29-303 (1955) forbidding a corporation to practice law, they will not be declared unlawful if incidental to the main business of the corporation. Title Guar. Co. v. Denver Bar Ass'n, 135 Colo. 423, 428, 312 P.2d 1011, 1014 (1957), decided on COLO. REV. STAT. ANN. § 12-1-17 (1953), held that "a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law." In the Colorado case the corporation as mortgagee was allowed to prepare mortgages, but not to fill in blanks affecting conveyancing of property. State Bar Ass'n v. Connecticut Bank & Trust Co., 20 Conn. Supp. 248, 264, 131 A.2d 646, 655 (Sup. Ct. 1957), relying on CONN. GEN. STAT. ANN. § 51-88 (1960), held

tions.[12]

The New York Penal Law § 280 provides that no corporation shall itself or by or through its officers, agents, or employees render legal services. A corporation, under this statute, is not to receive compensation directly or indirectly for preparing legal instruments. It excepts corporations lawfully engaged in examining and insuring titles to real property from its provisions in so far as preparation of legal instruments is necessary to the examination and insuring of titles and necessary or incidental to loans made by the corporation. Up to this point the New York statute appears very liberal. However, it further provides that no corporation may render any legal services which may not be rendered by a layman. The purpose of the statute, as expressed in subsequent New York decisions,[13] is to

that a bank which had given information on tax law and prepared legal documents pertaining to estates and trusts, had not violated the statute because in performing such acts they "are acting primarily for themselves in the proper exercise of their functions as fiduciaries . . . and are not engaged in the practice of law." Ingham County Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955), permitted conveyancing as incidental to a broker's business. See Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954). LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948), construing PA. STAT. ANN. tit. 17, § 1608 (1930), did not consider the gratuitous preparation of legal papers in question to be the practice of law. Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934) held that the drafting of legal instruments is prohibited only when not connected with the immediate business of the person preparing them.

[12] State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961), WIS. STAT. ANN. §§ 227.014, 256.30 (1957). New Jersey State Bar Ass'n v. Northern N.J. Mortgage Ass'n, 32 N.J. 430, 445, 161 A.2d 257, 265 (1960), interpreting N.J. STAT. ANN. § 2A:170-78 (1953) which forbids corporations to practice law, said that a corporation can "in pursuance of its lawful business activities, insure titles and cause searches and abstracts to be made . . . ." In this case the title company as mortgagee was allowed to draw the bond and mortgage provided no charge was made; if the fee charged for the services is so high as to imply the inclusion of a separate fee for the legal services it will be held to constitute the unauthorized practice of law. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957), having considered COLO. REV. STAT. ANN. § 12-1-17 (1953) which is similar to N.C. GEN. STAT. § 84-4 (1958), held that a licensed real estate broker could, without separate charge, prepare deeds and related instruments at the request of his customers in connection with a bona fide real estate transaction. The court in this case while rejecting the "incident-to-business" theory allowed such corporate activities because it was the custom for brokers to render such legal services incidental to their business and, therefore, they were acting in the public interest. Cowern v. Nelson, 207 Minn. 642, 209 N.W. 795 (1940), involved MINN. STAT. ANN. § 481.02 (1958) prohibiting a corporation to practice law.

[13] People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919), where defendant who drew legal instruments was held to have violated N.Y. PENAL LAW § 270 requiring a license to "practice as an attorney at law." People v. People's Trust Co., 180 App. Div. 494, 167 N.Y. Supp. 767 (1917); People v. Purdy, 174 App. Div. 694, 162 N.Y. Supp. 70 (1916).

prevent corporations from performing legal services which can only properly be done by licensed attorneys, under direct supervision of the court, whose interest is in their clients rather than the corporation. In later cases,[14] however, the New York courts held that the statute did not prohibit an employee of a corporation authorized to guarantee mortgages from filling in the blanks of a form mortgage and charging a fee for the service. Considering the public convenience and long-standing practice involved, the court said that such single occurrences did not constitute the practice of law or violate the penal code since no legal advice was given, and a layman could lawfully perform such acts. Subsequent New York decisions[15] apparently overruled these cases by holding a title insurance company which drafted mortgages to have practiced law in violation of the penal law.

The Texas statute[16] has been strictly construed to hold that

[14] Wollitzer v. National Title Guar. Co., 148 Misc. 529, 266 N.Y. Supp. 184 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 757, 270 N.Y. Supp. 968 (1934); People v. Title Guar. Co., 191 App. Div. 165, 181 N.Y. Supp. 52, *aff'd*, 230 N.Y. 578, 130 N.E. 901 (1920). The dissent in the appellate division, in the latter case said that the corporation through its employees went beyond its chartered powers in advising on legal matters. 191 App. Div. at 167, 181 N.Y. Supp. at 53 (1920) (dissent). In People v. Title Guar. Co., 227 N.Y. 366, 125 N.E. 666 (1919), the court held that although the legislature has allowed the defendant to search and insure titles, such work being between the corporation and its employees, the drawing of legal instruments is legal work which though it relates to insurance of titles affects individuals in other ways also and, therefore, such legal service should be performed by lawyers.

[15] People v. Lawyer's Title Corp., 282 N.Y. 513, 520, 27 N.E.2d 30, 33, *reversing* 258 App. Div. 916, 16 N.Y.S.2d 357 (1940), held that "the defendant is not protected by the provisions of section 280, which exempt a corporation engaged in the examination and insuring of titles to real property. That exemption has no application whatever to services which cannot be lawfully rendered by a person not admitted to practice law in the state of New York . . . . Nor may the defendant protect itself behind the claim that the services rendered were necessary to the examination of titles and the issuance of its policies of insurance." See also Application of N.Y. County Lawyers' Ass'n, 181 Misc. 632, 43 N.Y.S.2d 479 (Sup. Ct. 1943), in which a tax and management corporation which gave legal advice to and prepared legal documents for its subscribers was held to have engaged in the "illegal practice of law" even though it told its clients to consult private attorneys.

[16] TEX. REV. STAT. ANN. art. 320a-1, § 3 (1959) prohibits all persons who are not members of the bar from practicing law in Texas. Tex. Sess. Laws 1933, ch. 238, § 62, repealed by Tex. Sess. Laws 1949, ch. 301, § 62, prevented any corporation, person, firm or association from practicing law. The reason given for the repeal of this statute was that it had no practical value since the State Bar Act subsequently enacted (TEX. REV. CIV. STAT. ANN. art. 320a-1 (1959) prohibits all persons not members of the bar from practicing law. The present statute gives power to the courts to define "practice of law" and to protect the public from its practice by laymen and corporations through civil proceedings.

corporations who draft any kind of legal instrument are guilty of the unauthorized practice of law. The Texas court[17] has consistently held that in performing these acts corporations were rendering legal services to others and acting ultra vires.

In answer to the argument that the practice of law by corporations is in the interest of public policy it can be argued that a corporation cannot give legal advice without regard to its own interests. When an employee of a corporation, whether he is a layman or an attorney, renders legal services for his corporation and another, the non-corporate party is cheated.[18] The North Carolina Supreme Court argues that the purpose of G.S. § 84-4, and inferentially G.S. § 84-5, is to protect the public rather than the legal profession; but the question remains as to whether this is the way to protect the public. There are persuasive opinions saying it is not,[19] for the public is entitled to a legal representative who has a legal education and whose first and only loyalty is to his client's interests.

Some courts feel that if a corporation is allowed to prepare legal documents which are necessary to carry out its business objectives there is nothing to stop a building constructor, insurance company, or bank from claiming that because their business requires properly drafted deeds and other instruments affecting title to property they should be allowed to prepare them. There is danger in stretching the "its own business" concept so far that ultimately most of the out-of-court legal work may be performed by corporations and others

[17] O'Neal v. Ball, 351 S.W.2d 670 (Tex. Civ. App. 1961) held that an abstract company could not draft a conveyance even through its agents. In San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956), an injunction was granted to prohibit a corporation engaged in selling abstracts and title insurance from employing an attorney to prepare legal instruments. Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948 (Tex. Civ. App. 1954) held that it constituted unauthorized practice of law for a title company through attorneys to prepare legal instruments for other persons and corporations in transactions where it had no interest; Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945) held that the drawing of legal instruments by a corporation although done without compensation constituted illegal "practice of law"; Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

[18] Reisler, *Fundamentals of Unauthorized Practice of Law for the Law Student*, 26 UNAUTHORIZED PRACTICE NEWS 11 (1960). The non-corporate party either receives "incompetent and unethical advice" or is "served by lawyers who are not disinterested, whose real client is not the person advised but the entrepreneur furnishing the services."

[19] Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).

not licensed to practice law. "The law practice would be hawked about as a leader or premium to be given as an inducement for business transactions."[20]

According to the *Pledger* case the drafting of legal instruments would be warranted by a corporation provided the legal services so rendered are to its customers pursuant to transactions in which the corporation has a primary interest. It is arguable that this practice is not protective of the public interest.[21] If the legal services involved require the knowledge, judgment, and advice of an attorney, and the interests of someone other than the corporation are involved, the corporation should not be permitted under G.S. § 84-5 to render that service in spite of the fact that its interest may also be involved. If the employee of the corporation renders this service he is primarily serving the interest of the corporation and is selling the legal service to a customer of the corporation. It is almost impossible for him to serve equally both customer and corporation for he cannot be impartial.[22] This could result in harm not only to the legal profession and the lay practitioner[23] who is liable for his mistakes, but also to the customer who does not have the advantage of an impartial representative who can give advice as to the legal implications of the document drafted.

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[20] Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 519, 179 S.W.2d 946, 953 (1944).

[21] In Agran v. Shapiro, 127 Cal. App. 2d 807, 817, 273 P.2d 619, 625 (Dist. Ct. App. 1954) the court said that "any rule which holds that a layman who prepares legal papers . . . is not practicing law when such services are incidental to another business . . . completely ignores the public welfare." See also State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

[22] In addition it requires no extensive citation of authority to prove that even so simple an act as filling in the blanks of a form deed is fraught with pitfalls for the inexpert. The reports abound with examples of defective deeds, sometimes fatally so, resulting from carelessness, ignorance or both. The lay practitioner may prepare many hundreds of perfect instruments, but this is small consolation to the unhappy client who, at best, is subjected to an expensive lawsuit to perfect his title or, at worst, loses his land, due to an "honest mistake." True, the same might have happened had he had competent legal advice, but the chances are far less.

[23] Pelletier, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies*, 27 UNAUTHORIZED PRACTICE NEWS 217 (1961).

**Automobile Insurance—Permissive User Under the Omnibus Clause**

In *Hawley v. Indemnity Ins. Co. of North America*[1] the plaintiffs sought to fix liability upon defendant insurance company under the "omnibus clause"[2] of an automobile liability insurance policy issued by defendant to a corporation. One plaintiff suffered personal injuries and the other plaintiff's property was damaged when a vehicle owned by the latter collided with a truck owned by the corporation and driven by its employee. The employee, who had been given permission to use the vehicle to drive to and from work, and to keep it overnight at his home, was using it at the time of the accident on an entirely personal mission after returning home from work. Plaintiffs had recovered judgments against the employee which were unsatisfied at the time the present action was instituted. The insurer denied liability under the omnibus clause on the theory that the "actual use" of the vehicle at the time of the accident was outside the scope of the permission granted.

On appeal by defendant from an adverse judgment, the court held that plaintiffs' evidence[3] made a prima facie showing of express permission[4] for the use being made of the vehicle at the time of the accident. However, an instruction by the trial court which assumed, as a matter of law, that the initial permission to use the truck was comprehensive and unlimited if specific uses were not expressly prohibited was held erroneous in that it failed to place upon plaintiffs the burden of showing, as an affirmative matter, the *nature* and *extent* of the permission granted. The court found that the instruc-

[1] 257 N.C. 381, 126 S.E.2d 161 (1962).

[2] The policy definition of "insured" contained a clause which included as insured any person while using the vehicle, provided the *actual use* was with the permission of the named insured. Similar omnibus clauses are now contained in all standard automobile liability insurance policies. See Austin, *Permissive User Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962).

[3] The court held that evidence that the employee had been instructed only that he was not to "do too much running around with it at night" permitted the conclusion that non-excessive use at night was authorized. The court also held that the mere fact that the employee was carrying riders at the time in disobedience of instructions would not nullify such permission. This is in accord with the general rule. See, *e.g.*, Hartford Acc. & Indem. Co. v. Collins, 96 F.2d 83 (5th Cir.), *cert. denied*, 305 U.S. 627 (1938).

[4] It is universally held that permission under the omnibus clause may be either express or implied. 257 N.C. at 384, 126 S.E.2d at 164.

tion, in effect, was based on the liberal, "initial permission" rule[5] of construction,[6] and held that neither the omnibus clause required by the applicable Motor Vehicle Financial Responsibility Act of 1957,[7] nor the similar clause written into the policy in question,[8] justified the application of this rule.[9]

The main difference in the construction given an omnibus clause in other jurisdictions seems to be in "whether the permission is confined to the time when the accident occurs or whether it is defined as permission 'in the first instance.' "[10] Under the conventional analysis,[11] however, the decisions are divided into three groups.

[5] Under this rule, the person using the vehicle is insured if he has permission in the first instance, and any use while it remains in his possession is "with permission" even though that use is for a purpose not contemplated by the named insured when he parted with possession. See 257 N.C. at 385, 126 S.E.2d at 165.

[6] In a dictum the court stated that the instruction "is not improper" under the liberal rule, since most courts following this rule do not allow recovery when the personal use by the employee was specifically prohibited. However, the cases relied upon for this conclusion, Waits v. Indemnity Ins. Co. of North America, 33 So. 2d 554 (La. App. 1947) and cases therein cited, either did not apply the liberal rule, or held that there was no initial permission for the use. The *Waits* case itself was reversed by Waits v. Indemnity Ins. Co. of North America, 215 La. 349, 40 So. 2d 746 (1949). No decisions have been found denying recovery on such grounds while applying the liberal rule. This is to be expected since the very rationale of the liberal rule has been said to be that public policy will not allow the defense that the permittee went beyond the scope of his permission. See Arnold v. State Farm Mut. Auto. Ins. Co., 158 F. Supp. 1 (S.D. Ind.), *aff'd*, 260 F.2d 161 (7th Cir. 1958). *But see* Hubbard v. United States Fid. & Guar. Co., 192 Tenn. 210, 240 S.W.2d 245 (1951). Thus the lower court's instruction seems to be a confusing combination of the liberal and moderate rules.

[7] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1961). G.S. § 20-314 incorporates by reference the omnibus clause required by the Motor Vehicle Safety-Responsibility Act of 1953, codified as N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1961); this section provides that the policy shall insure "the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured . . . ."

[8] See note 2 *supra*.

[9] The court had not previously adopted a specific rule of construction. In several cases, specific exclusion clauses were given effect to bar recovery. See, *e.g.*, Johnston v. New Amsterdam Cas. Co., 200 N.C. 763, 158 S.E. 473 (1931); Holton v. Eagle Indem. Co., 196 N.C. 348, 145 S.E. 679 (1928). Recovery has also been denied on various other grounds. See, *e.g.*, Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957) (vehicle involved not covered by policy).

[10] Hodges v. Ocean Acc. & Guar. Corp., 66 Ga. App. 431, 435, 18 S.E.2d 28, 31, *cert. denied*, 316 U.S. 693 (1942). See generally Ashlock, *Automobile Liability Insurance: The Omnibus Clause*, 46 IOWA L. REV. 84 (1960), in which many cases are classified on the basis of this "two rule" analysis.

[11] See generally 7 APPLEMAN, INSURANCE LAW AND PRACTICE, §§ 4366-372 (1962) [hereinafter cited as APPLEMAN]; Annot., 5 A.L.R.2d 600 (1949).

(1) Under the strict or "conversion" rule,[12] any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause. (2) Under the moderate or "minor deviation" rule,[13] a material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage. (3) Under the liberal or "initial permission" rule,[14] if the permittee has permission to use the automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties at the time of the bailment, is a permissive use within the terms of the clause.

Such a superficial analysis of the cases, however, tends to overlook the often critical effect of local statutes upon the construction given an omnibus clause by the courts. Since the clause indirectly extends protection to members of the public injured by the negligent operation of motor vehicles, the courts often give great weight to considerations of public policy suggested by legislation requiring automobile liability insurance of certain vehicle owners or operators. In a particular case, the traditional rules of construction of insurance policies must be balanced against these considerations of public policy.[15]

A few states require all[16] or some[17] automobile liability policies to contain a statutory omnibus clause. In most jurisdictions, however, the parties are generally free to include an omnibus clause of their choice and to make it as broad or narrow in scope as they

[12] See, *e.g.*, Gray v. Sawatzki, 291 Mich. 491, 289 N.W. 227 (1939); Cypert v. Roberts, 169 Wash. 33, 13 P.2d 55 (1932).

[13] See, *e.g.*, Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866 (1924); Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356 (1939).

[14] See, *e.g.*, Parks v. Hall, 189 La. 849, 181 So. 191 (1938); Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960); Stovall v. New York Indem. Co., 157 Tenn. 301, 8 S.W.2d 473 (1928). For an excellent discussion of the problems raised by the *Matits* case see Cohen & Cohen, *Automobile Liability Insurance: Public Policy and the Omnibus Clause in New Jersey*, 15 RUTGERS L. REV. 155 (1961).

[15] See generally 7 APPLEMAN § 4343 and Ashlock, *op. cit. supra* note 10, at 86-90, for cases applying statutory provisions.

[16] See, *e.g.*, IND. ANN. STAT. § 39-4309 (1953).

[17] See, *e.g.*, IOWA CODE ANN. § 321A.21(2)(b) (Supp. 1962); N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1961). These are typical of statutes requiring an omnibus clause only in those policies furnished as proof of financial security following accidents, etc.

wish.[18] Thus it is not surprising to find that a majority of courts[19] have held that the parties had no intent to adopt the "hell and high water"[20] liberal rule. However, in the comparatively few instances where, as in the principal case, statutes require that a particular omnibus clause be included in the policy, most courts have taken the view that the clause should be liberally construed in favor of the injured plaintiff.[21]

Although North Carolina has required various statutory omnibus clauses since 1931,[22] no cases have been found in which the court has attempted to construe one of these clauses. In *Hooper v. Maryland Cas. Co.*,[23] the only case in this jurisdiction in which an omnibus clause had to be interpreted, the statutory clause was apparently not applicable and was not mentioned in the opinion. The court in that case expressly declined to adopt any one of the rules of construction, but its decision seems to follow the pattern of the strict or moderate rule jurisdictions.[24]

In recent years, several statutes[25] designed to increase the probability that innocent traffic victims will receive compensation have

[18] See, *e.g.*, McCann v. Continental Cas. Co., 8 Ill. 2d 476, 134 N.E.2d 302 (1956) (covered only named insured and relatives in his household).

[19] See, *e.g.*, Hodges v. Ocean Acc. & Guar. Co., 66 Ga. App. 431, 18 S.E.2d 28, *cert. denied*, 316 U.S. 693 (1942); Gulla v. Reynolds, 151 Ohio St. 147, 85 N.E.2d 116 (1949).

[20] The "hell and high water" appellation, with its inflammatory connotations, is often used by courts which, like the court in the principal case, wish to reject the liberal rule. It was probably originated by Appleman, a sharp critic of the rule. See 7 APPLEMAN § 4366, at 308.

[21] See, *e.g.*, O'Roak v. Lloyds Cas. Co., 285 Mass. 532, 189 N.E. 571 (1934).

[22] N.C. SESS. LAWS 1931, ch. 116, § 12(2) provided that policies issued thereunder "shall insure the insured named therein and any other person using . . . any such motor vehicle with the consent, express or implied, of such insured . . . ."

[23] 233 N.C. 154, 63 S.E.2d 128 (1951).

[24] By affirming a non-suit against the plaintiff on the grounds that he had not shown that the permission given the employee to use his employer's truck to drive to and from work extended to use for other personal purposes, it seems that the decision applied the "scope of permission" test of the strict or moderate rule. Since this decision there have been several decisions by federal courts applying North Carolina law which seem to follow the strict or moderate rule. See, *e.g.*, Williams v. Travelers Ins. Co., 265 F.2d 531 (4th Cir. 1959).

[25] See, *e.g.*, N.C. GEN. STAT. § 20-71.1 (Supp. 1961) (presumption that operator is agent of owner); N.C. GEN. STAT. §§ 20-279.1 to -.39 (Supp. 1961) (broader financial responsibility law); N.C. GEN. STAT. § 20-280 (1953) (taxicab operators must prove financial responsibility); N.C. GEN. STAT. §§ 20-281 to -284 (Supp. 1961) (vehicle lessors and renters must obtain insurance); N.C. GEN. STAT. § 58-194.1 (Supp. 1960) (requiring insurance for state-owned vehicles).

been enacted in this state. Among these is the Motor Vehicle Financial Responsibility Act of 1957.[26] With the enactment of this statute North Carolina became the third state[27] to require proof of financial responsibility as a condition precedent to the registration of motor vehicles. This act provided that automobile liability policies presented as proof must contain the statutory omnibus clause. If such a clause is not inserted, it will be read into the policy by the court.[28] In view of these recent expressions of a legislative intent to reduce the number of uncompensated automobile accident victims, it could have been predicted with some degree of confidence that the court would, given a proper case, adopt the liberal rule in construing the statutory omnibus clause in a policy issued in compliance with the 1957 act. With only the relatively weak precedent of the *Hooper* case to overcome, the court could have pointed out the obvious advantages offered by the liberal rule in effectuating the legislative policy.[29]

Perhaps this result would have been reached in the principal case[30] had the court not determined, by a rather strained interpretation of the statutory omnibus clause, that the legislative intent was to require no more "radical" coverage than that expressed by the moderate rule. The court pointed out that the omnibus clause in the superseded Motor Vehicle Safety and Responsibility Act of 1947[31] was broad enough to embrace the liberal rule in that it required coverage of anyone "in lawful possession" of the vehicle.

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[26] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1961).

[27] Massachusetts enacted the first such legislation in 1925. See MASS. ANN. LAWS ch. 90, §§ 34A-34J (1959), as amended, MASS. ANN. LAWS ch. 90, §§ 34A-34K (Supp. 1961); MASS. ANN. LAWS ch. 175, §§ 113A-113J (1959), as amended, MASS. ANN. LAWS ch. 175, §§ 113A, 113D (Supp. 1961). New York enacted a similar law in 1956. See N.Y. VEHICLE AND TRAFFIC LAW §§ 310-321.

[28] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[29] *Cf.* Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960), by which New Jersey became the latest state to adopt the liberal rule. The rule was chosen in this case because of its advantages in carrying out the legislative policy indicated by the trend toward stronger financial responsibility legislation.

[30] The court in the *Hawley* case noted that due to the widespread enactment of financial responsibility and compulsory insurance laws, there was a decided trend in the courts toward liberal construction of omnibus clauses.

[31] N.C. SESS. LAWS 1947, ch. 1006, §§ 1-59. Section 4(2)(b) of this act provided that every owner's policy shall insure "the person named, and any other person using . . . the motor vehicle with the permission, expressed or implied, of the named insured, *or any other person in lawful possession* . . . ." (Emphasis added.)

Since the phrase "or any other person in lawful possession" was deleted from the omnibus clause required by the Motor Vehicle Safety-Responsibility Act of 1953,[32] the court reasoned that this indicated an intention on the part of the legislature to reject the liberal rule.[33] This argument, however, overlooks the more likely explanation that the legislature was simply acting to bring our financial responsibility law back into line with the uniform legislation enacted in other jurisdictions.[34] Indeed, if the true intent was to preclude the adoption of the liberal rule by our court, it is highly unlikely that the legislature would have utilized the very language often construed in other jurisdictions as expressing the liberal rule. In any event, before attributing an intent to the legislature to so restrict the coverage of a policy required by such a remedial statute, the court should have required more cogent evidence.[35]

The court could have found more persuasive evidence of the intended meaning of the current statutory omnibus clause by examining the background of the 1957 act. This act was copied with slight modification from the comparable statute enacted in New York

[32] See note 7 *supra.*

[33] The court apparently overlooks the possibility that the phrase "or any other person in lawful possession" might be construed as providing coverage in situations where even the liberal rule courts would refuse to find the insurer liable. Such a situation might be one in which the owner had bailed the vehicle for storage and the bailee did not have even an implied initial permission to *use* the vehicle on the highway. The deletion of the phrase, to eliminate the possibility of such a construction, would be consistent with an intention to limit coverage to that provided by the liberal rule.

[34] The first motor vehicle financial responsibility legislation in North Carolina, enacted in 1931, was based upon the model Safety-Responsibility Act developed by the American Automobile Association in 1928. See 9 N.C.L. REV. 384 (1931). The model act was later incorporated into the Uniform Vehicle Code as the Uniform Motor-Vehicle Safety Responsibility Act (1934). Section 23(a)(3) of this act provided that the policy "shall insure the person named therein and any other person using . . . said motor vehicle . . . with the express or implied permission of the said insured." This omnibus clause was essentially the same as that required by the 1931 North Carolina legislation. See note 22 *supra.* The 1947 act departed from the uniform act in many ways, including the addition to the omnibus clause of the phrase "or any other person in lawful possession." See note 31 *supra.* The 1953 act, however, is modeled after the uniform legislation; and the 1953 omnibus clause construed by the court in the principal case is identical to that required by the revised UNIFORM MOTOR-VEHICLE SAFETY RESPONSIBILITY ACT § 21(b)2 (1952).

[35] After construing the statutory clause the court held that the provision in the policy that the "actual use" must be with permission indicated the intention of the parties to limit the coverage to use within the scope of the permission granted. A majority of the courts applying the moderate rule have interpreted this type of omnibus clause in the same manner. See cases cited in 7 APPLEMAN § 4354, at n. 58.

in 1956.[36] The New York legislation was, in turn, a broader version of the 1925 Massachusetts compulsory insurance statute.[37] The wording of the omnibus clause required in North Carolina[38] in the compulsory policy is quite similar to the earlier Massachusetts act.[39] Since the New York courts had apparently not construed the comparable omnibus clause required by its new act before the North Carolina statute was enacted, well-known principles of statutory construction[40] would suggest that our court should have examined the construction given the Massachusetts clause by the courts of that state. Such an examination would have revealed that the Massachusetts court applies the liberal rule when construing the compulsory omnibus clause.[41] However, where there is inserted in the policy in addition to the compulsory clause a voluntary clause, similar to that relied on by the insurer in the principal case, the court applies the strict rule to the extent that the policy coverage is greater than the statutory amount.[42]

In selecting the liberal rule to construe the statutory omnibus clause, the Massachusetts court reasoned in one case[43] that:

> The full benefit of the compulsory security and of the provision precluding avoidance by default of the owner will be lost, if violations of rules of conduct laid down by an owner to be observed by such as he permits to use his motor vehicle upon

[36] See Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961). New York decisions were utilized in this case as an aid in construing the North Carolina statute.

[37] See Netherton & Nabhan, *The New York Motor Vehicle Financial Security Act of 1956*, 5 AM. U.L. REV. 37 (1956), in which a detailed comparison of the New York and Massachusetts laws is made.

[38] See statutes cited note 7 *supra*.

[39] MASS. ANN. LAWS ch. 175, § 113A(1) (1959) requires that the policy provide coverage for "any other person . . . while legally using . . . such motor vehicle . . . provided that such use is with the permission of the named assured."

[40] A statute adopted from another state will be presumed to have been adopted with the construction placed on it by the courts of that state before its adoption. Such construction will generally be followed if sound and reasonable and in harmony with justice and public policy, and with other laws of the adopting jurisdiction on the subject. Where courts of the foreign state have not construed the law, decisions of the courts of the state from which the statute was originally adopted will be considered. See generally 82 C.J.S. *Statutes* § 372 (1953).

[41] See, *e.g.*, Blair v. Travelers Ins. Co., 288 Mass. 285, 192 N.E. 467 (1934).

[42] See, *e.g.*, Blair v. Travelers Ins. Co., 291 Mass. 432, 197 N.E. 60 (1935).

[43] Guzenfield v. Liberty Mut. Ins. Co., 286 Mass. 133, 190 N.E. 23 (1934).

> our ways are held to defeat an injured person's enforcement of the policy by destroying the owner's consent to the use.[44]

A recent North Carolina case[45] followed the reasoning of the Massachusetts court as to the provision precluding avoidance by default by the owner. In the North Carolina case, the insurer pleaded certain policy violations by the insured after the accident as a defense to a suit on a compulsory policy, contending that the non-forfeiture provisions of the 1953 act did not apply to a policy issued under the 1957 act. In disallowing this defense, the court held that, as to the compulsory coverage provided by a motor vehicle liability policy, no violation of the policy would defeat or avoid said policy. To bar recovery because of such a violation, the court argued, would "practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury."[46] However, as to coverage in excess of or in addition to the coverage specified, such violation would constitute a valid and complete defense. Thus, the Massachusetts solution to the problem of coverage under the omnibus clause would seem to be in harmony with the view our court has taken as to the effect of the non-forfeiture provision of the statute. The Massachusetts rule of construction is designed to do justice both to the contracting parties and to the public. It should have been adopted by the North Carolina court as being in accordance with the public policy of this state.

The effect of the *Hawley* decision will undoubtedly be to render coverage uncertain in many cases, foster litigation as to the existence or extent of any alleged deviation, and ultimately to inhibit the achievement of the legislative goal of broader coverage. Because this decision seems to be in sharp conflict with the policy underlying the 1957 act, the legislature should seriously consider amending the act to express its intent in this matter more clearly.

GEORGE M. BEASLEY, III

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[44] *Id.* at 136, 190 N.E. at 24.

[45] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[46] *Id.* at 126, 116 S.E.2d at 487. In Lane v. Iowa Mut. Ins. Co., 258 N.C. 319, 128 S.E.2d 398 (1962), the court extended *Swain* and held that the non-forfeiture provisions of the act apply even to assigned risk policies.

**Compromise and Settlement—Release—Insurance—Liability Carrier's Settlement as a Bar to Insured's Suit**

In a recent Georgia decision[1] the insured was involved in an automobile collision with a motor vehicle owned by the Garden Lakes Company and driven by Spector. The insurer entered into a settlement agreement with Garden Lakes and Spector, paying them a sum of money in consideration for a general release executed by them, releasing the insured from all consequences of the collision. The settlement was made without the insured's knowledge or consent, under a provision of the policy providing that "the company may make such investigation and settlement of any claim or suit as it deems expedient." Thereafter the insured brought an action for damages against Garden Lakes and Spector. The defendants pleaded the release as a defense. The trial court held this defense untenable since the insured had neither acquiesced in nor ratified the release. The defendant, Garden Lakes, then amended its answer to set up a counterclaim against the insured.

The insurer, being obligated to pay any judgment rendered on the counterclaim against the insured, sought to plead the release as a defense to the counterclaim. The insured contended that to allow the insurer to plead the release would defeat her claim against Spector and Garden Lakes. The insurer brought the present action seeking a declaratory judgment of its rights, naming Spector, Garden Lakes, and the insured as defendants. The Court of Appeals of Georgia held that the insured could prevent the insurer from pleading the release, and that the release was void when repudiated by the insured.

A release for money payment may take either of two forms. It may provide either that the payee releases the payor, or that each releases the other.[2] Generally it is held that the legal effect of either form is the same. Although the former provides only that the payee releases the payor, it is generally held that it will bar the payor's claims as well.[3] In reaching this result, it is reasoned that the parties

[1] Aetna Cas. & Sur. Co. v. Brooks, 106 Ga. App. 427, 127 S.E.2d 183 (1962).

[2] See 38 N.C.L. Rev. 81, 83 (1959).

[3] Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949); Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Graves Truck Line, Inc. v. Home Oil Co., 180 Kan. 594, 305 P.2d 1053 (1957); Cannon v. Parker, 249 N.C. 279, 106 S.E.2d 229 (1958); Traveler's Indem. Co. v. Home Mut. Ins.

made a complete settlement of all their claims, and that the payor admitted his liability by making payment to the releasor.[4] This result has been reached even where the release contained an express provision that it was not to be considered an admission of liability.[5]

A few courts, however, hold that a release does not bar the payor's claims unless it so provides by its terms. Reasons given for this view are (1) that it is difficult to construe the language to be an admission of liability by the payor,[6] and (2) that the payor should be able to "buy his peace" without defeating his own cause of action.[7]

It is suggested that the preferred rule would be to make the release prima facie evidence of the parties' intention to make a final settlement of all claims arising out of the accident.[8] If it could be shown that the payee knew or should have known[9] of the payor's intention to maintain a suit against him, the presumption would be overcome. Since it would seem that in most instances the parties intend a release to be a final settlement of all the claims of both

Co., 15 Wis. 2d 137, 111 N.W.2d 751 (1961); *cf.* Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); England v. Yellow Transit Co., 240 Mo. App. 968, 225 S.W.2d 366 (1949); Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951); Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N.W.2d 395, *rehearing denied,* 72 N.W.2d 102 (1955). *Contra,* Schledewitz v. Consumers Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960); Ruf v. Wittenberg, 13 Pa. D.&C.2d 672 (1957); *cf.* Crawford v. McLeod, 64 Ala. 240 (1879); Baldwin v. New York Central & H.R.R.R., 2 N.Y. Supp. 481, 56 N.Y. Super. Ct. 607, *aff'd* 121 N.Y. 684, 24 N.E. 1098 (1888); Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953); Wade v. Southern Ry., 89 S.C. 280, 71 S.E. 859 (1911).

[4] See, *e.g.,* Giles v. Smith, *supra* note 3; Cannon v. Parker, *supra* note 3; *cf.* Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., *supra* note 3.

[5] Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Graves Truck Line, Inc. v. Home Oil Co., 180 Kan. 594, 305 P.2d 1053 (1957); *cf.* Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N.W.2d 395 (1955). As stated in Giles v. Smith, 80 Ga. App. 540, 543, 56 S.E.2d 860, 862 (1949), "it would be anomalous indeed for the plaintiffs to pay Jackson the $275 and then sue him to recover the very money they had paid him."

[6] See Schledewitz v. Consumers Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

[7] See 1956 WIS. L. REV. 305; *cf.* Crawford v. McLeod, 64 Ala. 240 (1879); Wade v. Southern Ry., 89 S.C. 280, 71 S.E. 859 (1911).

[8] This was the rule used in Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951). See Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Cannon v. Parker, 249 N.C. 279, 106 S.E.2d 229 (1958).

[9] What an "ordinarily reasonable and reasoning man" in the place of the releasor at the time of the execution of the release would take the settlement to mean was the measure for the objective test used in Mensing v. Sturgeon, 250 Iowa 918, 930, 97 N.W.2d 145, 151 (1959).

parties,[10] such a rule would have the desired result of effectuating the intent of the parties. Although injustice might occasionally result from the application of such a rule, due to the difficulty of proving what the parties actually intended, such a result would seem less likely than under alternative rules. To hold a release to be a final settlement between the parties as a matter of law—as appears to be the rule in the principal case[11]—would deny the parties the right to give effect to a contrary intention, even though they might be able to prove it. On the other hand, to hold that a release gives rise to either a conclusive or a rebuttable presumption that the parties did not intend to bar the payor from bringing later claims would be to ignore the findings of the great majority of courts that the release was intended as a final settlement. A third alternative, that it be left to the court or jury to decide what the parties intended by the release in a given situation, would leave the law uncertain as to the effect of a release and would do nothing to solve the problem in the absence of any evidence as to the intention of the parties.

It is a well-settled rule in Georgia[12] and the United States[13] that an insurer cannot bind its insured by settling without his knowledge and consent. Where such settlement is made, however, and the insured brings suit against the releasor, who in turn counterclaims, it has been the subject of speculation whether the release could be used as a defense to the counterclaim. A recent law review note[14] suggested that since the releasor had received all to which he was legally entitled under the circumstances, it would seem bound to forego suing the insured. Consequently, the insured should be able to

[10] This statement is made on the assumption that a majority of the courts which have considered the question have correctly decided that the parties intended the release to be a complete settlement of all claims. See, *e.g.*, Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

[11] The concurring opinion suggests a different interpretation of the release if the defendant knew that the insurer was not representing the insured in making the settlement, and suggests that this was a factual issue which should be determined before the effect of the release was decided. However, the majority decided the effect of the release without any determination of the actual intent of the parties. From this it may be inferred that the court held the effect of the release to be the same, no matter what the intent of the parties.

[12] See Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 279 (1938).

[13] See, *e.g.*, Fikes v. Johnson, 220 Ark 448, 248 S.W.2d 362 (1952); Campbell v. Brown, 251 N.C. 214, 110 S.E.2d 897 (1959).

[14] Note, 38 N.C.L. Rev. 81 (1959).

defeat the releasor's counterclaim by setting up the release as a counterclaim.

Since the writing of that note, however, two cases have been litigated where an insured set up a release in defense of the releasor's counterclaim. Neither case was decided on the grounds suggested.

In *Faught v. Washam*[15] the Supreme Court of Missouri recognized the rule that ordinarily a release is ratified by one pleading it. However, the court reasoned that the general rule would not apply so as to bind the insured in this case because the release was pleaded for the benefit of the insurer and not the insured.[16]

In *Cochran v. Bell*[17] the insured's attorney elicited from the releasor on cross-examination the fact that he had signed a release of all claims against the insured. This release was made the basis of a motion to dismiss the counterclaim. The Court of Appeals of Georgia stated that the insured had relied on the release to obtain a legal advantage for herself and that this constituted ratification "as effectively as though the release had been pleaded in the plaintiff-insured's petition."[18]

The principal case extended the holding of *Cochran* to the situation where the insurer pleads the release in defense to the counterclaim. In such a case, the court reasoned that the insured would be barred in the action against the releasor.[19] This result would have

[15] 329 S.W.2d 588 (Mo. 1959).

[16] The court pointed out that the insurer was obligated under the policy to pay any damages against the insured, resulting from the counterclaim, since the damages sought were less than the limit of the insurer's liability under the policy. Consequently, according to the court, the insured had no financial interest in pleading the release in defense but was pleading it for the sole benefit of the insurer who, under Missouri practice and procedure, could not be joined as a party to the action.

It would seem, however, that it would be to a plaintiff's benefit to defeat the defendant's counterclaim to his complaint. The fact that he had a collateral contract with a third party providing that the third party would pay any judgments against him should have no bearing on the action between the plaintiff and the defendant. In that respect the defense would benefit the plaintiff-insured, even though the insurance contract would prevent it from benefiting him monetarily.

[17] 102 Ga. App. 617, 117 S.E.2d 645 (1960).

[18] *Id.* at 619, 117 S.E.2d at 646.

[19] In a concurring opinion it was suggested that the effect of the release being used as a defense should depend upon whether or not the releasor knew that the insurer was acting without authority in making the settlement. If the releasor had such knowledge, he would be presumed to know that the insurer could not defeat any claim that the insured might have against the releasor. On the other hand, if he assumed the insurer to be acting as an agent of the insured, the releasor would have thought that the insured

allowed the insurer to defeat the insured's action for substantial damages by settling even a small claim against the insured arising out of the same cause of action. Thus the court held that the insured *could* prevent the insurer from pleading the release as a defense.

The principal case would seem to deny the insurer the right of settlement and the right to control litigation—rights which were given to it by the policy. However, since the insurer is chargeable with knowledge that an insurer cannot bind its insured by making settlement without his knowledge and consent,[20] it should know that the effect of the provisions in the contract would not give it those rights. If it wanted a final settlement of the claim against its insured, the insurer would be forced to get the insured's permission.[21] When compared to the alternatives,[22] it would seem that the court made the preferred choice.

COWLES LIIPFERT

**Constitutional Law—Cruel and Unusual Punishment—Criminality of a Status**

The eighth amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The origin of this provision of the Bill of Rights can be traced to the Magna

would be bound by the settlement. When he learned otherwise, the releasor could repudiate the settlement by returning the consideration to the insurer. To so hold would qualify the holding of *Cochran* and lend support to the contention of the law review note where the releasor executed the release for money consideration only. In such a case, ratification by the insured should not release him, since the release was not part of the settlement.

The concurring judge probably assumed that by making a settlement with the releasor, the insured impliedly held itself out to be an agent of the insured. *But* see Note, 38 N.C.L. REV. 81, 83 (1959), where it was suggested that the releasor would be chargeable with knowledge that an insurer cannot bind the insured without his consent and, therefore, could not be misled by the insurer's making the settlement.

[20] See Parham v. Robins, 197 Ga. 386, 29 S.E.2d 608 (1944).

[21] Unless a release is held to be conclusive evidence of the intent to settle all claims of both parties arising from the same cause of action, the insurer could also make a final settlement of the claim against the insured by first notifying the releasor that it was not an agent of the insured. Of course the insurer could still get authority from the insured to make such settlement.

[22] Other alternatives would be to allow: (1) a release to bar only the claims of the releasor; (2) an insurer to bind its insured by settling without his knowledge and consent; (3) the insurer to plead the release without it being considered a ratification by the insured.

Carta[1] and the English Declaration of Rights of 1688.[2] It was adopted in 1791 as an admonition to all departments of the national government against such violent proceedings as had taken place in England during the reign of the Stuarts.[3] Most states have also adopted constitutional provisions which in some form prohibit cruel and unusual punishments.[4]

In a recent decision, *Robinson v. California*,[5] the Supreme Court took a new approach to the eighth amendment. The petitioner was convicted under a California statute[6] which makes it a misdemeanor, punishable by imprisonment, for any person to "be addicted to the use of narcotics." In sustaining the petitioner's conviction, the California court construed the statute as making the "status" of narcotic addiction a criminal offense.[7] The California

[1] See ch. 14 of the Magna Carta, printed as confirmed by King Edward I in 1297, 4 HALSBURY, STATUTES OF ENGLAND 24 (2d ed. 1948). "A freeman shall not be amerced for a small fault; but after the manner of the fault, and for a great fault, after the greatness thereof; saving to him his contenement; and a merchant likewise, saving to him his merchandise; and any other's villain than ours shall likewise be amerced, saving his wainage."

[2] 1 W. & M., c. 2, § I, 10. "Excessive bail *ought not* to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[3] 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 610 (2d ed. 1851).

[4] The constitutions of 48 states have express prohibitions of excessive punishment. Wording of the provisions varies from "cruel" to "cruel *or* unusual" and "cruel *and* unusual," while constitutions of a few states only provide that all punishments shall be proportioned to the offense. Connecticut and Vermont have no constitutional prohibition against cruel punishment, but Connecticut provides against excessive fines, CONN. CONST. art. 1, § 13, and CONN. GEN. STAT. § 53-20 (1958) makes cruel and unusual punishment a crime. VT. STAT. ANN. tit. 1, § 271 (1950) provides that the common law of England, which prohibits cruel and unusual punishment, applies. See State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1933).

[5] 370 U.S. 660 (1962).

[6] CAL. HEALTH & SAFETY CODE § 11721: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[7] People v. Robinson, Super. Ct. No. CR A-4425, App. Dep't Super. Ct. of Los Angeles, March 31, 1961. The opinion was unreported, but may be found in Record, p. 102, Robinson v. California, 370 U.S. 660 (1962). Due

court further held that the offender may be prosecuted even though he has never used or possessed any narcotics within the state. The United States Supreme Court reversed, holding that narcotics addiction is a sickness and that to make a sickness a crime is to inflict a cruel and unusual punishment in violation of the fourteenth amendment.

It has been consistently held that the first eight amendments restrict only the federal government and do not apply to the governments of the individual states.[8] However, the due process clause of the fourteenth amendment protects many rights from state infringement which are similarly protected from federal encroachment by the first eight amendments.[9] The test of whether any right is included within the protection of the due process clause is whether that right is "inherent in the fundamental principles of justice and liberty which lie at the base of our civil and political institutions."[10] In the *Robinson* case the Supreme Court for the first time definitely stated that the due process clause of the fourteenth amendment proscribes cruel and unusual punishment, although it had strongly indicated such in an earlier case,[11] and several lower courts had so stated.[12]

Mr. Justice McKenna's observation that "a principle to be vital must be capable of wider application than the mischief which gave it birth,"[13] has certainly been followed by the courts in applying the cruel and unusual punishments provision. No longer is this prohibition limited to the physical brutality and torturous punishment contemplated by its framers. A review of the cases which have dealt with this clause will illustrate how the meaning of cruel and unusual

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to California procedure, after affirmance by the appellate department of the California superior court, no further review in the state courts was available, and the case was brought to the Supreme Court on direct appeal.

[8] *E.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959); Collins v. Johnston, 237 U.S. 502 (1915); Ohio v. Dollison, 194 U.S. 445 (1904); McElvaine v. Brush, 142 U.S. 155 (1891); Barron v. Baltimore, 32 U.S. 243 (1833).

[9] *Cf.* Moore v. Dempsey, 261 U.S. 86 (1923).

[10] *E.g.*, Powell v. Alabama, 287 U.S. 45, 67 (1932), quoting from Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

[11] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[12] Application of Middlebrooks, 88 F. Supp. 943, 951-52 (S.D. Cal. 1950), *rev'd on other grounds sub nom.* Ross v. Middlebrooks, 188 F.2d 308 (9th Cir.), *cert. denied,* 342 U.S. 862 (1951); Johnson v. Dye, 175 F.2d 250, 256 (3rd Cir.), *rev'd per curiam on other grounds,* 338 U.S. 864 (1949).

[13] Weems v. United States, 217 U.S. 349, 373 (1910).

punishment has been expanded as society's concepts of decency and humanity have changed.

The first significant consideration of cruel and unusual punishment by the Supreme Court was in an 1878 case from the Territory of Utah.[14] The defendant was convicted of first degree murder and sentenced to be shot. A territorial statute provided that every person guilty of murder should suffer death, but did not state the mode of execution. Since the territory derived its authority from the federal government, it was therefore subject to the limitations of the eighth amendment. It was held that death by shooting was not a cruel and unusual punishment, as it involved no terror[15] and was regularly imposed under the Articles of War.[16] The Court stated that even though it could not formulate an exact definition of cruel and unusual punishment, it was axiomatic that torture and unnecessary cruelty were forbidden by the eighth amendment.[17]

The next important decision was *In re Kemmler*,[18] in which the petitioner had been sentenced to death pursuant to a state statute "by then and there causing to pass through the body of him . . . a current of electricity of sufficient intensity to cause death."[19] It was contended that electrocution violated the eighth amendment and the due process and privileges and immunities guarantees of the fourteenth amendment. The Supreme Court rejected this argument, repeating the principle that the first eight amendments restricted only the federal government. However, the Court indicated that electrocution would violate no constitutional right if used by the federal government, stating that punishments are cruel "only when they involve torture or lingering death."[20] The eighth amendment "implies . . . something inhuman and barbarous, something more than the mere extinguishment of life."[21]

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[14] Wilkerson v. Utah, 99 U.S. 130 (1878).

[15] Such as the common-law punishments of dragging to the place of execution for treason, emboweling alive, beheading and quartering for high treason, public dissection for murder, and burning alive for treason by a female. *Id.* at 135.

[16] The articles did not prescribe the method of inflicting death, but custom had determined that capital punishment may be inflicted by shooting and hanging. *Id.* at 133-34.

[17] *Id.* at 136.

[18] 136 U.S. 436 (1890).

[19] *Id.* at 441.

[20] *Id.* at 447.

[21] *Ibid.*

In a 1910 decision[22] the defendant was convicted in a Philippine court, which was under United States authority, of falsifying a public document recording certain wage payments. He was sentenced to fifteen years at hard labor in chains, a fine of four thousand pesatas, loss of civil rights during imprisonment and political rights thereafter, and subjection to surveillance by the authorities for life. The statute under which the sentence was imposed was declared void and the conviction was reversed. The Supreme Court there established the principle that punishment is unconstitutionally cruel and unusual when it is not graduated and proportional to the offense committed. The Court's decision was largely influenced by the result of its comparison of the defendant's sentence with penalties imposed in other jurisdictions. It found that the defendant's punishment not only greatly exceeded those which were usually inflicted for similar offenses, but that more serious crimes such as robbery, larceny, and some degrees of homicide were not punished so severely. The Court also pointed out that other Philippine statutes did not provide for such harsh punishment for much more atrocious crimes.

Other attacks on the severity of fines or terms of imprisonment have generally failed.[23] Large aggregate sentences, arrived at by treating a single act or series of acts as distinct offenses and imposing separate sentences for each, have been held not to constitute cruel and unusual punishment.[24] The standard against which the courts have measured the sentence or fine is not the total penalty, but rather the penalty for each individual offense.[25]

Habitual criminal statutes under which repeated offenders are punished more severely for the same offense than are persons with shorter records have been upheld as not providing cruel and unusual punishment.[26] Nor does it matter that the stricter sentence is

[22] Weems v. United States, 217 U.S. 349 (1910).

[23] *E.g.*, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) ($1,623,500 in penalties for violation of state anti-trust laws assessed against corporation with over forty million dollars in assets).

[24] Badders v. United States, 240 U.S. 391 (1916) (conviction on seven counts of using the mails to defraud, concurrent five-year sentences and $1000 fines on each count); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960) (conviction on fourteen separate counts resulting from one sale of marihuana, two sales of heroin, and possession of both, sentence of fifty-two years in jail).

[25] *E.g.*, Manley v. Fisher, 63 F.2d 256 (4th Cir. 1933); Scala v. United States, 54 F.2d 608 (7th Cir. 1931).

[26] *E.g.*, MacDonald v. Massachusetts, 180 U.S. 311 (1901); Beland v. United States, 128 F.2d 795 (5th Cir.), *cert. denied*, 317 U.S. 676 (1942).

imposed in a special proceeding commenced by information after conviction of a substantive offense.[27]

Shortening or remitting of a sentence is purely a matter of legislative or executive grace, so that none of the prisoner's constitutional rights are infringed if he is denied these privileges.[28] The federal statute prohibiting probation of first-time narcotics offenders[29] does not violate the eighth amendment,[30] nor does commutation of a death sentence to life imprisonment without the opportunity of parole.[31] In *United States ex rel. Bongiorno v. Ragen*[32] the petitioner was convicted of first degree murder and sentenced to 199 years in prison. Under Illinois parole law, a prisoner serving a life term becomes eligible for parole after twenty years, but a person serving a term of years becomes eligible only after he has completed one third of his term. The petitioner sought habeas corpus claiming that his punishment was cruel and unusual because, as the parole laws were framed, he would not live long enough to apply for parole. The writ was denied, even though the 199 year sentence was a device specifically used to avoid the parole of murderers after twenty years.

It has been held that a prison sentence does not become cruel and unusual merely because the defendant is so old that he is unlikely to survive it.[33] Nor is a long sentence objectionable because equally guilty co-defendants have been dealt with more leniently,[34] or because the jurisdiction imposes lighter penalties on crimes generally thought to be more grievous.[35] Imprisonment at hard labor is not objectionable.[36] Solitary confinement for convicts condemned to death,[37] and for a prisoner whose death sentence for

[27] Graham v. West Virginia, 224 U.S. 616 (1912).
[28] *E.g.*, Lathem v. United States, 259 F.2d 393 (5th Cir. 1958).
[29] INT. REV. CODE OF 1954, § 7237(d).
[30] Lathem v. United States, 259 F.2d 393 (5th Cir. 1958).
[31] Green v. Teets, 249 F.2d 401 (9th Cir. 1957).
[32] 54 F. Supp. 973, (N.D. Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945).
[33] *E.g.*, Black v. United States, 269 F.2d 38 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960) (30-year sentence for narcotics violations on a 51-year old defendant).
[34] United States v. Sorcey, 151 F.2d 899 (7th Cir. 1945), *cert. denied*, 327 U.S. 794 (1946).
[35] Howard v. Fleming, 191 U.S. 126, 135-36 (1903).
[36] Pervear v. Commonwealth, 72 U.S. 475 (1866) (Court regarded problem as one of proportional sentence rather than of humaneness of punishment).
[37] McElvaine v. Brush, 142 U.S. 155 (1891).

murder of a prison guard was commuted to life and who was considered dangerous as an inmate,[38] were upheld against cruel and unusual punishment objections.

Electrocution came up again in 1946 in *Louisiana ex rel. Francis v. Resweber*.[39] Willie Francis, having been convicted of murder and sentenced to death by a Louisiana court, was placed in the electric chair and subjected to an electrical current which was not of sufficient intensity to cause his death, presumably because of some mechanical defect. He was returned to prison and a warrant for his subsequent execution was issued. Francis contended that "two electrocutions" would be a cruel and unusual punishment barred by the eighth amendment. Mr. Justice Reed, speaking for the Court, stated that the petitioner's claim would be considered "under the assumption, but without so deciding, that violation of principles of . . . the Eighth Amendment . . . as to . . . cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment."[40] The Court expressly rejected the contention by the petitioner that the manifold psychological factors involved in two executions was cognizable under the eighth amendment.[41]

The concurring opinion of Mr. Justice Frankfurter was based upon the continued freedom of a state to administer criminal justice unless it should offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[42]

Four members of the Court dissented,[43] urging that the case be remanded for further proceedings to determine whether current was actually applied to the petitioner, and, if so, how much.[44] They

[38] Stroud v. Johnston, 139 F.2d 171 (9th Cir. 1943).
[39] 329 U.S. 459 (1947).
[40] *Id.* at 462.
[41] "Even the fact that the petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain involved in the proposed execution." *Id.* at 464.
[42] *Id.* at 469, quoting Mr. Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[43] Justices Burton, Douglas, Murphy, and Rutledge. *Id.* at 472.
[44] There were conflicting affidavits in the briefs as to whether current had

argued that the due process clause of the fourteenth amendment incorporates the cruel and unusual punishment provisions of the eighth amendment. If electric current had passed through Francis' body during the first attempt, a second attempt would be a "cruel and unusual punishment violative of due process of law," as this would not be an instantaneous execution, which had been upheld by the Court in the *Kemmler*[45] case.

The 1958 case of *Trop v. Dulles*[46] represents the second time the Supreme Court has held a punishment to be cruel and unusual. Trop had been convicted by a court martial of wartime desertion. The Nationality Act of 1940 provided that a person so convicted shall lose his citizenship.[47] Trop brought action for a declaratory judgment that he was an American citizen. The Supreme Court declared the statute unconstitutional, four justices holding that it was penal in nature,[48] and that loss of citizenship as a punishment

reached Francis at all. These are set out in a footnote in the dissenting opinion. *Id.* at 480-81 n.2.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Affidavit of official witness Harold Resweber.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.'" Affidavit of official witness Ignace Doucet.

Attached to respondents' brief was a transcript of testimony, taken before the Louisiana Pardon Board, of those who were in charge of the equipment at the attempted execution that no electric current reached Francis' body and that his flesh did not show electrical burns. Also included was a statement by the sheriff of a neighboring parish that Francis told him on leaving the chair that the electric current had "tickled him."

An interesting discussion of this case can be found in PRETTYMAN, DEATH AND THE SUPREME COURT 90 (1961).

[45] *In re* Kemmler, 136 U.S. 436 (1890).

[46] 356 U.S. 86 (1958).

[47] 66 Stat. 163, 268 (1952), 8 U.S.C. § 1481(a)(8) (1958).

[48] The courts have held that deportation of an alien for the commission of a crime involving moral turpitude is a civil proceeding so that the eighth amendment does not apply. United States *ex rel.* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied,* 348 U.S. 964 (1955); Costanzo v. Tillinghast, 56 F.2d 566 (1st Cir.), *aff'd on other grounds,* 287 U.S. 341 (1932). In United States *ex rel.* Ulrich v. Kellog, 30 F.2d 984 (D.C. Cir. 1929), it was held that exclusion of an alien convicted of crime involving moral turpitude before her marriage to a native-born American citizen did not inflict a cruel and unusual punishment.

for crime was cruel and unusual.[49] "There may be involved no physical mistreatment, no primitive torture," the opinion remarks, but "there is instead the total destruction of the individual's status in organized society."[50] The part of the decision that may have the most far-reaching effects was the recognition that the mental as well as the physical element must be considered in determining what punishments are cruel and unusual.[51]

In the principal case the Court was not concerned with the method of punishment or with a punishment disproportionate to the offense as in previous cases. Rather, it was the *purpose* of the confinement that was measured against the constitutional prohibition of cruel and unusual punishments.[52] "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[53] The Court recognizes the authority of a state in the exercise of its police power to regulate the administration, sale, prescription, and use of habit-forming drugs,[54] or to establish a program of involuntary confinement.[55] While evidence of past narcotics use is necessary to prove addiction, under the California statute involved in this case no proof of any specific instance of use or possession within the jurisdiction was necessary. The state only had to show that the defendant had the "status" of addiction, for which he was to be punished.

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[49] Chief Justice Warren, Justices Black, Douglas, and Whittaker. Concurring, Mr. Justice Brennan stated that there was no relevant connection between the act in question and any power granted to Congress by the constitution.

In a companion case, the Court upheld another section of the Nationality Act, which provided for automatic denationalization by voting in a foreign election, as a valid exercise of congressional power to regulate foreign affairs. Perez v. Brownell, 356 U.S. 44 (1958).

[50] 356 U.S. at 101.

[51] "It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." *Id.* at 102.

[52] *Id.* at 677 n. 5 (concurring opinion of Justice Douglas).

[53] *Id.* at 667.

[54] *Id.* at 664.

[55] *Id.* at 665. California has established such a program. *Cal. Welfare & Inst'ns Code* §§ 5350-361.

The scope of the cruel and unusual punishments provision has undergone considerable expansion since the eighth amendment was adopted in 1791. The *Weems*[56] decision extended its protection to punishments disproportionate to the offense. *Trop v. Dulles*[57] recognized that mental anxiety must be considered. Now *Robinson v. California*[58] has put the legislatures on notice that the Court will also apply the cruel and unusual punishments clause to the purpose of a statutory penalty in deciding upon its constitutionality. This case is an exception to the general rule that constitutional limitations in the area of criminal law do not restrict the power of the states to define crime, but only restrict the manner in which the states may enforce their penal codes.

Whether the principle of the *Robinson* decision will be extended to strike down other statutes which define offenses in terms of personal condition must await future litigation.[59] By applying the cruel and unusual punishments provision to the states through the fourteenth amendment and establishing limitations on the power of states to define crime, the Supreme Court has significantly enlarged its area of supervision of state penal legislation.

RALPH A. WHITE, JR.

**Contracts—Employee Covenants Not to Compete—"Blue Pencil" Rule**

The case of *Welcome Wagon Int'l, Inc. v. Pender*[1] marks the first clear application of the "blue pencil" rule[2] in employment con-

[56] Weems v. United States, 217 U.S. 349 (1910).
[57] 356 U.S. 86 (1958).
[58] 370 U.S. 660 (1962).
[59] In Stoutenburgh v. Frazier, 16 App. D.C. 229, 236 (1900), the court stated that conviction under a statute which provided that "all suspicious persons" could be arrested and prosecuted as criminals, without anything more, would impose a cruel and unusual punishment. See generally Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Note, 37 N.Y.U.L. REV. 102 (1962).

[1] 255 N.C. 244, 120 S.E.2d 739 (1961).
[2] Where a contract not to compete contains both lawful and unlawful restrictions, if the restrictions are stated separably or in the alternative the court will enforce the valid restrictions and disregard the invalid. In effect the test is whether the court could take a "blue pencil" and mark out the invalid restrictions, leaving the valid ones to be enforced. *E.g.*, Roane Inc. v. Tweed, 33 Del. Ch. 4, 89 A.2d 548 (Sup. Ct. 1952); General Bronze Corp. v. Schmiling, 208 Wis. 565, 243 N.W. 469 (1932); RESTATEMENT, CONTRACTS § 518 (1932); 6A CORBIN, CONTRACTS § 1390 (1962); 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1937).

tracts in North Carolina. In *Welcome Wagon* the defendant, a former employee of the plaintiff, had covenanted not to engage in a similar business during employment or thereafter for a period of five years, (1) in Fayetteville, N. C., (2) in any other city or town in North Carolina where plaintiff was engaged in such business, (3) in any city or town in the United States in which plaintiff was engaged in such business, or (4) in any city or town in the United States in which plaintiff has been or signified its intention to engage in such business. Shortly after termination of her employment defendant set up a similar business in Fayetteville and plaintiff sought to enjoin such competition. Defendant demurred, claiming among other grounds, that the restrictions contained in the covenant were unreasonable as to the extent of territory. In overruling the demurrer, the court applied the "blue pencil" rule, saying that if the parties made divisions of the territory, some reasonable and some unreasonable, a court of equity will enforce the territorial divisions deemed reasonable and refuse to enforce those deemed unreasonable. Restriction (1) (as to Fayetteville) was reasonable and enforceable; restriction (2) might be reasonable or unreasonable, raising a question for the chancellor; and restrictions (3) and (4) were clearly unreasonable and thus unenforceable. This is in accord with the majority.[3]

There is little North Carolina authority prior to the principal case dealing with divisible covenants not to compete in employment contracts. North Carolina has clearly applied the "blue pencil" rule to covenants not to compete in contracts for the sale of a business.[4] However, the prevailing tendency, followed in North Carolina, is to distinguish covenants ancilliary to the sale of a business from those in an employment contract.[5]

There are two previous North Carolina cases involving employment contracts which seemingly deal with separable territorial

[3] *Ibid.*

[4] Hauser v. Harding, 126 N.C. 295, 35 S.E. 586 (1900), where the restriction ancillary to the sale of a medical practice covered "Yadkinville and the surrounding territory." The court severed the indefinite "surrounding territory" restriction and upheld an injunction as to the definite area of Yadkinville. *Accord,* Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910).

[5] *E.g.,* Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 45-46, 105 N.E.2d 685, 703-04 (C.P. 1952), citing among numerous other authorities, Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944). That they have been distinguished in regard to application of the "blue pencil" rule see notes 24, 25 *infra* and accompanying text.

covenants, but neither is clear authority for an application of the rule. In *Sonotone Corp. v. Baldwin*[6] the covenant restricted a former employee from competing in a forty-nine county area and a fifty mile strip on either side. The lower court injunction covered only the forty-nine counties. In upholding the lower court's injunction the opinion made no reference to severability, saying only that the covenant was "reasonably limited both in respect of time and territory."[7] Whether the court referred to the separated or the original covenant cannot be determined.

In *Moskin Bros. v. Swartzberg*[8] the court upheld a municipal court injunction covering only the city of High Point even though the covenant was much broader in its scope. But the court's only reference to territory was "we think the covenant is reasonable in its terms, and not unreasonable in time or territory."[9] In neither case is there a clear cut application of the "blue pencil" rule.[10]

On the other hand, the North Carolina court has held that it will not give partial effect to an "indivisible" promise, *i.e.* one not grammatically severable, by granting an injunction to cover only a reasonable area of a larger territory. In *Noe v. McDevitt*[11] the covenant was not to compete in North and South Carolina. The plaintiff's business covered only eastern North Carolina, and the court refused to grant an injunction covering this smaller area, saying, "the court cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally."[12] This view is not in accord with the more modern approach in which courts do not depend on grammatical severability, but issue an injunction to cover the reasonable part of an excessive restraint.[13]

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[6] 227 N.C. 387, 42 S.E.2d 352 (1947).

[7] *Id.* at 391, 42 S.E.2d at 355.

[8] 199 N.C. 539, 155 S.E. 154 (1930).

[9] *Id.* at 545, 155 S.E. at 157.

[10] In Welcome Wagon v. Morris, 224 F.2d 693 (4th Cir. 1955) the court of appeals considered a contract from Gastonia, North Carolina almost identical to that in the principal case. The court of appeals refused to apply the "blue pencil" rule saying, "we find nothing in the authorities cited by counsel for *Welcome Wagon* that militates against this view. See *Moskin Bros. v. Swartzberg . . . Wooten v. Harris . . . Hauser v. Harding.*"

[11] 228 N.C. 242, 45 S.E.2d 121 (1947).

[12] *Id.* at 245, 45 S.E.2d at 123.

[13] *E.g.*, Hill v. Central West Pub. Service Co., 37 F.2d 451 (5th Cir. 1930) (restraint throughout Texas, enforced as to city of Dallas); New England Tree Expert Co. v. Russell, 306 Mass. 504, 28 N.E.2d 997 (1940) (restraint as to all New England states, enforced as to one state and parts of two others); 6A CORBIN, *op. cit. supra* note 2, § 1390; Williston & Corbin,

In *Henley Paper Co. v. McAllister*[14] the court seemingly refused to apply the rule to a separable list of activities.[15] Here the court considered a covenant which bound the defendant for three years after termination of employment not to "either directly or indirectly engage in the manufacture, sale, or distribution of paper or paper products within a radius of 300 miles of any office or branch of the Henley Paper Co. or its subsidiary divisions."[16] The court held that the contract excluded the defendant from too much territory and too many activities and was therefore void and unreasonable.[17] The court did not see fit to sever the activity restrictions which were phrased in the alternative.[18] Thus it seems that the court has been faced with two covenants where severability was applicable; one concerning activity restrictions (*Henley Paper Co. v. McAllister*), the other territory restrictions (*Welcome Wagon Int'l, Inc. v. Pender*). The court apparently denied severance in relation to activities and allowed it in relation to territory. As pointed out by the dissent in *Welcome Wagon,* the holdings are clearly inconsistent in that the rule was applicable in both cases, yet applied only in the second. This inconsistency raises the question of what the court will do when faced with a covenant not to compete, otherwise reasonable except for restrictions as to time[19] or as to persons with

*On the Doctrine of Beit v. Beit,* 23 CONN. B.J. 40 (1949); Note, 26 N.C.L. REV. 402 (1948).

[14] 253 N.C. 529, 117 S.E.2d 431 (1960).

[15] Generally the "blue pencil" rule is applied to separate covenants covering too many businesses or activities, too much time or too broad a class of persons, as well as excessive territory. John T. Stanley Co. v. Lagomarsino, 53 F.2d 112 (S.D.N.Y. 1931); 5 WILLISTON, *op. cit. supra* note 2, § 1659 RESTATEMENT, CONTRACTS, § 518 (1932).

[16] 253 N.C. at 531, 117 S.E.2d at 432.

[17] *Id.* at 534-35, 117 S.E.2d at 434.

[18] The court seems to base its holding on Noe v. McDevitt, 228 N.C. 242, 45 S.E.2d 121 (1947) in which the court, faced with a covenant not grammatically severable, refused to grant an injunction to a lesser reasonable area. This is applicable to the 300 mile restraint in the present case, and this alone would make the covenant invalid. However, the court specifically includes the activities as being unreasonable. The prayer for relief asks the defendant be enjoined from the "manufacture, sale or distribution" of paper products, and the plaintiff's brief raises the question of severability.

[19] Guth v. Minnesota Mining & Mfg. Co., 72 F.2d 385 (7th Cir. 1934) dealt with a covenant by an employee to assign invention rights, and the court severed the unreasonable time period. See also 5 WILLISTON, *op. cit. supra,* note 2, § 1659. "No example has been found of comparable draftsmanship as to the time element, although someday a draftsman may summon up the courage to try 'for 6 months plus 6 months plus . . . for a total of . . . years.'" Blake, *Employee Agreements Not To Compete,* 73 HARV. L. REV. 625, 682 n.193 (1960).

whom the covenantee will not do business,[20] such covenants being grammatically divisible into valid and invalid units.

At present there is no clear answer to this question. The decision in *Welcome Wagon* makes no mention of overruling *Henley Paper Co. v. McAllister* and contains no dicta to indicate extensions of the rule. In applying the rule the court refers only to territorial restraints[21] since this was the only "divisible" issue before the court.

The language in *Henley Paper Co. v. McAllister* is the broader of the two,[22] but in the light of the subsequent *Welcome Wagon* decision this language must now be taken as limited. Thus authority can be found both for extending the rule to new factual situations, or refusing to do so. An extension would be in accord with leading authorities.[23]

By choosing the traditional "blue pencil" rule in the principal case, the court refused to follow a trend[24] toward the more conservative English view[25] which generally denies the doctrine of severance in employer-employee contracts when the covenant is harsh or oppressive. Under this view if the restraint is excessive, though grammatically severable, the court will reject the whole covenant. In *Welcome Wagon v. Morris*[26] the contract was almost identical to that in the principal case and the court of appeals refused severance saying, "we think the restrictive covenant must be judged as a whole and must stand or fall when so judged." The North Carolina court's comment in the principal case was that this case did not follow the general rule and was not based on the sounder reasoning.

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[20] Dubowski & Sons v. Goldstein [1896] 1 Q.B. 478 allowed severance as regards classes of customers. See also 5 WILLISTON, *op. cit. supra* note 2, § 1659.

[21] 255 N.C. at 248, 120 S.E.2d at 742.

[22] "Whether part of the contract might be deemed reasonable and enforceable is not the question. It comes to us as a single document. We must construe it as the parties made it. 'The court cannot by splitting up the territory make a new contract for the parties. It must stand or fall integrally.'" Noe v. McDevitt, 253 N.C. at 535, 117 S.E.2d at 434-35.

[23] See authorities cited note 15 *supra*.

[24] "In addition courts are increasingly subscribing to, or at least acting in accordance with the Mason [English] rule in distinguishing employee restraint cases . . . ." Blake, *supra* note 19, at 682 n.193; 5 DUKE B.J. 115 (1956).

[25] 5 WILLISTON, *op. cit. supra* note 2; Farwell, *Covenants in Restraint of Trade as Between Employer and Employee*, 44 L.Q. REV. 66 (1928). This approach finds its basis in Mason v. Provident Clothing & Supply Co., [1913] A.C. 724.

[26] 224 F.2d 693 (4th Cir. 1955).

The question of which of these views follows the sounder reasoning has been the subject of extensive argument and comment.[27] The chief argument against the rule is that it gives the employer, who normally has superior bargaining power, an undue advantage in that he can draft a wide and oppressive covenant in the alternative, confident that the court will enforce the reasonable part.[28] Also, as pointed out by the *Pender* dissent, the covenant in its entirety hangs over the employee. It is he who must ascertain where the court will draw the line.[29] Thus, the unreasonable covenant may well be enforced by intimidation or fear of litigation.[30] Also, by severance, the court in effect makes a new contract for the parties.[31]

Under the "blue pencil" rule the emphasis is on form rather than substance.[32] "Questions involving legality of contracts should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning."[33] It is not really a matter of what the covenant contains, but how it is drafted. The crucial factor in determining enforcement is whether or not the covenant is worded in the alternative. This conclusion is criticized by writers who favor partial enforcement of indivisible promises, rather than the traditional "blue pencil" rule.[34]

On the other hand the employer certainly has an interest to protect. He is not solely interested in oppressing a former employee, but he has trade secrets, good will, and the like to retain. "[T]his requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an

[27] Blake, *supra* note 19, at 682-84; 5 DUKE B.J. 115 (1956).

[28] See Mason v. Provident Clothing & Supply Co., [1913] A.C. 724, 745; WILLISTON, *op. cit. supra* note 2, § 1660.

[29] Corbin points out that in the principal case the ex-employee should have known that competition in Fayetteville was unreasonable, irregardless of "blue pencil" application. 6A CORBIN, *op. cit. supra* note 2, § 1390 n. 51.5.

[30] "It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master." Mason v. Provident Clothing & Supply Co., [1913] A.C. 724, 745 quoted by the dissent in the principal case.

[31] "By some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a 'blue pencil' would be making a new contract for the parties, while partial enforcement in the wake of a 'blue pencil' would not." 6A CORBIN, *op. cit. supra* note 2, § 1390.

[32] Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 256, 120 S.E.2d 739, 747 (1961) (dissent); Note, 26 N.C.L. REV. 402, 404 (1948).

[33] 5 WILLISTON, *op. cit. supra* note 2, § 1660.

[34] *Ibid.*; CORBIN, *op. cit. supra* note 2, § 1390.

employer."[35] The court must balance these two interests. Also the defendant "should not object to a lawful restraint which is less than he voluntarily agreed to and for which he has been paid."[36] Usually restrictive covenants are made with employees with executive or sales ability who fully understand the covenant; not with a workingman who has nothing to sell but his labor and who must take what he is offered.

It has been suggested that courts should refuse severance when it is clear that the employer has exacted an unduly harsh covenant, and allow severance where the employer acts fairly in trying to reasonably protect his interests and not impose an undue burden on the employee.[37] This would combine the best features of the English view and the "blue pencil."[38]

But whether or not it has selected the best rule, in *Welcome Wagon Int'l, Inc. v. Pender* the North Carolina court has taken a clear stand on the territorial aspect of covenants not to compete. With respect to territorial restraints, the court has rejected both the liberal view which upholds the reasonable part of a grammatically inseparable covenant and, the English view which denies severance even where it is grammatically possible. It is clearly established that North Carolina will apply the "blue pecil" rule to appropriate territorial restrictions, both in contracts for the sale of a business and, by the principal case, employment contracts.

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[35] 6A CORBIN, *op. cit. supra* note 2, § 1394.

[36] Breckenridge, *Restraint of Trade in North Carolina*, 7 N.C.L. REV. 249, 258 (1929).

[37] Blake, *supra* note 19, at 683-84.

[38] The application of this proposed rule will, of course, depend on the particular facts of each case. It would seem that if this rule had been applied in the principal case, the court would have refused severance, for it seems that the restrictions here (extending to any city or town in the United States where employer has signified his intention to operate such business) are an unduly harsh and unjustified burden. Perhaps if the covenant had contained only the provisions regarding (1) Fayetteville and (2) North Carolina, this would not have been deemed unduly harsh and the court could, under the proposed rule, allow severance. Also the type of covenant in Hauser v. Harding, 126 N.C. 295, 35 S.E. 586 (1900), covering "Yadkinville and the surrounding territory" may be one which falls into the latter class and would not be denied severance. This covenant, on its face, does not seem excessively harsh and is a good example of a covenant which is not an undue burden and is also severable. Blake, *ibid*, suggests that the burden should be on the employer to show that he acted fairly towards the employee and did not impose an unjust burden on him.

**Criminal Law—Presentence Investigation—Right of Confrontation**

In every criminal prosecution the accused enjoys the constitutional right to be present at his trial.[1] *State v. Pope*[2] presented for the first time in North Carolina the question of whether this right extends to a presentence investigation.[3] After the defendant had been found guilty of felonious breaking and entering and of larceny, but prior to sentencing, the trial judge, in the company of the solicitor, the deputy clerk, and two state's witnesses, retired to chambers to clerically compile the counts in the indictment. Neither the defendant nor his counsel was present at this conference. Here, information was elicited for the first time which tended to implicate the defendant in the commission of other crimes for which no warrants had been issued. Before pronouncing sentence, the judge confronted the defendant with this information and gave him an opportunity to refute or explain it. The defendant declined to comment, but on appeal from a denial of his motion to set aside the judgment and vacate the sentence, he contended that his exclusion from the presentence investigation amounted to a violation of his fundamental rights and a denial of due process of law. The North Carolina Supreme Court rejected these contentions[4] and affirmed the lower court conviction. They warned, however, that all information coming to the notice of the trial court which might conceivably aggra-

[1] "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ." N.C. CONST. art. 1, § 11. "This, of course, implies that he shall have the right to be present." State v. Overton, 77 N.C. 485, 486 (1887).

[2] 257 N.C. 326, 126 S.E.2d 126 (1962).

[3] When a defendant is convicted of a crime, the punishment for which is left, within certain defined limits, to the discretion of the judge, an investigation may be conducted with regard to any circumstances which tend to aggravate or mitigate the punishment. The investigation may be conducted by the judge himself, or consist merely of the submission of a presentence report prepared by a probation officer. N.C. GEN. STAT. § 15-198 (1953), State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). See also State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955), and State v. Summers, 98 N.C. 702, 4 S.E. 120 (1887). See generally Annot., 77 A.L.R. 1211 (1932).

[4] The court noted the distinction between the trial and sentencing stages of the proceedings, recognizing that whereas the issue of guilt or innocence in the former demands the defendant's presence at all times to confront his accusers, the same reason does not prevail in the latter. 257 N.C. at 333, 126 S.E.2d at 132.

vate the punishment should be disclosed to the defendant, with an opportunity afforded to refute or explain it.[5]

Although the subject of the defendant's right to be present at a presentence investigation has received little judicial attention, those courts which have directly decided the question are not in agreement. Some states have judicially extended the defendant's right to be present at the trial to a presentence investigation,[6] while other states have failed to recognize such a right.[7] Notwithstanding dictum to the contrary,[8] the federal courts have generally denied the defendant a right to be present at this time.[9] Those courts which demand the defendant's presence rely mainly on constitutional grounds,[10] although one court suggests the defendant's common-law right to be present when sentence is pronounced as a possible basis for such a rule.[11] On the other hand, the opposing view, possibly in deference

[5] *Id.* at 335, 126 S.E.2d at 132.

[6] In the Matter of Fowler, 49 Mich. 234, 13 N.W. 530 (1882); State v. Simms, 131 S.C. 422, 127 S.E. 840 (1925); State v. Harvey, 128 S.C. 447, 123 S.E. 201 (1924); Phelps v. State, 158 Tex. Crim. 510, 257 S.W.2d 302 (1953); State v. Stevenson, 64 W. Va. 392, 62 S.E. 688 (1908). Note that in West Virginia, the right to be "personally present during the trial" is reserved by statute rather than by the constitution. W. VA. CODE ANN. § 6191 (1961). This statute has been construed as requiring the defendant's presence "when any step affecting him is taken from *arraignment to final judgment inclusive.*" State v. Vance, 124 S.E.2d 252, 259 (W. Va. 1962). (Emphasis added.)

[7] Driver v. State, 201 Md. 25, 92 A.2d 570 (1952); Commonwealth v. Myers, 193 Pa. Super. 531, 165 A.2d 400 (1960). See also Commonwealth v. Johnson, 348 Pa. 349, 35 A.2d 312 (1944), where the Pennsylvania court reversed a judgment in which the record failed to disclose that no *ex parte* evidence was heard by a three judge court sitting *en banc* to determine the degree of *guilt.* The court stresses the fact that they are not reversing because *ex parte* evidence might have been heard in the determination of *sentence.*

[8] "We think, however, that such information should have been disclosed to the judge in open court and in the presence of the appellant." Stephan v. United States, 133 F.2d 87, 100 (6th Cir. 1943).

[9] Zeff v. Sanford, 31 F. Supp. 736 (N.D. Ga. 1940).

[10] These courts have held that since a defendant has a *right* to have everything bearing on his case open and above board, State v. Harvey, 128 S.C. 447, 123 S.E. 201 (1924), it would be clearly unconstitutional to permit evidence to be introduced and considered in the absence of a *convicted* defendant, In the Matter of Fowler, 49 Mich. 234, 13 N.W. 530 (1882). "Our system of jurisprudence is based on the doctrine of confrontation. An accused is not confronted by witnesses who speak in his absence." Phelps v. State, 158 Tex. Crim. 510, 512, 257 S.W.2d 302, 303 (1953).

The Montana court in construing their statutory presentence procedure, note 13 *infra,* finds support for demanding the defendant's presence in the sixth amendment to the United States Constitution. Kuhl v. District Court, 366 P.2d 347, 362 (Mont. 1961).

[11] "One of the purposes of requiring that the defendant be present may

to administrative convenience, favors limiting the right to be present solely to that period in which the alleged guilt of the defendant is determined.[12]

Statutory provisions in nine states provide that all information in aggravation or mitigation of punishment must be presented in open court.[13] At least two states have construed these statutes as also requiring the defendant's presence.[14]

In reaching its conclusion in the principal case, the court recognized that the modern philosophy of fitting the punishment to the offender rather than the crime,[15] demands that a sentencing judge not be restricted to the formalistic requirements of trial procedure in gathering information to assist him in determining an appropriate sentence.[16] While it may be conceded that the practice of individualizing punishment is commendable, it nevertheless may be argued that the means employed to achieve this goal are frequently open to criticism. The rationale employed to deny the defendant a right

well be to give him an opportunity to show that accusations made against him, other than the one of which he stands convicted, are without foundation, and a chance to object to the consideration of improper evidence." People v. Giles, 70 Cal. App. 2d 872, —, 161 P.2d 623, 628 (1945). This argument is supported by no authority. For a statement of the reason for the common-law rule, see Ball v. United States, 140 U.S. 118, 131 (1891).

[12] Thus, the right to be present is limited to that period between *arraignment* and *verdict*. Commonwealth v. Myers, 193 Pa. Super. 531, 540, 165 A.2d 400, 405 (1960). Compare this with the West Virginia interpretation of its statutory provision requiring the defendant's presence at the trial, *supra* note 6. Those courts which refuse to extend the right to a presentence investigation nevertheless insist that "the manifestly correct practice . . . is to hear all the testimony in the case, including the testimony which relates to the fixing of the penalty, in the presence of the defendant and his counsel . . . ." Commonwealth v. Johnson, 348 Pa. 349, 355, 35 A.2d 312, 314-15 (1944).

[13] ARIZ. CRIM. RULES § 336; CAL. PEN. CODE §§ 1203, 1204; IDAHO CODE § 19-2516 (1948); MINN. STAT. § 631.20 (1947); MONT. REV. STAT. §§ 94-7813, 7814 (1949); N.D. CENT. CODE ANN. § 29-26-18 (1960); OKLA. STAT. § 974 (1958); ORE. REV. STAT. §§ 137.080, 137.090 (1959); UTAH CODE ANN. § 77-35-13 (1953).

[14] People v. Giles, 70 Cal. App. 2d 872, 161 P.2d 623 (1945); People v. Sauer, 67 Cal. App. 2d 664, 155 P.2d 55 (1945); Kuhl v. District Court, 366 P.2d 347 (Mont. 1961), in which the reception of information offered by a probation officer in the absence of the defendant constituted a violation of the Montana statute.

In courts-martial trials, evidence bearing on the subject of punishment is heard immediately after a plea or verdict of guilty. MANUAL FOR COURTS-MARTIAL UNITED STATES § 75 & app. 8 (1951). This implies the defendant's presence.

[15] Weihofen, *Retribution Is Obsolete*, 39 NAT. PROB. & PAR. ASSOC. NEWS 1 (1960).

[16] 257 N.C. at 333, 126 S.E.2d at 133.

to be present at the presentence investigation[17] fails to take into account the fact that in many criminal cases, the paramount interest in the proceeding is not the guilt or innocence of the accused, but rather the type and amount of punishment to be inflicted.[18] In North Carolina, the trial judge, for purposes of sentencing, may avail himself of information concerning every facet of the defendant's background.[19] If the defendant's liberty is to be deprived on the basis of such information, justice requires that the information be accurate.[20] One method of promoting accuracy is to confront the defendant with such information and give him an opportunity to rebut it.[21] The principal case purports to insure such safeguards,[22] yet, in effect, reposes the defendant's protection in the discretion of the trial judge.[23] Although a sentence based on false information concerning the defendant's background is vitiated under due process standards,[24] such a holding is of little comfort to a defendant

[17] See note 4 *supra.*

[18] A study made in 1956 of 32 superior courts in North Carolina revealed that 47.7% of all felony cases were disposed of by pleas of guilty. Hall, The Administration of Criminal Justice in North Carolina, 1956 (unpublished research in N. C. Inst. Govt. Library). "About ninety percent of all defendants in federal courts plead guilty." Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 HARV. L. REV. 1281, 1290 (1952). See generally ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 546 (1947) and Note, 58 COLUM. L. REV. 702, 706 (1958).

[19] N.C. GEN. STAT. § 15-198 (1953) provides for furnishing the court with a probation report concerning the criminal record, social history, and present condition of the defendant. "The investigation may adduce information concerning defendant's criminal record, if any, his moral character, standing in the community, habits, occupation, social life, responsibilities, education, mental and physical health, the specific charge against him, and other matter pertinent to a proper judgment." 257 N.C. at 335, 126 S.E.2d at 133.

[20] Wyzanski, *supra* note 18, at 1291.

[21] "Anglo-American law has relied traditionally upon an adversary system to ascertain the facts. Impartiality has not been considered a sufficient safeguard." Knowlton, *Should Presentence Reports Be Shown to a Defendant,* 79 N.J.L.J. 409, 417 (1956).

[22] The court instructed judges to disclose all information coming to their notice which might conceivably aggravate the punishment, and afford the defendant an opportunity to refute or explain such information. 257 N.C. at 335, 126 S.E.2d at 133.

[23] In order for the defendant to know the contents of probation reports and other oral testimony, it is obvious from this holding that such knowledge will be dependent on the trial judge's decision whether to disclose or conceal the information. "Certainly due process should not depend on the unrestrained discretion of one man in determining whether the information considered should be disclosed." Note, 34 MINN. L. REV. 470, 472-73 (1950).

[24] *Ex parte* Hoopsick, 172 Pa. Super. 12, 91 A.2d 241 (1952). See also Townsend v. Burke, 334 U.S. 736 (1948), and Smith v. United States, 223

sentenced on the basis of false information if the trial judge inadvertently fails to disclose such information to the defendant before sentencing.

The procedural problem at the sentencing stage is characterized, on the one hand, by a desire to grant the sentencing judge the utmost leeway in access to information properly bearing on the question of punishment, and, on the other, by the necessity that the defendant be confronted with such information to insure its accuracy. Although the principal case dealt primarily with the propriety of receiving oral testimony in the defendant's absence, the problem frequently arises with regard to a written report considered by the judge prior to sentencing. In *Williams v. New York*[25] the United States Supreme Court held that the due process clause of the fourteenth amendment is not violated when the defendant is denied the opportunity to confront and cross-examine informants who contribute to a probation report considered by the judge before sentencing.[26] Perhaps the more serious question is whether the defendant should be allowed to examine the report itself and chal-

F.2d 750 (5th Cir. 1955). *Townsend* appears to have been determined largely on the ground that the defendant was not represented by counsel when sentence was imposed. However, one writer has questioned the benefit of counsel in a situation in which the judge fails to disclose the false premises on which he bases his stentence. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 267 (1952).

[25] 337 U.S. 241 (1949), portions of which are quoted in *Pope* in support of the court's holding that the instant procedure was not in violation of the due process clause of the North Carolina Constitution, art. 1, § 17. 257 N.C. at 332-34, 126 S.E.2d at 131-32.

[26] Mr. Justice Black reasoned that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentence would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." 337 U.S. at 250. *But see* Jay v. Boyd, 351 U.S. 345 (1956), in which Mr. Justice Black in a dissenting opinion vigorously objects on due process grounds to the Attorney General's use of confidential information as a basis for refusing to suspend deportation of a former Communist.

A closely analagous situation is the procedure by which the sanity of a convicted murderer is determined subsequent to sentence but prior to execution. In Solesbee v. Balkcom, 339 U.S. 9 (1950), the Supreme Court over due process objections approved a procedure in which the defendant was denied an opportunity to present his own evidence or confront the evidence submitted by the state on the issue of sanity. In a dissent, Mr. Justice Frankfurter addressed himself to the majority's argument that such a procedure was necessary to obviate delay: "[T]he risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity." 339 U.S. at 25. The decision in this case was approved in Caritativo v. California, 357 U.S. 549 (1958).

lenge its accuracy.[27] Statutes in at least three states expressly provide for such inspection by the defendant.[28] The originally proposed Federal Rules of Criminal Procedure included a provision[29] which would have insured inspection of a probation report by the defendant. This provision was deleted in the final draft,[30] however, and the practice now varies between making the report public in some districts, and treating it as confidential in others.[31] Arguments against a procedure of inspection stress the possibility that such a procedure would seriously hamper the efficient administration of criminal justice, and possibly result in a retrial of collateral issues.[32] It seems just as probable, however, that if the report is true, it will not be contested at all, either because it is not detrimental to the defendant, or because it is capable of comparatively easy proof, as in the case of establishing the fact of a prior conviction. Conversely, those portions of the report which are challenged are likely to be statements which are most prejudicial to the defendant and more difficult to

[27] It is questionable whether *Williams* decided this issue. Note, 23 So. CAL. L. REV. 105, 107 (1949). For a statement of the narrow holding in *Williams*, see Gonzales v. United States, 348 U.S. 407, 412 n. 4 (1954), and White v. United States, 215 F.2d 782, 789 (1954).

[28] ALA. CODE ANN. tit. 42, § 23 (1959); CAL. PEN. CODE § 1203 (Supp. 1962); VA. CODE § 53-278.1 (1958). See Linton v. Commonwealth, 192 Va. 437, 65 S.E.2d 534 (1951) where the failure to allow defense counsel to cross-examine the probation officer was reversible error. N.C. GEN. STAT. § 15-207 (1953) provides that the probation report is privileged information and may only be seen by the court and "others entitled under this article." One writer has interpreted this to include disclosure to the defendant and his counsel. Sharp, *The Confidential Nature of Presentence Reports*, 5 CATHOLIC U.L. REV. 127, 131 (1955). In the absence of case authority to substantiate either position, it seems reasonable to argue that the section does not make disclosure to the defendant mandatory.

[29] "After determination of the question of guilt the report shall be made available, upon such conditions as the court may impose, to the attorney for the parties and to such other persons as the court may designate." FED. R. CRIM. P., REPORT OF THE ADVISORY COMMITTEE 34 (1944).

[30] See FED. R. CRIM. P. 32(c).

[31] "[I]n 65 districts the presentence report is available only to the judge. In 30 districts the report is available also to other interested parties and in all but two of these the United States Attorney receives a copy. In 11 districts the defense counsel has access to the report." *Pilot Institute On Sentencing*, 26 F.R.D. 231, 329 (1961). See generally Chandler, *Latter-Day Procedures In the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825, 834 (1951).

[32] Morgan v. State, 142 So. 2d 308, 312 (Fla. 1962). The rules of evidence in the California presentence procedure appear to be rather rigid. People v. Valdivia, 5 Cal. Rptr. 832, 182 Cal. App. 2d 149 (1960), 34 So. CAL. L. REV. 231 (1961); People v. Neal, 97 Cal. App. 2d 688, 218 P.2d 556 (1950).

prove, such as conclusions deduced from hearsay or rumor.[33] The risk of injustice to the defendant if such statements are false would seem to outweigh contrary considerations of administrative convenience.[34]

A further argument against allowing disclosure and challenge is that such a rule might discourage confidential informants, thus rendering unavailable much of the information now relied upon by judges.[35] This possibility is conceded, although it would seem to be an unavoidable consequence of any system of criminal administration which requires that defendants be informed of the evidence against them.[36]

Judging from the tenor of opinions which deny the defendant access to probation reports and the right to be present when oral testimony is presented, the inescapable conclusion is that, but for insuperable procedural difficulties, the courts think it only fair that there be some means by which a defendant may be confronted with information bearing on the subject of punishment.[37]

The English courts seem to have reached a flexible solution. An act of Parliament[38] provides that after conviction "without prejudice to any right of the accused to tender evidence as to his

[33] "The presentence probation report in Williams v. New York illustrates this problem. The probation department there concluded that Williams was a 'psychopathic liar' whose ideas 'revolve around a morbid sexuality,' that he was 'a full time burglar,' 'emotionally unstable,' 'suffers no remorse,' and was deemed to be 'a menace to society.'" His criminal record consisted of a charge of theft when he was 11 years old and a conviction as a wayward minor. Such a record would not support such generalizations as above. The conclusions were drawn from information solicited from various people who accused Williams of committing other crimes for which he had never been prosecuted. Note, *Due Process and Legislative Standards in Sentencing,* 101 U. PA. L. REV. 257, 276-77 (1952). On conclusions of probation officers based on these uncorroborated accusations, the trial judge overrode the jury's recommendation of life imprisonment and imposed the death penalty on Williams, a convicted murderer.

[34] Rubin, *Probation and Due Process of Law,* 31 FOCUS 40, 44 (1952); Note, *Right of Criminal Offenders To Challenge Reports Used In Determining Sentence,* 49 COLUM. L. REV. 567, 571-72 (1949).

[35] United States v. Durham, 181 F. Supp. 503, 504 (D.D.C.), *cert. denied,* 364 U.S. 854 (1960).

[36] Rubin, *op. cit. supra* note 34, at 45.

[37] See Zeff v. Sanford, 31 F. Supp. 736, 738 (N.D. Ga. 1940); Driver v. State, 201 Md. 25, 32, 92 A.2d 570, 573 (1952); Commonwealth v. Johnson, 348 Pa. 349, 355, 35 A.2d 312, 314-15 (1944). The court in the principal case admits that it is better practice to receive all reports and representations from probation officers in open court. State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

[38] Prevention of Crime Act, 1908 8 Edw. VIII, ch. 59 § 10(5).

character and repute, evidence of character and repute may, if the court thinks it fit, be admitted as evidence bearing on the question whether the accused is or is not leading persistently a dishonest or criminal life." If the accused challenges any statement, the judge has two alternatives. He must either disregard the challenged statement,[39] or require legal proof of it.[40] Such a procedure accommodates both interests by allowing the judge to consider all unchallenged information, while at the same time insuring its accuracy by requiring proof of those statements which are challenged.

While the decision in the *Pope* case worked no obvious injustice on the particular defendant, its limited protection to defendants in general should provoke serious legislative attention to the possible adoption of a statutory presentence procedure. This procedure, while reserving the necessary discretion in the sentencing judge, should be geared to insure the utmost accuracy of any information, oral or written, which is offered in aggravation or mitigation of punishment. New concepts of administering sentences should not neglect the protection of the individual they seek to benefit.

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**Estoppel by Judgment—Client Not Estopped in Action Against Attorney**

A resident of Virginia and his wife engaged a North Carolina attorney to defend them in an action brought against them in North Carolina. The attorney failed to file any pleadings and a default judgment was entered against his clients. Subsequently, they employed other counsel and moved to set aside the default judgment on the ground of excusable neglect.[1] The attorney also retained counsel and joined in the prosecution of the motion. The court found that the neglect of the attorney was not attributable to his clients,[2] but

[39] Rex v. Campbell, 6 Crim. App. R. 131, 132 (1911).
[40] *Ibid.*

[1] N.C. GEN. STAT. § 1-220 (1953) provides: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment . . . taken against him through his mistake . . . or excusable neglect . . . ."

[2] If a party has employed counsel and given him the necessary information about the case, the attorney agreeing to file an answer and protect his interest, failure of the attorney to perform his duty is excusable neglect on the part of the client. Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944); Edwards v. Butler, 186 N.C. 200, 119 S.E. 7 (1923); Mann v. Hall, 163 N.C. 50, 79 S.E. 437 (1913).

refused to set aside the judgment because they had no meritorious defense to the prior action.[3] Rather than appealing from the order denying the motion, the clients instituted the instant action against the attorney, alleging that by reason of his negligence in the first action they had been substantially damaged.

As an affirmative defense the attorney pleaded an estoppel by judgment. He contended that it had been determined by final judgment in a court of competent jurisdiction that plaintiffs had no meritorious defense in the first action.[4] Plaintiffs moved to strike this defense. The court ruled that the findings by the court which refused to set aside the default judgment did not constitute an estoppel. The defense was ordered stricken and on appeal this was affirmed.[5]

An estoppel by judgment differs from res judicata in that the latter refers to the conclusive effect of a judgment upon an adjudicated *cause of action,* and the former refers to the judgment's conclusive effect upon *issues* that were litigated and necessarily adjudicated by the judgment in litigation involving a different cause of action.[6]

It is fundamental that a final judgment, when rendered on the merits by a court of competent jurisdiction, is conclusive of rights,

[3] In a proceeding to set aside a default judgment the court determines, as a matter of law, whether or not there was excusable neglect, and whether or not the facts alleged would constitute a meritorious defense if proven in a trial on the merits. Helderman v. Hortsell Mills Co., 192 N.C. 626, 135 S.E. 627 (1926); Gaylord v. Berry, 169 N.C. 733, 86 S.E. 623 (1915). The judgment cannot be set aside unless the moving party can show both excusable neglect, and that he has a meritorious defense. Greitzer v. Eastman, 254 N.C. 752, 119 S.E.2d 884 (1961); Moore v. Deal, 239 N.C. 224, 79 S.E.2d 507 (1954). But even though it may be determined that there was excusable neglect and a meritorious defense, it is within the discretion of the court to set the judgment aside or not. The decision is not subject to review unless it appears there was an abuse of discretion. Allen v. McPherson, 168 N.C. 435, 84 S.E. 766 (1915); Pepper v. Clegg, 132 N.C. 312, 43 S.E. 906 (1903).

[4] "In an action by a client against his attorney, the attorney is not liable for negligence in the conduct of litigation, where notwithstanding such negligence in defense of a suit, the client has no meritorious defense." Masters v. Dunstan, 256 N.C. 520, 523, 124 S.E.2d 574, 576 (1962). This logically follows, since where there is no meritorious defense the attorney's negligence results in no damage.

[5] Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962).

[6] RESTATEMENT, JUDGMENTS § 68, comment *a* (1942). This distinction is a technical one which is not always observed in the language of the court's decisions. See Cannon v. Cannon, 223 N.C. 664, 28 S.E.2d 240 (1943); Southern Distrib. Co. v. Carraway, 196 N.C. 58, 144 S.E. 535 (1928).

questions, and facts in issue as to all *parties* and their *privies* in all other actions involving the same matter.[7] This principle is based on the "mutuality" concept and requires a former judgment to be mutually binding upon the parties before it can be used as an estoppel or is res judicata.[8] A party will not be bound by a former judgment unless he could use it for protection, or for the foundation of a claim, had the judgment been decided the other way.[9]

The doctrine of mutuality is firmly established in North Carolina,[10] and is recognized and applied by the majority of jurisdictions.[11]

[7] Bryant v. Shields, 220 N.C. 628, 18 S.E.2d 157 (1942); Bruton v. Carolina Power & Light Co., 217 N.C. 1, 6 S.E.2d 822 (1940); Gay v. Stancill, 76 N.C. 369 (1877).

[8] Comment, 34 N.C.L. REV. 458 (1956).

[9] Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1954); Meacham v. Larus & Bros. Co., 212 N.C. 646, 194 S.E. 99 (1937); Armfield v. Moore, 44 N.C. 157 (1852).

A judgment in rem is generally taken as an exception to the mutuality doctrine, since it is binding on all those having an interest in the subject matter. But the fact that in rem judgments are good against the world actually brings them within the limits of the mutuality doctrine. Comment, 34 N.C.L. REV. 458 (1956). *But see* Current v. Webb, 220 N.C. 425, 17 S.E.2d 614 (1941), where a former decision as to the residence of *D* was held to be in the nature of a judgment in rem and was res judicata when *D* was sued by a different plaintiff. Both cases involved a motion to quash the purported service of summons on *D*, and the facts of each case were identical. Service in both cases was made by the same officer at the same time. But the parties were not the same, and there was no showing of privity.

[10] Allred v. Webb, 135 N.C. 443, 47 S.E. 597 (1904), has been cited as indicating that the mutuality requirement may lead to some unusual results. Comment, 34 N.C.L. REV. 458, 464 (1956). In that case *X* died leaving nine heirs at law, but prior to her death she had executed a deed for the land in controversy to one of them, *D*. Another heir, *A*, in a former suit against *D*, alleged *X* did not have sufficient mental capacity to execute the deed, and the jury so found. The deed was declared void and ordered cancelled. Subsequently, the heirs brought a partition proceeding against *D*, alleging that each was entitled to a one-ninth interest in the property. The court ruled that the prior judgment was good only between *A* and *D*, since the estoppel must be mutual.

In a vigorous dissent, Chief Justice Clark argued that the former judgment was a final cancellation of the defendant's title, binding him against all parties. *But see* First Nat. Bank v. McCaskill, 174 N.C. 362, 93 S.E. 905 (1917), where the Chief Justice wrote an opinion on similar facts, but said such a judgment could not be pleaded as an estoppel.

[11] For a collection of cases, see Annots., 23 A.L.R.2d 710 (1952); 133 A.L.R. 181 (1942). See generally RESTATEMENT, JUDGMENTS § 96, comment *a* (1942). Those who advocate the same issue rule advance the following rational. "The requirement that in order to be bound by a judgment a person must have had his day in court, say the critics of the mutuality doctrine, is a requirement of due process and the only necessary limitation on the persons who may be bound by, or entitled to the benefit of, a judgment's conclusive force. Thus when *A* obtains a judgment against *B* and attempts

There is, however, a long recognized exception to the rule where the liability of a defendant is dependent upon the liability of another —or on the existence of some culpable act of another—that has been judicially determined not to exist in other litigation by the same plaintiff, but to which the defendant was not a party nor privy. The theory[12] of this exception can be illustrated as follows: Assume that *A* and *B* are both liable, if at all, on the basis of the same factual situation, and the liability of one is derived from the liability of the other *because of some legal relationship between them.* *P* sues *A* and obtains an adverse judgment, necessarily adjudicating that no primary liability towards *A* arose from the factual situation involved. In such a case *P* is precluded from retrying the same issue in a suit against *B*. Only those situations involving derivative liability, based on a legal relationship between the person invoking the judgment and a party to it are included in this exception, and it permits only defensive use of prior judgments.

This exception is also well recognized in North Carolina, and the court has held that where the relationship between two parties is analogous to that of principal and agent, or master and servant, or

to use the judgment to bind *X*, who was neither party nor privy to the *A-B* litigation, *X* is not bound because the 'day in court' requirement is not fulfilled. But in litigation between *X* and *B*, the opponents of mutuality say that *B* has had his day in court (against *A*) and lost; therefore no logical reason exist to prevent *X* from using *A's* judgment to conclude *B* on issues that the judgment necessarily adjudicated. And this is true whether *X* is a defendant, using the *A-B* judgment to bar *B's* suit against him, or a plaintiff using the judgment to preclude a defense by *B*." Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301, 307 (1961).

But "the contention that when *X* uses *A's* judgment against *B*, *B* has had his day in court, clearly begs the question: his day in court against whom? When *B* was a party to the suit in which judgment was rendered, and *X* was a stranger to that suit, *B* has no more had his day in court against *X* than if *X* had been a party to the suit, and *B* a stranger to it." Moore & Currier, *supra* at 310. Because of the sum involved in *A's* claim, or other more personal reason, *B* may have been quite willing to allow *A's* judgment against him, but not *X's;* and to preclude *B* from defending *X's* suit would in effect deny him his day in court.

[12] Moore & Currier, *supra* note 11, discusses two general theories supporting this exception, but admits that the broader theory includes the narrower one. The narrower theory, briefly, is that "an indemnitee against whom a claim is asserted on the basis of secondary liability derived from the primary liability of his indemnitor is normally permitted to invoke the conclusive effect of a judgment adverse to the same plaintiff rendered in a suit between him and the indemnitor, although the indemnitee-defendant was neither party nor privy to the suit, and would not be bound had the judgment gone the other way." Moore & Currier, *supra* note 11, at 311. See generally RESTATEMENT, JUDGMENTS §§ 96-99 (1942).

employer and employee, a judgment in favor of either in an action brought by a third party, rendered upon a ground equally applicable to both, will be accepted as conclusive against the claimant's right of action against the other.[13]

Another exception is stated in the Restatement of Judgments.[14] Under this rule, one who controls an action, but is not a party to it, is bound as if he were a party, on the principle that a person is entitled only to one adjudication of an issue.[15]

In the principal case it was recognized that the estoppel was not mutual, because an opposite finding on the question of meritorious defense could not have estopped the attorney from denying negligence on his part and asserting want of a meritorious defense. Thus, apply-

[13] Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N.C. 501, 2 S.E.2d 570 (1939).

"[W]here the doctrine of *respondeat superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the agent or servant and such judgment is not satisfied, the injured party may bring an action against the principal or master. In such case, however, the recovery against the principal or master may not exceed the amount of the recovery against the agent or servant . . . . On the other hand, if the agent or servant satisfies the judgment against him or obtains a verdict in his favor, no action will lie against the principal or master." Thompson v. Lassiter, 246 N.C. 34, 38, 97 S.E.2d 492, 496 (1957).

At times the court has reached the proper result under this principle without referring to it. In Crosland-Cullen Co. v. Crosland, 249 N.C. 167, 105 S.E.2d 655 (1958), the plaintiff was the initial beneficiary of *X's* life insurance policy, but assigned it to *X's* wife. When *X* died the proceeds of the policy were paid to his widow. Plaintiff sued the insurance company alleging that the assignment was invalid. The assignment was found to be valid and there was a judgment for the insurer. In a subsequent suit against the widow, it was held that the judgment in favor of the insurer established the validity of the assignment as far as plaintiff was concerned, and it mattered not that the widow was not a party. Although the court spoke in terms of the "same issue" rule, it would seem that the relationship of indemnitee-indemnitor between the insurance company and the widow should support the result.

Savage v. McGlawhorn, 199 N.C. 427, 154 S.E. 673 (1930), was apparently decided on an in rem theory. Plaintiff *P* sued partners *A* and *B* for breach of contract, and *A* set up a former recovery against *P* for breach of the same contract. It was held that although *B* was not a party to the original action this did not prevent the former judgment from being res judicata, since there was but one contract. Again, the partnership relation between *A* and *B* should have supported this result.

[14] "A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." RESTATEMENT, JUDGMENTS § 84 (1942).

[15] *Id.* at comment *a* (1942).

ing the mutuality concept, the finding made would not estop the plaintiffs.[16]

It is obvious that the exception to the mutuality rule, which is based upon liability derived from some legal relationship between the parties, does not encompass the principal case. This exception is invoked only against third party plaintiffs and not between those liable on the same factual situation because of the legal relationship.

The effect of the attorney's control over the proceeding to set aside the default judgment is not so obvious. The attorney argued that his participation in the motion put him in privity with plaintiffs. The court, however, ruled that there was no privity between them,[17] and that mere participation in the motion created no estoppel by judgment between plaintiff and one not a party.

In support of this latter ruling the court quoted the headnote from *Falls v. Gamble*.[18]

> No estoppel of record is created against one not a party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in defence of the action, employed counsel, introduced his deeds in evidence and paid the cost, and though he and the present defendant claimed by deeds under the present trespasser.[19]

The *Falls* case is a strong decision to the effect that even one who instigates and controls the action is not bound by the judgment unless he is a party thereto.[20] But that decision was handed down

[16] Even if the court had found excusable neglect and a meritorious defense and still refused to set aside the default judgment in exercise of its discretion, this could not estop defendant from asserting want of a meritorious defense without denying him his day in court.

[17] "When used with respect to estoppel by judgment, the term 'privity' denotes mutual or successive relationship to the same rights of property." Queen City Coach Co. v. Burrell, 241 N.C. 432, 435, 85 S.E.2d 688, 691 (1954).

[18] 66 N.C. 455 (1872).

[19] *Id.* at 455.

The court also cited Meacham v. Larus & Bros. Co., 212 N.C. 642, 194 S.E. 99 (1937), where *A* and *B*, both passengers in an automobile, were injured when their automobile collided with one driven by *D*. *A* sued *D* for damages and *B* testified for *A* at the trial, which resulted in a judgment adverse to *A*. *B* then sued *D* who pleaded the former judgment as res judicata. It was held that *B's* participation in the former trial created no estoppel against him. While the result is the same as in the principal case, the difference in one's participation as a witness and as attorney would seem great enough to render this case of doubtful value as precedent.

[20] In Falls v. Gamble, 66 N.C. 455 (1972), *A* and *B* both claimed under

ninety years ago, and the court failed to mention that more recent decisions[21] have recognized the Restatement of Judgments rule[22] that control is an exception to the general requirement of parties or privies.

Nevertheless, the result of the principal case seems correct for reasons of sound administrative policy. The control exercised by the attorney over the proceeding to set aside the default judgment is all the more reason to deny his plea of estoppel when he is later sued by his former client. To apply the exception to this case would in effect allow the attorney who controlled the proceeding to work toward a result beneficial to his own interest, but detrimental to his clients. Since the attorney was acting in a representative capacity, this would be a violation of his fiduciary obligations.[23]

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deeds from *X*. *A* brought an action against *B* to recover the land and introduced both deeds from *X* into evidence, attempting to prove that the deed to *B* was given while *X* was an infant of ten. *B* pleaded as an estoppel a former suit by *B* against *X* for trespass, where *A* had instigated the trespass then complained of, aided in defending that suit, employed counsel, and introduced his deed from *X* in evidence. The jury decided in the former action that *X* was not an infant when he delivered his deed, which passed title to *B*. *A* admitted his part in the former action. Although the same questions were involved in both actions the court found no privity between *A* and *X*, holding that *A's* participation in that action made him an accessory before and after the act, but not a sufficient party to be estopped by it.

[21] In Thompson v. Lassiter, 246 N.C. 34, 97 S.E.2d 492 (1957), *A* brought an action against *B* to recover damages suffered by him in a collision between an automobile driven by *B* and a family purpose automobile owned by *A* and driven by his son. *A* alleged damage to his automobile, medical expenses for his son, and loss of his son's services. In a former action by *C*, who was injured in the same accident, against *B*, *A's* son was made a party by *B* for purposes of contribution. *A* participated in that suit as guardian ad litem, and both *B* and *A's* son were found guilty of negligence. *B* pleaded the former action as an estoppel, and the court agreed, quoting the Restatement of Judgments.

Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 79 S.E.2d 167 (1953), recognized the Restatement of Judgments rule as an exception, but held the facts alleged were insufficient to invoke it. See generally Annot., 13 A.L.R. 9 (1942).

[22] Falls v. Gamble, 66 N.C. 455 (1872), would seem to fall within this rule. See RESTATEMENT, JUDGMENTS § 84, comment *b* (1942). "The rule also applys to one who participates in an action because an issue in the action is the tortious quality of an act on which his liability or freedom from liability depends, or because *the validity of a deed to which he claims title is involved.*" (Emphasis added.)

[23] One case has been found, on comparable facts with the principal case, where a former finding was held conclusive in an action between an attorney and his former client, but in that case the finding of fact in the prior suit was to the best interest of the client. In Boynton v. Brown, 103 Ark. 513, 145 S.W. 242 (1912), attorney *A* brought suit against *B* for attorney's fees

**Foreign Divorce—Fraudulent Domicile—Full Faith and Credit**

In *Donnell v. Howell*[1] the North Carolina Supreme Court held that the full faith and credit clause[2] did not apply to a foreign divorce decree obtained through fraudulent allegations of domicile in an Alabama court. A brief review of prior decisions seems appropriate in order to put this case in context.

The first of the celebrated *Williams v. North Carolina*[3] decisions involved a criminal prosecution for bigamous cohabitation. The United States Supreme Court held that for a state to have jurisdiction to grant a divorce, at least one of the parties must be domiciled in the state which awards the decree. The second *Williams* decision[4] held that full faith and credit need not be accorded to a foreign divorce decree obtained in an *ex parte* proceeding where neither party was domiciled in the awarding state. This blow to the efficacy of the full faith and credit doctrine was somewhat softened by the subsequent decisions of *Sherrer v. Sherrer*[5] and *Coe v. Coe*.[6] In these two decisions, the Court held that decrees obtained by fraudulent

due for services rendered in a prior action, and *B* alleged negligence on the part of *A* in the management and conduct of that action. In the prior litigation the court ruled that *A* had not been negligent in discovering after the trial that a certain decree upon which the opposing party based his claim had been rendered in vacation time, and was, therefore, void, and ruled that *B* was entitled to a bill of review. This finding was held conclusive in the *A-B* suit, with no discussion of party or privy requirements.

In the principal case the clients alleged that they had been damaged in the sum of $4203.54. Subsequent to the reported opinion the case was settled for $2200.00. Letter From Rodman & Rodman, Attorneys For Plaintiffs, to Sam S. Woodley Jr., December 6, 1962. While it would have been difficult for plaintiffs to prove there was a meritorious defense, the court having ruled as a matter of law, taking the evidence in a light most favorable to plaintiffs, that there was none; still defendant was undoubtedly reluctant to have the case go to trial.

[1] 257 N.C. 175, 125 S.E.2d 448 (1962).

[2] U.S. CONST. art. IV, § 1.

[3] 317 U.S. 287 (1942).

[4] Williams v. North Carolina, 325 U.S. 226 (1945). For excellent discussions of the total effect of *Williams* and subsequent litigation, see Baer, *So Your Client Wants a Divorce!*, 24 N.C.L. REV. 1 (1945); Baer, *The Aftermath of Williams v. North Carolina*, 28 N.C.L. REV. 265 (1950); Baer, *The Law of Divorce Fifteen Years After Williams v. North Carolina*, 36 N.C.L. REV. 265 (1958).

[5] 334 U.S. 343 (1948). In *Sherrer* the defendant's attorney denied the allegations of the plaintiff's domicile in the Florida divorce proceedings. However, there was no subsequent attempt to disprove the domicile.

[6] 334 U.S. 378 (1948). *Coe* was a companion case to *Sherrer* and involved a Nevada proceeding wherein the allegations of domicile were admitted by the defendant.

jurisdiction in a sister state could not be collaterally attacked and were entitled to full faith and credit where: (1) there was participation in the divorce action by the defendant, (2) full opportunity to contest the jurisdictional issue of domicile was afforded the defendant, and (3) where the decree would not be subject to collateral attack in the awarding state. When these requirements have been met, res judicata applies to the jurisdictional issue of domicile. Regardless of whether the issue of domicile was actually litigated, the decree is entitled to full faith and credit.[7]

In the principal case, the plaintiff-wife brought a partition proceeding[8] concerning certain real property. She alleged that the property was held with the defendant-husband as tenants in common as a result of an Alabama divorce. The defendant answered that the divorce was null and void because plaintiff was a bona fide resident of North Carolina at the time of the divorce. Therefore they still held the property as tenants by the entirety, and no partition proceedings could be enforced.[9] The defendant had entered a general and personal appearance in the Alabama proceedings by signing a notice of waiver and answer to the complaint. By this instrument, the defendant waived all service of process, submitted himself to the jurisdiction of that court, and admitted that the plaintiff was a bona fide resident of Alabama. The plaintiff replied that the effect of the defendant's having signed the instrument was: (1) to estop the defendant from attacking the decree, and (2) to entitle the decree to full faith and credit.[10]

It was clear from the facts that neither the plaintiff nor the defendant had ever been domiciled in Alabama. The court found that there was no estoppel.[11] The court then held that the decree

[7] 334 U.S. at 351-52.

[8] N.C. GEN. STAT. § 46-3 (1950) allows such special proceedings for joint tenants or tenants in common. When the parties are divorced, they become tenants in common rather than remaining tenants by the entirety. McKinnon, Currie & Co. v. Caulk, 167 N.C. 411, 83 S.E. 559 (1914).

[9] The rule in North Carolina appears to be that a tenant by the entirety cannot force partition without the consent of the spouse. See, *e.g.*, Davis v. Bass, 188 N.C. 200, 208, 124 S.E. 566, 570 (1924) (dictum); Jones v. W. A. Smith & Co., 149 N.C. 318, 319, 62 S.E. 1092, 1093 (1908) (dictum).

[10] 257 N.C. at 177, 125 S.E.2d at 450.

[11] There could be no true estoppel. The plaintiff knew all of the material facts and had not been misled. She was actively trying to enjoy the benefits of her fraudulent act. The defendant was merely trying to resist. Although the defendant had participated with her in the fraud, to estop him

was subject to collateral attack and that full faith and credit did not apply. The *Sherrer* and *Coe* cases were distinguished on the grounds that in the *Donnell* case: (1) the defendant was not at the trial, (2) the defendant did not participate in the trial, and (3) the defendant was not represented by counsel at the trial.[12] The first two reasons given for refusing to invoke the *Sherrer* doctrine seem clearly insufficient. In a United States Supreme Court decision,[13] the defendant's sole participation in the divorce action was by attorney, and the Court held the decree was not subject to collateral attack. The *Sherrer* and *Coe* cases were cited as controlling. The third reason given would seem equally insufficient because the only requirement laid down by the *Sherrer* case is that there be participation by the defendant. There appears to be no requirement of a certain degree of participation. There was participation in *Donnell.* By his answer and waiver, the defendant entered a general and personal appearance and became a party to the suit.[14] The defendant clearly participated, but failed to take advantage of his opportunity to contest the issue of domicile.[15]

Perhaps a better attempt at evading the effect of the *Sherrer* doctrine could have been made. It could have been argued that the failure of the defendant to be at the trial, or to have a lawyer, may have resulted in there not having been a full opportunity to contest the issue of domicile.[16] Still another device would be that the decree would be subject to collateral attack in the awarding state, Alabama,

"would be [productive of] an offense against public morals and good conscience, a reflection upon the integrity of the court, and productive of perjury." *Id.* at 185, 125 S.E.2d at 455. For comprehensive treatments of the doctrine of estoppel with respect to the validity of foreign divorce decrees, see, *e.g.*, Annots., 175 A.L.R. 538 (1948), 153 A.L.R. 941 (1944), 140 A.L.R. 914 (1942), 122 A.L.R. 1321 (1939), 109 A.L.R. 1018 (1937).

[12] *Id.* at 187, 125 S.E.2d at 457.

[13] Johnson v. Muelberger, 340 U.S. 581 (1951).

[14] In order to overcome the validity of a foreign decree, it would seem that the attacking party has the burden of showing that the defendant never made an appearance in the divorce action. Cook v. Cook, 342 U.S. 126, 128 (1951) (dictum).

[15] "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant [to litigate the issue of domicile] under such circumstances should be permitted to provide a basis for subsequent attack in the court of a sister State on a decree valid in the State in which it was rendered." Sherrer v. Sherrer, 334 U.S. 343, 352 (1948).

[16] See Note, *Participation by Defendant Spouse in a Foreign Divorce Action: State Court Interpretation of the "Sherrer Doctrine,"* 34 IND. L.J. 592, 597 (1959).

and hence not subject to full faith and credit under the *Sherrer-Coe* decisions.[17]

It should not be overlooked that the exact fact situation in *Donnell* has not been before the United States Supreme Court, *i.e.* where the sole participation by the defendant was the signing of a written instrument.[18] In this fact situation, the states have reached different results. Some states grant full faith and credit,[19] while others, like North Carolina have refused to extend full faith and credit to this fact situation.[20] And still other courts may or may not give full faith and credit, depending on the circumstances of the case.[21]

[17] In Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961), the parties appeared in an action to modify a decree which had been effective for six years. When the trial judge found that both parties admitted that neither had ever been domiciled, and that they had consequently worked a fraud on the awarding court, he vacated the decree. The Supreme Court of Alabama affirmed. The requirement of the full faith and credit doctrine is that a sister state give the decree as much effect as it would be given in the awarding state. When Alabama vacates its decrees, why not let North Carolina do the same to an Alabama decree on an identical fact situation?

In Hudson v. Hudson, 69 N.J. Super. 128, 173 A.2d 721 (Super. Ct. Ch. 1961), the court refused to examine a decree on the basis of *Hartigan*. For discussions concluding that this approach would be impermissible, see Comment, 47 CORNELL L.Q. 459, 468-69 (1962); Ross & Crawford, *Greshem's Law of Domestic Relations: The Alabama Quickie*, 27 BROOKLYN L. REV. 224, 246 (1961). See also, Note, 36 TUL. L. REV. 154 (1961). *But cf.* Rosenbluth v. Rosenbluth, 34 Misc. 2d 290, 228 N.Y.S.2d 613 (Sup. Ct. 1962) which held that a third party could attack an Alabama divorce decree on this basis and was not precluded by full faith and credit.

For evidence that Alabama is concerned with the fraudulent domicile problem, see Ross & Crawford, *supra* at 241-42.

[18] In both *Sherrer* and *Coe* the parties were both present at the proceedings and represented by counsel. In Johnson v. Muelberger, 340 U.S. 581 (1951), the defendant was represented by counsel. In Cook v. Cook, 342 U.S. 126 (1951), there was no determination of the extent of the defendant's participation.

[19] *In re* Raynor's Estate, 220 Cal. App. 2d 715, 332 P.2d 416 (3d Dist. 1958) (defendant's sole participation was by signing a notice and waiver); *In re* Day's Estate, 7 Ill. 2d 348, 131 N.E.2d 50 (1956); Boxer v. Boxer, 12 Misc. 2d 205, 177 N.Y.S.2d 85 (Supp. Ct. 1958), *aff'd*, 7 App. Div. 2d 1001, 184 N.Y.S.2d 303 (1959), *aff'd mem.*, 7 N.Y.2d 781, 163 N.E.2d 149 (1959) (defendant signed a power of attorney); Chittick v. Chittick, 332 Mass. 554, 126 N.E.2d 495 (1955) (sole participation was having lawyer at the proceedings).

[20] Gherardi De Parata v. Gherardi De Parata, 179 A.2d 723 (D.C. Munic. Ct. App. 1962); Eaton v. Eaton, 227 La. 992, 81 So. 2d 371 (1955); Pelle v. Pelle, 229 Md. 160, 182 A.2d 37 (1962); Brasier v. Brasier, 200 Okla. 689, 200 P.2d 427 (1948). *Cf.* Davis v. Davis, 259 Wis. 1, 47 N.W.2d 338 (1951) where the court required physical participation by the defendant and refused to grant full faith to the decree, even though the defendant was represented by counsel at the trial.

[21] In New Jersey full faith was denied where the plaintiff obtained a power of attorney from the defendant and obtained a foreign divorce.

In *Sherrer* and *Coe* there were indications that the decisions would add certainty to the marital status.[22] As the above cases bear witness, certainty has not resulted. The courts are seizing on insignificant factual variations to avoid *Sherrer* and to prevent their own divorce laws from becoming ineffective.

The *Sherrer* case and other related decisions by the United States Supreme Court may be beneficial in that their effect is to allow quicker divorces which are needed in our modern society.[23] Perhaps the Constitution demands that the full faith and credit doctrine be upheld.[24] However it seems that the merits lie elsewhere. It is questionable that the full faith and credit clause should be used to defeat a state's divorce laws. The marriage relation is a basic institution of our society, and a state should be able to prescribe its own laws reflecting this relationship. Other states, for monetary or other considerations, should not be able to defeat the laws of sister states in proceedings tainted with fraud. Although the court's reasoning in *Donnell* may be faulty, the result nevertheless seems desirable because such a fraudulent proceeding was nullified. But the practical effect of *Donnell* is only that the parties now have to either hire a lawyer, or be at the trial personally, to be protected by full faith and credit.

What is needed to remedy this situation is clear. The United States Supreme Court should re-examine and overrule the *Sherrer* and *Coe* cases and return to the *Williams* decision in order to prevent this fraudulent circumvention of the individual state's divorce law. The integrity of our divorce laws should not be defeated by a twisted and hollow use of the full faith and credit doctrine.

JOHN SIKES JOHNSTON

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Staedler v. Staedler, 6 N.J. 380, 78 A.2d 896 (1951). But where the defendant got his own attorney, full faith was granted. Hudson v. Hudson, 69 N.J. Super. 128, 173 A.2d 721 (Super. Ct. Ch. 1961), Schlemm v. Schlemm, 31 N.J. 557, 158 A.2d 508 (1960).

In the District of Columbia, full faith was denied where the defendant, in a distraught condition, signed a power of attorney. Ryan v. Ryan, 139 F. Supp. 98 (D.D.C. 1954), *aff'd,* 230 F.2d 838 (D.C. Cir. 1956). But full faith was granted when the defendant signed a notice of waiver and entry of appearance. Drinkwater v. Drinkwater, 111 F. Supp. 559 (D.D.C. 1953).

[22] For a discussion of the merits of this "certainty," see 334 U.S. at 363, 368-69 (dissenting opinion).

[23] See generally Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes,* 9 VAND. L. REV. 1-4 (1955).

[24] 334 U.S. at 355.

**Insane Persons—Guardianship—Restoration to Sanity After In re Wilson**

In *In re Wilson*[1] the North Carolina Supreme Court held that permanent commitment to a mental hospital without proper notice and hearing is a violation of due process.[2] In addition the court, by way of dictum, placed a construction on the North Carolina involuntary commitment and guardianship procedure which is the subject of consideration here.

The North Carolina procedure for involuntary commitment or hospitalization of insane persons is contained in Chapter 122 of the General Statutes. Section 122-46[3] authorizes the clerk of the superior court to hold an informal hearing upon the certification of two physicians that a person is in need of observation. At this hearing, which is preceded by notice to the allegedly deranged person, the clerk must examine any proper witnesses and the certificates and affidavits of the physicians. He may then issue an order of commitment for an observation period not exceeding sixty days.[4] If this period should prove to be insufficient, the clerk may order the person to remain at the hospital for another observation period not exceeding four months.[5] When the observation is completed, the hospital authorities must file with the clerk a written report stating their conclusions as to the patient's sanity. Upon the basis of this report the clerk may either order the person discharged or committed indeterminately, as the facts may warrant.[6] The subsequent discharge of a person indeterminately committed is upon certification by the superintendent of the hospital that the patient has regained his sanity.[7]

The guardianship statutes, quite distinct from the commitment procedure, are contained in Chapter 35. Mental incapacity[8] is the

[1] 257 N.C. 593, 126 S.E.2d 489 (1962).

[2] This note should be read in connection with Note, 41 N.C.L. REV. 141 (1962) which discusses the constitutional issues involved in this case.

[3] N.C. GEN. STAT. § 122-46 (Supp. 1961).

[4] If a person committed is found not to be mentally disordered the superintendent must immediately report this to the clerk who shall order his discharge. *Ibid.*

[5] N.C. GEN. STAT. § 122-46.1 (Supp. 1961).

[6] *Ibid.*

[7] N.C. GEN. STAT. § 122-66.1 (1958).

[8] Mental incapacity is the inability to legally manage and understand one's affairs. It should not be confused with the various medical terms describing types of mental illnesses.

only cause for appointment of a guardian under this Chapter.[9] Section 35-2[10] requires a jury finding of insanity before the clerk is authorized to appoint a guardian for one not confined in an institution. "Restoration to sanity"[11] for such person is also by jury trial under G.S. § 35-4[12] upon the filing of a petition in his behalf.

The certificate of the superintendent of a mental hospital declaring a patient already committed to be insane is sufficient evidence to authorize the clerk to appoint a guardian.[13] A certificate from the superintendent may also restore a patient to legal sanity.[14] Upon discharge from a mental institution the patient for whom a guardian has been appointed may petition the clerk for the guardian's discharge.[15] A hearing is then held, with or without a jury at the petitioner's option. One or more physicians are appointed by the clerk to examine the petitioner and make affidavits as to his mental state. Upon a determination of legal competency the clerk must discharge the guardian.

It should be noted that guardianship is not a necessary element of commitment. The two proceedings are complete in themselves. A person may be committed to a mental institution without the appointment of a guardian, just as a guardian may be appointed without commitment.

The 1957 General Assembly, in an effort to clarify the effect of involuntary commitment for observation under G.S. § 122-46 on legal competency, amended the statute by adding the following paragraph:

> Neither the institution of a proceeding to have any alleged mentally disordered person committed for observation as provided in this section nor the order of commitment by the clerk as provided in this section shall have the effect of creating any presumption that such person is legally incompetent for any purpose. Provided, however, that if a guardian or trustee has been appointed . . . under G.S. 35-2 or 35-3 the procedure

[9] N.C. GEN. STAT. § 35-2 (Supp. 1961). The adjudication of incompetency and appointment of a guardian are merged into one finding.
[10] N.C. GEN. STAT. § 35-2 (Supp. 1961).
[11] "Restoration to sanity" is used in the statutes to mean a return to mental capacity.
[12] N.C. GEN. STAT. § 35-4 (Supp. 1961).
[13] N.C. GEN. STAT. § 35-3 (Supp. 1961).
[14] N.C. GEN. STAT. § 35-5 (Supp. 1961).
[15] N.C. GEN. STAT. § 35-4.1 (1950).

> for restoration to sanity shall be as is now provided in G.S. 35-4 and 35-4.1.[16]

It had been expressly held prior to this amendment that the procedure outlined in Chapter 35 did not apply to a person involuntarily committed to a mental institution under G.S. § 122-46. His remedy was by habeas corpus, not jury trial.[17]

The construction placed on the amendment by the North Carolina Supreme Court, however, appears to be contrary to the express language of the statute and inconsistent with the legislative intent. The court's dictum in the principal case reads the amendment to provide that restoration to sanity for one committed under G.S. § 122-46 may be had under G.S. §§ 35-3, 35-4, and 35-4.1. They said that "The amendment removes from G.S. § 122-46 the objection that a traditional trial by jury is not provided as a means of determining the issue of sanity. Apparently the requirement that a guardian be appointed and made a party is to give binding effect to an adverse verdict by the jury."[18] The court said a judgment that a person is lawfully detained and insane exceeds the scope of habeas corpus.[19] They concluded by saying that:

> As a more practical approach, however, a guardian may be appointed upon the basis of the superintendent's certificate as provided in G.S. 35-3. A petition, on the application of some relative or friend, may be filed invoking the procedure under G.S. 35-4 and have a jury pass upon Mrs. Wilson's sanity. The guardian should be a party to the end the finding of the jury, if adverse, may have finality until a material change in condition occurs.[20]

This interpretation by the court seems to embrace procedures not contemplated by the amendment. The basic steps suggested are

[16] N.C. GEN. STAT. § 122-46 (Supp. 1961). Prior to this amendment there had been some confusion among members of the bar, particularly those in title practice, as to whether commitment to a mental institution created a presumption that the patient was incompetent, and thus incapable of disposing of his property.

[17] *In re* Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

[18] 257 N.C. at 596, 126 S.E.2d at 491.

[19] This is a departure from *In re* Harris, 241 N.C. 179, 84 S.E.2d 808 (1954). The court's reasoning seems to be that the writ of habeas corpus can only test the legality of the petitioner's detention *assuming* he may be insane. Therefore a finding that petitioner is in fact insane is beyond the scope of the writ and may be made only by a jury.

[20] 257 N.C. at 597, 126 S.E.2d at 492.

the appointment of a guardian under G.S. § 35-3, followed by a petition by the patient under G.S. § 35-4 asserting his competency, thus resulting in a jury trial on the question of his sanity.[21] Analysis reveals that this would not accomplish the ends anticipated by the court. Even if the jury finds the patient competent, the guardian's removal does not result in the patient's discharge from the hospital. A court adjudication of incompetency is not a necessary element for detention in a mental hospital under our statutes.[22]

The strongest argument that can be made against the court's interpretation of the amendment, however, is that it reads into the statute a legislative intent to import guardianship procedure into involuntary commitment procedure, when in fact it was the intent of the proviso within the amendment to make it clear that G.S. § 122-46 would have no effect on guardianship proceedings, and vice versa.[23]

Despite the confusion of the principal case, it serves to point up two problems worthy of mention. One is the feasibility of a jury trial in hospitalization procedures, the other the relationship between hospitalization and guardianship or incompetency proceedings.[24]

The majority of jurisdictions have dispensed with jury trials in hospitalization cases since they are not necessary for due process.[25]

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[21] It is difficult to ascertain exactly what the court envisaged. The appointment of a guardian apparently is to enable the patient to invoke the procedures under G.S. § 35-4 for restoration to competency by jury trial. Even so, restoration under G.S. § 35-4 does not affect the patient's status in the hospital.

[22] N.C. GEN. STAT. § 122-46.1 (Supp. 1961).

[23] "I should like to state simply that the purpose of the amendment was to clarify the law in the following particulars, to-wit: . . . (2) To make it clear that G.S. 122-46 would have no effect on guardianship proceedings, and vice versa. . . . Again, I should like to state that the question of trial by jury, the appointment of a guardian and the purpose for such appointment was not contemplated under G.S. 122-46 by the amendment. It was the sole specific purpose and intent of the proviso within the amendment to provide that the procedure for the restoration to sanity for those whose cases come within the classifications embraced in G.S. 35-2 or 35-3 would be as provided by G.S. 35-4 and 35-4.1." Letter from Clyde A. Shreve to George C. Cochran, August 3, 1962. Mr. Shreve was co-introducer of the amendment.

[24] See generally Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1953); GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952); LINDMAN AND MCINTYRE, THE MENTALLY DISABLED AND THE LAW (1961); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959); Slovenko & Super, *The Mentally Disabled, the Law, and the Report of the American Bar Foundation*, 47 VA. L. REV. 1366 (1961).

[25] *E.g.*, Clough v. Clough, 10 Colo. App. 433, 51 Pac. 513 (1897); People v. Niesman, 356 Ill. 322, 190 N.E. 668 (1934); *In re* Brewer, 224 Iowa 773, 276 N.W. 766 (1937); *Ex parte* Higgins v. Hoctor, 332 Mo. 1022, 62 S.W.2d

Contemporary writers[26] on the subject have cited Alaska and Kentucky as the only states that require a jury trial in every case; however, recent statutory changes in these two states now require a jury trial only if requested by the patient.[27] Thus Alaska and Kentucky have now joined approximately thirty per cent of the states which provide optional jury trials.[28]

Admission procedures to a mental hospital should be as simple as possible. As a means to this end authorities, both medical and legal, have strongly urged dispensing with jury trials.[29] The detrimental effect a trial may have on a mentally unbalanced person is readily apparent. If he is required to sit through a trial and listen to his physician, his family, and other witnesses testify against him it may make psychiatric treatment even more difficult.[30] Also, the use of a lay jury to determine such a highly technical question as insanity has been compared to "calling the neighbors to diagnose meningitis or scarlet fever."[31] A paranoiac, for example, can be lucid and convincing one instant and completely deranged the next.[32] The mentally ill person is much more likely to fool a jury than an expert, while the truly sane person should have no greater difficulty convincing a judge and expert physician of his sanity than he would a jury.

The relationship between hospitalization and incompetency differs

410 (1933); *In re* Boyett, 136 N.C. 415, 48 S.E. 789 (1904); *Ex parte* Dagley, 35 Okla. 180, 128 Pac. 699 (1912). See Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Montana Co. v. St. Louis Min. & Mill. Co., 152 U.S. 160 (1894). *Cf.* Maxwell v. Dow, 176 U.S. 581 (1900), Strauder v. West Virginia, 100 U.S. 303 (1880).

[26] See Ross, *supra* note 24, at 970.

[27] ALASKA COM. LAWS ANN. § 51-4-4 (1949) required a jury trial in commitment proceedings. This was repealed by an Act of Congress, July 28, 1956. The proclamation issued by the Acting Governor of Alaska on June 19, 1957, made this effective July 1, 1957. The new law requires a jury trial only upon written request at least two days prior to the hearing. ALASKA COM. LAWS ANN. § 51-4-20h(f) (Supp. 1958). KY. REV. STAT. § 202.080 (1952) required a jury trial in every case. This section was repealed in 1960. Ky. Laws 1960, ch. 67, § 35. KY. REV. STAT. § 202.140 (1962) now provides that a jury trial is still required in all instances if the petition requests the person be adjudged incompetent.

[28] For a table showing the statutory provisions as to jury trials in the other states, see LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 58-62.

[29] See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 24, at 300; LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 27, 41; Ross, *supra* note 24, at 970.

[30] See generally Ross, *supra* note 24.

[31] STERN, MENTAL ILLNESS: A GUIDE FOR THE FAMILY 37 (1952).

[32] See Ross, *supra* note 24, at 970.

greatly among the states.[33] There is considerable controversy over whether a person in need of confinement in a mental hospital is necessarily incapable of managing his own affairs.[34] Incompetency may be the result of independent judicial action, as it is in North Carolina, or it may be one of the issues decided at a hospitalization proceeding.[35] The appointment of a guardian, however, is a consequence of an adjudication of incompetency in North Carolina.[36] The legislative trend appears to be toward complete separation of hospitalization and incompetency.[37] The Draft Act[38] prepared by the National Institute of Mental Health states that an order of hospitalization decides no more than the *need* for hospitalization. Several states have adopted modified versions of this act.[39]

The separation of the two procedures is based upon the presumption that a person in need of hospitalization may still be quite capable of handling certain of his affairs, just as an incompetent may not need hospitalization. In support of this view, it has been espoused that "from a medical viewpoint, there is no necessary relationship between commitability and competency."[40] Mental disabilities vary to such a degree that any connection between hospitalization and incompetency seems unjustified.

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[33] See Ross, *supra* note 24, at 980-95; LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 220, 235-8. Hospitalization and incompetency are two distinct legal concepts fulfilling different purposes. Although both result in a loss of rights, hospitalization affects the person's freedom to be at large while incompetency results in a loss of civil rights and gives the incompetent the legal status of a minor.

[34] See Ross, *supra* note 24, at 980-95; LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 220, 235-8.

[35] *Ibid.*

[36] N.C. GEN. STAT. §§ 35-2, -3 (Supp. 1961). In some of the states which merge hospitalization and incompetency a guardian is not always appointed. Thus the incompetent is in the position of being unable to manage his own affairs and yet has no one to do so for him. See LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 220, 235-8.

[37] See LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 221.

[38] NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL, SCOPE OF THE DRAFT ACT 2, PUBLIC HEALTH SERVICE PUB. NO. 51, 1952. For a brief summary of the act by one of its authors, see Felix, *Hospitalization of the Mentally Ill,* 107 AM. J. PSYCHIATRY 712 (1951). See also Ross, *supra* note 24; Slovenko & Super, *supra* note 24.

[39] See LINDMAN & MCINTYRE, *op. cit. supra* note 24, at 221; Ross, *supra* note 24, at 949 n. 19, 991.

[40] GUTTMACHER & WEIHOFEN, *op. cit. supra* note 24, at 339.

**Labor Law—Railway Labor Act—Use of Union Funds for Non-bargainable Purposes**

The right to work or to be employed is property within the meaning of due process and is entitled to legal protection.[1] One cannot be deprived of the right to work by an arbitrary mandate of the legislature;[2] however, the right is subject to reasonable regulation under statutes enacted in the exercise of the police power.[3] Many states,[4] including North Carolina,[5] have enacted statutes[6] or constitutional provisions[7] providing that no one shall be denied an opportunity to attain or retain employment because he is or is not a member of a labor organization. These laws outlaw both union and closed shop agreements.[8] However, it has been held that these state laws must yield to federal laws permitting such union security provisions in a field over which the federal government has jurisdiction.[9]

One such federal law is the Railway Labor Act. This act was amended in 1951 to authorize a labor organization to make agreements with carriers requiring membership in the organization as a condition of employment.[10] Membership under such an agreement

[1] Truax v. Raich, 239 U.S. 33 (1915).

[2] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[3] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[4] Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah and Virginia. The "Right to Work" law in Louisiana is limited to agricultural and certain processing workers. See Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959).

[5] See N.C. GEN. STAT. §§ 95-78 to -84 (1958).

[6] See, *e.g.*, GA. CODE ANN. §§ 54-901 to -09 (1961).

[7] See, *e.g.*, FLA. CONST., *Declaration of Rights* § 12.

[8] For the effect of these laws on the agency shop, see Johanneson, *Recent Decisions Concerning the Agency Shop*, 40 N.C.L. REV. 603 (1962).

[9] Hudson v. Atlantic C.L.R.R., 242 N.C. 650, 89 S.E.2d 441, *cert. denied*, 351 U.S. 949 (1956).

[10] 64 Stat. 1238, 45 U.S.C. § 152, which provides in part: "any carrier or carriers as defined in this Chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class. *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any other than the failure of the employee to tender the

cannot, however, be denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments.[11]

The constitutionality of security agreements entered into pursuant to the union shop amendment was attacked in *Hanson v. Union Pac. R.R.*[12] In this case the plaintiffs sought to restrain the carrier and the unions from putting into effect union shop agreements containing provisions expressly authorized by the union shop amendment. The Supreme Court of Nebraska held that the enforcement of these contract provisions would deprive the plaintiffs of the freedom to join or not to join in association with others as guaranteed by the first amendment, and would deprive them of property without due process of law, as guaranteed by the fifth amendment, by requiring them to pay for many things besides the cost of collective bargaining. The defendants appealed to the United States Supreme Court, which reversed.[13] In upholding the constitutionality of the union shop amendment, the Court stated that it was enacted pursuant to the power of Congress under the commerce clause,[14] and superceded any state law to the contrary by its express terms and, therefore, by force of the supremacy clause of the federal constitution.[15]

In *Allen v. Southern Ry.*[16] the North Carolina Supreme Court was presented with a similar constitutional question. In this case non-union employees of the railroad sought an injunction to restrain collection from them of dues, fees, or assessments not reasonably necessary and related to collective bargaining. The trial court enjoined the collections but provided that if the union would present proof as to what portion would be reasonably necessary to collective bargaining, such portion could be collected. The defendants appealed to the North Carolina Supreme Court which, in reversing, stated: "the very questions now raised by plaintiffs were before the Court and decided in *Hanson* . . . ."[17] The court interpreted *Hanson* as holding that a requirement that plaintiffs pay ordinary periodic dues

periodic dues, initiation fees and penalties, uniformly required as a condition of acquiring or retaining membership."

[11] *Ibid.*

[12] 160 Neb. 669, 71 N.W.2d 526 (1955).

[13] Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956).

[14] U.S. CONST. art. I, § 8.

[15] U.S. CONST. art. 6, § 2.

[16] 249 N.C. 491, 107 S.E.2d 125 (1959).

[17] *Id.* at 504, 107 S.E.2d at 133.

and initiation fees uniformly required of all members violates neither the first nor the fifth amendments.

Plaintiffs, however, contended that the questions raised in *Allen* were not decided by *Hanson* but were, in fact, expressly reserved. In support of their contention, plaintiffs cite language of Justice Douglas, who, in writing for the majority of the Court in *Hanson,* stated: "If assessments are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."[18] The North Carolina Supreme Court, however, was of the opinion that the questions reserved in *Hanson* would arise only if and when defendant-unions should undertake to deny membership or to terminate membership because of the failure of plaintiffs to comply with the various regulations applicable to voluntary members, *e.g.* refusal to sign application blanks or failure to attend meetings.[19]

After the adverse decision of the North Carolina court, the plaintiffs filed a petition for rehearing. The petition was allowed, but the court deferred rehearing pending the decision of the United States Supreme Court on a case on appeal from the state of Georgia. In this case, *International Ass'n of Machinists v. Street,*[20] the plaintiffs sought to enjoin the enforcement of a union shop agreement entered into pursuant to the Railway Labor Act. Plaintiffs alleged that the agreement required as a condition of continued employment that the employees pay union dues which would be used to support political and economic programs, and candidates for office opposed by the plaintiffs. The trial court granted the relief sought, and this was affirmed on appeal by the Georgia Supreme Court which held that the union shop agreement violated the plaintiffs' right to freedom of speech and deprived them of their property without due process of law. The defendants appealed to the United States Supreme Court which reversed the holding as to the constitutional issues.[21] While recognizing that the case squarely presented "the

[18] *Id.* at 503, 107 S.E.2d at 133, citing from 351 U.S. at 238 (1956).

[19] In a dissenting opinion, Justice Parker felt that the case presented the very question reserved in *Hanson,* and that it was not within the concept of due process to compel a person to contribute dues and fees from his earnings for the purpose of promoting political and ideological ends to which he is opposed, and of electing men to public office whose purposes he may distrust, and if he does not so contribute to discharge him from his job with loss of seniority.

[20] 215 Ga. 27, 108 S.E.2d 796 (1959).

[21] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

constitutional questions reserved in *Hanson*"[22] as to the use of exacted funds for political purposes opposed by the employees, the Court avoided deciding these questions by construing the Railway Labor Act to deny such use of the funds.[23] The case was remanded to the Georgia Supreme Court for consideration of a proper remedy.[24]

After the decision of the Supreme Court in *Street,* a rehearing was held in the *Allen* case. This time,[25] the court was equally divided.[26] Thus, the trial court was affirmed without becoming precedent.[27] As a result, the union must prove what portion of the

[23] *Id.* at 749.

[24] In Lathrop v. Donohue, 367 U.S. 820 (1961), a companion case with *Street,* a Wisconsin lawyer brought an action to recover dues paid to the integrated state bar. He alleged that the bar "has used its . . . funds in active opposition to the adoption of legislation which" he favored. *Id.* at 822. Although the case arose on a demurrer, a plurality of the Court again refused to consider the constitutional issues because plaintiff did not indicate "whether any of his dues were used to support the State Bar's positions." *Id.* at 846. See note 30 *infra.*

[25] The United States Supreme Court stated that appropriate remedies in such a case do not include an injunction against the enforcement of a union shop agreement, or an injunction barring the union from collecting any funds from its objecting members, nor an injunction against all expenditures for the disputed purposes, even if the injunction is conditioned on cessation of the improper expenditures. The Court suggested, however, that appropriate remedies would include (1) an injunction against expenditures, for political causes opposed by the complaining employee, of a sum which is so much of the money exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget, or (2) restitution to an individual employee of that portion of his money which the union expended for the political causes to which he had advised the union he was opposed. In the latter remedy, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

[26] Allen v. Southern Ry., 256 N.C. 700, 124 S.E.2d 871 (1962).

[27] Justice Sharp declined to take part in the consideration of the rehearing because she had presided at the hearing of the case and had entered an interlocutory order at the superior court level.

[28] The court cited two North Carolina cases, Schoenith v. Town & Country Realty Co., 244 N.C. 601, 94 S.E.2d 592 (1956) and Ward v. Odell Mfg. Co., 126 N.C. 946, 36 S.E. 194 (1900), to support the proposition that the trial court should be affirmed. However, neither of these cases involved a rehearing. Actually, it would seem that the law in North Carolina is contrary to the result of this decision. See Best & Co. v. Maxwell, 311 U.S. 454 (1940) where the United States Supreme Court in commenting on the history of the case stated: "The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand." 311 U.S. at 455. The case was reversed by the Supreme Court on other grounds.

The few cases which have decided the point elsewhere are in conflict. See Pitton v. Atlantic C.L.R.R., 144 Fla. 462, 198 So. 503 (1940), holding that an equal division of the court on rehearing works an affirmance of the previous

exacted funds would be reasonably necessary to collective bargaining. Otherwise, it would be enjoined from making any further collections from union members.

A view somewhat analogous to that taken by the North Carolina trial court was taken by the Supreme Court of Georgia[28] when considering the *Street* case on remand from the United States Supreme Court. Here the Court directed the trial court to determine the amount being expended for non-bargainable purposes, and to enter a decree accordingly. If the trial court was unable to make this determination, it was directed to enjoin the union from spending any money for political purposes.

The view taken by the North Carolina trial court would seem to be a desirable one since it would be impractical, if not impossible, for a union member to prove what portion of his dues and assessments were being expended for non-bargainable purposes. Under this view the union members would be required only to prove that *some* of the union funds were being used for non-bargainable purposes. The court would then enjoin further collections and expenditures until the union could prove *how much* was being used for bargainable purposes.

In conclusion, it may only be said that this area of the law remains in a state of confusion. The *Street* case, while authority for the proposition that the Railway Labor Act prohibits compulsory contributions by union members to non-bargainable political purposes, leaves the constitutional issues unanswered. *Lathrop v. Donohue,*[29] a companion case with *Street,* merely adds further confusion to the law. Although a majority of the members of the Court agreed in *Lathrop* that the constitutional issues were properly raised,[30] the

opinion of the appellate court and not an affirmance of the judgment appealed from, when the original judgment was reversed and Richards v. Burden, 59 Iowa 723, 13 N.W. 90 (1882), holding that the lower court would be affirmed in such a case.

This point of the *Allen* case will be commented on in the *Tenth Annual Survey of North Carolina Case Law,* which will appear in a later issue of the *Law Review.*

[28] International Ass'n of Machinists v. Street, 217 Ga. 351, 122 S.E.2d 220 (1961).

[29] 367 U.S. 820 (1961).

[30] Five members of the Court agreed that a constitutional question was raised. Of these five, two felt that a state can, without violating the constitution, compel a lawyer to pay dues to be used in part for support of legislation which he opposes. Another member felt that a state may require "that a lawyer pay to its designee an annual fee . . . as a condition of its grant, or of

effect of the decision is, perhaps, best summed up by Justice Black, who, in a dissent, states: "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."[31] The problem is further complicated in North Carolina due to the fact that the court on rehearing the *Allen* case did not refer to the constitutional issues in its opinion. In any event, the court was equally divided and, therefore, the holding of the case, whatever it may be, is not precedent for future litigation.

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**Torts—Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability**

In *Holytz v. City of Milwaukee*[1] an action was brought by a three-and-one-half year old infant against the defendant municipality for injuries sustained when a steel trap door, covering a water meter pit, fell on her hands. An action was also brought by the infant's father to recover for medical expenses incurred by him as a result of his child's injuries, and for damages due to loss of her society and companionship. The injuries occurred while the infant was using a playground maintained by the defendant for pre-school aged children. It was alleged that the employees of the defendant had negligently allowed the trap door to remain open.

The Wisconsin Supreme Court, reversing the trial court which had sustained the defendant's demurrer, held that the municipality was not immune from liability for its negligent torts. In so holding, Wisconsin joined at least four other states[2] which have abolished by

continuing its grant, to him of the *special privilege* . . . of practicing law in the State." *Id.* at 865. Two members agreed that the powers conferred on the bar violated both the first and fourteenth amendments. Finally, a plurality of four members refused to consider the constitutional issues. *Cf.*, United States v. CIO, 335 U.S. 106 (1948) and United States v. International Union UAW, 352 U.S. 567 (1957) construing 18 U.S.C. § 610 which prohibits any corporation or labor organization from making "a contribution or expenditure in connection with any election to any political office . . . ."

[31] 367 U.S. at 865.

[1] 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[2] *California,* see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (Sup. Ct. 1961); *Florida,* see Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); *Illinois,* see Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Michigan,* see Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

judicial decision the time-honored and deeply engrained doctrine of municipal immunity to tort liability.[3]

While the basic principle of governmental immunity is founded on the English concept that the sovereign can do no wrong,[4] the judicial basis of municipal immunity from tort claims can be traced to the English case of *Russel v. Men of Devon.*[5] In that case an unincorporated county was relieved of liability for damages which were caused by the disrepair of a bridge. As one of the reasons for its decision, the court stated that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[6]

There is probably no tenet in our law that has been more universally berated by courts[7] and legal writers[8] than the governmental immunity doctrine. The criticisms are wide-ranging and highly varied. Some common examples are: that it is unfair to impose upon the individual the burden of his damage, rather than upon the entire community where it justly belongs;[9] that by denying a remedy for a wrong, the doctrine results in the deprivation of life, liberty, and property without due process of law;[10] and that the doctrine runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence.[11]

Why has a rule been adhered to so consistently and with so few exceptions in the face of virtually unanimous criticism? The answer to this question is embedded in the traditions of the Anglo-American philosophy of the common law and the doctrine of stare decisis.

[3] For other notes dealing with the general subject of municipal immunity from tort liability see Notes, 4 N.C.L. REV. 136 (1926), 12 N.C.L. REV. 172 (1934), and 36 N.C.L. REV. 97 (1957).

[4] See Borchard, *Government Liability in Torts,* 34 YALE L.J. 1, 4 (1924).

[5] 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). There is some argument that this case relied upon an earlier authority from Brookes Abr., but most historical analyses agree that *Men of Devon* is the common law basis of municipal tort immunity. See 17 Wis. 2d at —, 115 N.W.2d at 620.

[6] *Id.* at 673, 100 Eng. Rep. at 362. Another ground advanced by the court for allowing immunity was that the defendant was an unincorporated county and did not have funds to pay damages.

[7] See, *e.g.,* Fowler v. City of Cleveland, 100 Ohio St. 158, 176, 126 N.E. 72, 77 (1919).

[8] See, *e.g.,* Casner & Fuller, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437 (1941).

[9] Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943).

[10] Liber v. Flor, 143 Colo. 205, 209, 353 P.2d 590, 593 (1960) (dissenting opinion).

[11] Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959).

Invariably, in the opinions of the courts upholding the rule of municipal immunity, one will find a statement to the effect that the overruling of such a well-established doctrine is a policy question which should be directed to the legislature and not the court.[12] There are numerous areas of the law, however, where the courts have overruled long-standing common-law doctrines. Most analogous to the subject under discussion is the judicial abolition of tort immunity of charitable institutions.[13] The right of the child to recover from a third party for alienation of affection and disruption of the family circle,[14] the recognition of the right of privacy,[15] and the right of contribution between or among negligent tortfeasors[16] similarly illustrate areas of the common law which the courts have chosen to change, despite the demands of stare decisis.[17]

The seemingly invincible barrier to judicial abrogation of municipal tort immunity was first broken in the Florida case of *Hargrove v. Town of Cocoa Beach.*[18] Subsequently, at least four other jurisdictions,[19] including Wisconsin, have joined what now

[12] See, *e.g.,* Howard v. Tocoma School Dist. No. 10, 88 Wash. 167, 152 Pac. 1004 (1915), where the court stated that the doctrine had become fixed as a matter of public policy, and regardless of the reason upon which the rule was made to rest, any change had to come from the legislature. See also Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961); Maffie v. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

[13] See, *e.g.,* Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958), where the court, in overruling the doctrine, said that it is a judicial responsibility to conform to modern concepts and needs, and when judges of a later generation reach contrary conclusions with those of an earlier generation, they must take the necessary corrective action. *But see* Knecht v. St. Mary's Hosp., 392 Pa. 75, 140 A.2d 30 (1958), where the court refused to overrule the doctrine even though judge-made, because it was firmly fixed in the law of the state, and, therefore, should be abrogated only by the legislature.

[14] See, *e.g.,* Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949), where recovery was allowed. *But see* Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949), where recovery was refused.

[15] See, *e.g.,* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), where the court recognized the right. *But see* Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955), where it was held that such right should be provided by the legislature and not by the court.

[16] See, *e.g.,* Knell v. Felton, 174 F.2d 662 (D.D.C. 1949), allowing contribution between negligent tortfeasors. *But see* Fidelity & Cas. Co. v. Chapman, 167 Ore. 661, 120 P.2d 223 (1941), following the common-law rule of no contribution in the absence of a statute.

[17] Generally speaking, the one field in which the courts adhere strictly to the doctrine of stare decisis is that of real property, where stability is felt to be a necessity in order to protect vested rights. See, *e.g.,* Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893).

[18] 96 So. 2d 130 (Fla. 1957).

[19] California, Illinois, Michigan, and Wisconsin.

appears to be a definite trend. In overruling this well-established common-law rule, these courts were faced with similar obstacles. First, in all five jurisdictions, as in the great majority of jurisdictions in the United States, the common law had been adopted as the law of the state either by statute[20] or by constitutional provision.[21] Thus, the question arose as to whether the courts were invading the province of the legislature when they attempted to abolish a particular common-law rule. In two of the cases[22] specific reference was made to this question, but both courts emphatically rejected it as being an obstruction to the discarding of an unjust rule that the courts themselves had created.[23]

The existence of legislative enactments[24] waiving the immunity in certain specific circumstances presented another formidable problem. Once again, proponents of the immunity rule argued that the legislature had pre-empted the field and that judicial action was forbidden. Two cases[25] dealt expressly with this point, but neither accepted it as grounds for retention of the rule. One court reasoned that the series of statutes created a trend toward full abrogation which the court carried to its ultimate,[26] while the other simply visualized them as sporadic efforts to relieve the harshness of the rule, rather than as comprehensive legislation designed to cover the field.[27]

The extent to which the abrogation of the doctrine would apply in the future presented additional problems. The court in the principal case attempted to anticipate and to resolve these issues. First, the court extended the abolition only to harms which are torts, and no

[20] *E.g.*, CAL. CIV. CODE § 5.

[21] *E.g.*, WIS. CONST. art. 14, § 13.

[22] Williams v. City of Detroit, 364 Mich. 231, 255, 111 N.W.2d 1, 23; Holytz v. City of Milwaukee, 17 Wis. 2d 26, —, 115 N.W.2d 618, 624 (1962).

[23] In Holytz v. City of Milwaukee, *supra* note 22, the Wisconsin court in disallowing this argument stated: "The doctrine of governmental immunity having been engrafted upon the law of the state by judicial provision, we deem that it may be changed or abrogated by judicial provision."

[24] *E.g.*, in California: CAL. ED. CODE § 903 (liability of school district for negligence of employees); CAL. GOV. CODE § 50140 (public agency liability for damage by mobs); CAL. GOV. CODE § 53051 (public agency liability for dangerous or defective condition of public property); CAL. VEH. CODE § 17001 (public agency liability for negligent operation of motor vehicles).

[25] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (Sup. Ct. 1961); Williams v. City of Detroit, 364 Mich. 231, 253, 111 N.W.2d 1, 22 (1961).

[26] Williams v. City of Detroit, *supra* note 25.

[27] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (Sup. Ct. 1961).

liability was imposed upon municipalities in the exercise of their legislative, quasi-legislative or quasi-judicial capacities. However, the abolition was not limited to acts of commission but was made to apply broadly to all torts, including those of omission.[28] Although the principal case related specifically to a city, the court considered the abrogation to encompass all public bodies—the state, counties, cities, villages, towns, school districts, and all other political subdivisions of the state—whether they be incorporated or not. Finally, the effective date of the decision was set some forty days after the rendering of the opinion, in order to give governmental units the opportunity to make financial arrangements to meet the new liability implicit in the holding. However, the ruling was made to apply to the principal case so as to prevent the announcement of the new rule from being dictum, and further, to give the plaintiffs the benefit of their efforts and expenditures in challenging the old rule.

No doubt, in the near future the North Carolina Supreme Court will be afforded the opportunity to abolish judicially the rule of municipal tort immunity. If the court should decide to follow the trend set by the above-mentioned cases, it will be faced with the same problems as to judicial abolition of the rule. North Carolina has, by a reception statute,[29] expressly declared that the common law is in full force in the state, thus presenting the problem of whether or not this deprives the court of the power to alter the rule. In the past the North Carolina court has, in numerous cases, steadfastly refused to abolish many common-law doctrines.[30] As the court made no specific reference to the reception statute in these cases, it is impossible to determine if this was a factor in its decision. However, these decisions are significant in that they illustrate the court's reluctance to overrule deeply engrained common-law rules.

The North Carolina Supreme Court will also be faced with pre-

[28] At least one court limited the abrogation to acts of commission. McAndrew v. Mularchuck, 33 N.J. 172, 162 A.2d 820 (1960).

[29] N.C. GEN. STAT. § 4-1 (1953).

[30] *E.g.*, Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952), upholding rule of no recovery by unemancipated child in suit against parents for negligent torts; Elliot v. Elliot, 235 N.C. 153, 69 S.E.2d 224 (1952), upholding rule that the obligation of father to support minor child is not a property right but is a personal duty terminated by death of father; Sholten v. Sholten, 230 N.C. 149, 52 S.E.2d 350 (1949), upholding rule of no recovery by husband for loss of consortium; Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939), upholding rule of implied warranty in sale of food by retailer to consumer.

existing legislation on the subject, which will require a decision as to whether this is indicative of the extent of abrogation desired by the legislature. The North Carolina Tort Claims Act[31] in one fell swoop abolished the defense of governmental immunity for "negligent acts"[32] in suits against state agencies and employees.[33] In addition, there are several other statutes that waive the defense of immunity in certain instances.[34] On the basis of these statutes the court might well hold that the legislature has indicated the extent of abrogation desired by it, thus precluding judicial invasion of this field. But the line of reasoning adopted by those courts which have overruled the doctrine offers a sound solution to problems entailed in the judicial repudiation of municipal tort immunity, and it is believed that North Carolina, by following this line, can rid itself of an unjust and anachronistic rule of law.[35]

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[31] N.C. GEN. STAT. § 143-291 (1958). This statute is commented upon in *A Survey of Statutory Changes in North Carolina in 1951,* 29 N.C.L. REV. 351, 416 (1951).

[32] The term "negligent torts" has been interpreted by the North Carolina Supreme Court as including only acts of commission. See, *e.g.,* Flynn v. State Highway Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956), discussed in Note, 36 N.C.L. REV. 352 (1958).

[33] A few other states have a similar statute, but only in New York has it been construed to waive immunity as to all state agencies and political subdivisions, including municipalities. N.Y. CT. CL. ACT § 8. In Bernadine v. City of New York, 182 Misc. 609 (Sup. Ct. 1943), *rev'd,* 268 App. Div. 444, 51 N.Y.S.2d 888 (1st Dept. 1944), *aff'd,* 294 N.Y. 361, 62 N.E.2d 604 (1945), the court in construing the act held that the civil divisions of the state were answerable equally with individuals and private corporations for wrongs of officers and employees, since the act waived the state's immunity, and the legal irresponsibility previously enjoyed by these governmental units was nothing more than an extension of the exemption of liability that the state had possessed. In Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959), the North Carolina court held the act not applicable to employees of local units, such as city and county boards of education, because they are not employees of the state.

[34] *E.g.,* N.C. GEN. STAT. § 115-53 (Supp. 1961), waiver of governmental immunity by city and county boards of education by securing liability insurance; N.C. GEN. STAT. § 143-300.1 (1958), Industrial Commission to hear tort claims arising out of negligence of driver of school bus or school transportation service vehicle, when salary is paid out of State Nine Months School Fund; N.C. GEN. STAT. § 160-54 (1952), duty of governing authorities of municipality to keep streets and bridges in proper repair, governmental immunity being no defense; N.C. GEN. STAT. § 160-191.1 (1952), waiver of governmental immunity by municipality for negligent operation of motor vehicles by securing liability insurance, waiver being only to extent of amount of insurance so obtained. This last statute is commented upon in *A Survey of Statutory Changes in North Carolina in 1951,* 29 N.C.L. REV. 351, 421 (1951).

[35] The oft-quoted statement made by the Washington court in overruling

**Torts—Railroads' Liability at Dangerous Highway Crossings—Statutory Construction of That Duty.**

In *Southern Ry. v. Akers Motor Lines, Inc.*[1] the Supreme Court of North Carolina, by its interpretation of a statute, in effect abolished the common-law duty of a railroad to erect, after due notice, any type of warning device or signal at dangerous grade crossings. In *Akers* the plaintiff railway sought damages arising out of a collision between its train and the defendant's tractor-trailer. It based its claim on the alleged negligence of the truck driver in failing to keep a proper lookout when approaching a grade crossing. The defendant motor lines filed a cross action against the plaintiff, basing its claim on the failure of the railroad to maintain gates, gongs or other such safety devices at the crossing which the railroad should have known was dangerous. With respect to the cross action, the judge instructed the jury as to the defendant's contention of negligence on the part of the railroad in failing to maintain warning devices at the crossing. On appeal, the court held it was error to so charge, because the trial court had failed to take notice of the provisions of G.S. § 136-20.[2] The court stated that by the enactment of this statute, the legislature has taken from the railroads all authority and duty to erect safety devices at railroad crossings, and has vested in the State Highway Commission "exclusive discretionary authority . . . to determine when and under what conditions such signalling devices are to be erected and maintained by railroad companies."[3]

The statute involved, G.S. § 136-20, is a comprehensive statute dealing with the safeguarding, and in some cases the elimination, of grade crossings. In essence, this statute provides that where a railroad and a public highway intersect, the Highway Commission, if it feels such crossing is dangerous to the public, has authority to order the railroad to alter the crossing in such a way as to eliminate any dangerous conditions. The costs of such changes are to be appor-

the doctrine of tort immunity of charitable institutions seems to best represent the rationale of courts that have abolished outmoded common law principles: "We have closed our courtroom doors without legislative help, and we can likewise open them." Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 162, 178, 260 P.2d 765, 774 (1953).

[1] 242 N.C. 676, 89 S.E.2d 392 (1955).

[2] N.C. GEN. STAT. § 136-20 (Supp. 1961).

[3] 242 N.C. at 680, 89 S.E.2d at 394-95. The court admits that this statute works a radical change in the law.

tioned as the Commission may determine. Subsection (f) provides: "The jurisdiction over and control of said grade crossings and safety devices upon the State highway system herein given the Commission shall be exclusive."[4] This subsection was the primary basis for the *Akers* decision. The court interpreted it as taking away all authority of a railroad to erect safety devices at crossings on their own initiative, thereby, in effect, doing away with the common-law duty to maintain necessary safety devices.

G.S. § 136-20 is not a unique statute. There are many other states which have similar, and in some instances almost identical, statutes.

A Minnesota statute, comparable to G.S. § 136-20, also exclusively authorizes the Highway Commission to designate what safety devices are needed at crossings, and to order the railroad to install them.[5] Minnesota was faced with almost the identical problem in *Licha v. Northern Pac. Ry.*[6] that the North Carolina court encountered in *Akers*. In a previous case the court had concluded that their statute was comprehensive and dealt with the entire matter of safety devices at railroad crossings, thus indicating the legislative intent "to occupy the entire field."[7] This decision was overruled by the *Licha* decision.[8] In *Licha,* the plaintiff collided with a train while proceeding across the defendant railway's tracks which, due to the terrain, was a blind crossing. The railroad had complied with the Commission's requirements as to the necessary signs at the crossing; however, the plaintiff alleged that the reflector signs so provided in compliance with the order of the Commission were insufficient, and that the defendant should have placed some other type of warning device commensurate with conditions at the crossing. The railroad took the position that by installing the reflector signs in compliance with the Commission's order, it was absolved of any further duty to give additional warning. In rejecting the railroad's contention, the court recognized its error in the earlier case of *Olson v. Chicago,*

[4] N.C. GEN. STAT. § 136-20(f) (Supp. 1961).

[5] 15 MINN. STAT. ANN. § 219.24 (1947): "When . . . the commission finds that conditions exist at any grade crossing which in its opinion require any safeguards for the protection of life and property, such as crossing gates or other suitable devices, the commission is authorized to specify the nature of the devices required and to order the railway company operating the railroad at such crossing to install the same."

[6] 201 Minn. 427, 276 N.W. 813 (1937).

[7] Olson v. Chicago, Great W. Ry., 193 Minn. 533, 259 N.W. 70 (1935).

[8] 201 Minn. at 439, 276 N.W. at 819.

*Great W. Ry.*[9] and consequently overruled that prior decision. The court thus held that the exclusive authority of the Commission, given by the statute, to order a railroad to comply should be deemed to be a revocation of a similar authority previously given to municipalities.[10] Thus a railroad must take such precautions in management and operation as public safety requires, even though such precautions may be in addition to those required by statute or order of the Commission. Compliance with the Commission's order was regarded as only the minimum duty of the railroad.[11]

Similarly, Connecticut has a statute, closely paralleling G.S. § 136-20, which gives the Commission power to order warning devices to be installed at railroad crossings which the Commission deems dangerous.[12] In *Pratt, Read & Co. v. New York, N.H. & H.R.R.*[13] the Connecticut court was called upon to determine the effect of the statute. There, the defendant railroad had complied with all the statutes requiring warning signs at railroad crossings. While the statute in question gave the Commission power to order additional automatic signals to be installed, no such order had been given. The plaintiff, who was injured at a blind crossing, alleged that the railroad had a duty to provide additional warning devices even though it had not been so ordered by the Commission. The trial court charged the jury that the railroad was not guilty of negligence as a matter of law for not providing such devices, because the legislature had assumed the regulation of such installation and could order such installation when it deemed it necessary. On appeal, the Connecticut Supreme Court held the instruction erroneous. The court said that merely because those to whom the legislature has delegated the authority of ordering installation of warning devices

[9] 193 Minn. 533, 259 N.W. 70 (1935).

[10] 201 Minn. at 435, 276 N.W. at 817. Prior to the Minnesota statute, the legislature had authorized municipalities to order railroads to ameliorate dangerous crossings; the court construed the new statute as a revocation of such municipal power, vesting such power exclusively in the Commission.

[11] *Id.* at 435, 276 N.W. at 817; Blaske v. Northern Pac. Ry., 228 Minn. 444, 37 N.W.2d 758 (1949); Koop v. Great No. Ry., 224 Minn. 286, 28 N.W.2d 687 (1947); Massmann v. Great No. Ry., 224 Minn. 170, 282 N.W. 815 (1938); Munkel v. Chicago, M., St. P. R.R., 202 Minn. 306, 278 N.W. 41 (1938).

[12] 3 CONN. GEN. STAT. § 16-159 (1958): "If the Commission upon such hearing finds that public safety requires it, the Commission shall order such company to install and maintain, at such crossings, gates, a flagman or such electric signals or other signal device as may be approved by the commission . . . ."

[13] 102 Conn. 735, 130 Atl. 102 (1925).

at crossings have failed to so order, no presumption can arise, as a matter of law, that reasonable care on the part of the railroad would not require such protection. It is still a question of fact for the jury as to whether or not it was the duty of the railroad to have provided any safeguard.[14]

A parallel Arizona statute gives the Commission the same powers as conferred upon the North Carolina State Highway Commission by G.S. § 136-20.[15] This statute was considered by the Arizona court in *Canion v. Southern Pac. Co.*[16] In that case the plaintiff was driving his truck over the defendant's tracks, following another truck. The lead truck raised so much dust that the plaintiff was unable to see the approaching train. A collision resulted, and the plaintiff sued for damages. As one of the alleged grounds of negligence, the plaintiff contended that the defendant railway failed to maintain a watchman or automatic safety signal at the crossing. The defendant relied upon the absence of an order of the Commission to install any safety device, contending that such absence absolved it from any negligence on that theory as a matter of law. As in the *Licha* and *Pratt* cases, the court rejected this contention, holding that the railroad might still be liable on a theory of negligence in not installing safety devices, even if not ordered to do so by the Commission, if reasonable care would require such warning to be maintained.[17]

If any one conclusion can be deduced from this investigation, it is that no other jurisdiction now regards a statute such as G.S. § 136-20 as abolishing the common-law duty of a railroad at dangerous crossings to use due care toward the travelling public. It appears that North Carolina stands alone in its novel interpretation of the statute as propounded in the *Akers* case.

Without any evidence of the intention of the legislature in regard to this common-law duty in enacting G.S. § 136-20, two possibilities exist: (1) that the legislature did in fact intend to take from the

[14] *Id.* at 751, 130 Atl. at 107; Trombly v. New York, N.H. & H.R.R., 137 Conn. 465, 78 A.2d 689 (1951); Markar v. New York, N.H. & H.R.R., 77 F.2d 282 (2d Cir. 1935).

[15] 12 ARIZ. REV. STAT. § 40-337 (C) (1956): "The commission shall have the exclusive power to prescribe the character of crossings to be constructed and maintained by railroads where their lines cross public roads or streets of a town or city."

[16] 52 Ariz. 245, 80 P.2d 397 (1938).

[17] *Id.* at 253, 80 P.2d at 401; Southern Pac. R.R. v. Mitchell, 80 Ariz. 50, 292 P.2d 827 (1956).

railroads all duty and authority to erect safety devices at crossings, vesting such duty and authority exclusively in the Highway Commission; or, (2) that the legislature never intended to delimit the railroads' common-law duties with regard to dangerous crossings, and that the court in *Akers* misinterpreted G.S. § 136-20.

The North Carolina statute is almost identical to statutes of numerous other states. In not one of those states has it been interpreted as an intention on the part of the legislature to absolve a railroad of any of its common-law duties. The possibility that North Carolina, by the enactment of so similar a statute, intended to exempt railroads from any common-law duty is, therefore, remote.

If the legislature never intended to abolish the railroads' common-law duties at dangerous crossings, it follows that the North Carolina Supreme Court misinterpreted G.S. § 136-20, and that the rule laid down in the *Akers* decision is erroneous. In particular, the court construed subsection (f) as vesting exclusive authority in the Highway Commission to determine when and where safety devices are to be constructed, thus relieving the railroad of all authority to erect such devices on their own. Apparently the words "herein given the Commission" were forgotten by the court when it interpreted subsection (f). These words would seem to delegate to the Commission the *sole authority to order* construction, reparation, and maintenance of facilities at grade crossings, to the exclusion of like authority being exercised by municipalities, counties, or other state agencies.[18] The only agency authorized to exercise the powers "herein given the Commission" is the Highway Commission itself, the only purpose of subsection (f) being to delegate to a single agency the power to order the railroad to erect such safety devices if it deems such action necessary for the protection of the public. If this is the correct interpretation of G.S. § 136-20, it should not in any way be construed as a bar to a railroad's erecting its own safety devices or an abolition of the railroad's common-law duties to the public.

The *Akers* decision is the only occasion in which the court has had to apply its interpretation of G.S. § 136-20. The apparent result of the decision is to leave the injured plaintiff with no recourse

[18] Prior to the enactment of G.S. § 136-20, such authority was frequently exercised in North Carolina by municipalities through powers given in their charters and by ordinances. See City of Durham v. Southern Ry., 185 N.C. 240, 177 S.E. 17 (1924); Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1914).

against the railroad when the sole basis of his action is failure of the railroad to provide safety devices which have not been prescribed by the Highway Commission. Such a result appears to be entirely inconsistent with the rule laid down in other states which have similar statutes.[19]

If the legislature did not intend to abolish the railroads' common-law duties to erect safety devices at dangerous crossings, the best possible remedy to the problem would be an amendment to G.S. § 136-20 by the legislature. It should specify that nothing in G.S. § 136-20 should be construed to absolve a railroad from any common-law duty to the public, whether or not any action has been taken by the Highway Commission under the powers granted by G.S. § 136-20.

ARCH K. SCHOCH IV

**Torts—Res Ipsa Loquitur—Doctrine of Exclusive Control of the Instrumentality**

The doctrine of res ipsa loquitur is a rule of evidence applied where, under the circumstances of the case, the mere fact that the accident occurred is of itself circumstantial evidence of negligence on the part of someone.[1] In application of the doctrine to actual fact situations the courts have developed certain "elements" which might be termed conditions precedent to its invocation. These elements

[19] 57 CAL. PUB. UTIL. CODE § 1202, Pennington v. Southern Pac. Co., 146 Cal. App. 2d 605, 304 P.2d 22 (1956); Jenson v. Southern Pac. Co., 129 Cal. App. 2d 67, 276 P.2d 703 (1954); Lloyd v. Southern Pac. Co., 111 Cal. App. 2d 626, 245 P.2d 583 (1952); ILL. ANN. STAT. 111⅔ § 62 (1954), Baltimore & O.R.R. v. Felgenhauer, 168 F.2d 12 (8th Cir. 1948); Bales v. Pennsylvania R.R., 347 Ill. App. 466, 107 N.E.2d 179 (1952); Lauer v. Elgin, J. & E. Ry., 305 Ill. App. 200, 27 N.E.2d 315 (1940); Willett v. Baltimore & O.S.W.R.R., 284 Ill. App. 307, 1 N.E.2d 748 (1936); Wagner v. Toledo, P. & W.R.R., 352 Ill. 85, 185 N.E. 236 (1933); 5 MASS. GEN. LAWS ANN. ch. 160, § 147 (1959), Peterson v. Boston & M.R.R., 310 Mass. 45, 36 N.E.2d 701 (1941); Mannino v. Boston & M.R.R., 300 Mass. 71, 14 N.E.2d 122 (1938); Hubbard v. Boston & A.R.R., 162 Mass. 132, 38 N.E.2d 366 (1894); 49 OHIO REV. CODE ANN. § 4907.47 (Supp. 1961), Evans v. Erie R.R., 213 Fed. 129 (6th Cir. 1914); 17 OKLA. STAT. ANN. § 84 (1951), Slowik v. Chicago, M., St. P. & Pac. R.R., 89 F. Supp. 590 (D. Minn. 1950); Kansas City So. Ry. v. State, 195 Okl. 424, 158 P.2d 699 (1945); St. Louis-S.F. Ry. v. Prince, 145 Okl. 194, 291 Pac. 973 (1930).

[1] The Latin phrase "res ipsa loquitur" means "the thing speaks for itself." It was first used in Byrne v. Boadle, 2 Hurl. & C. 722, 159 Eng. Rep. 299 (Exch. 1863), although the idea that negligence could be proven by circumstantial evidence had existed prior to that time. PROSSER, TORTS § 42, at 201 (2d ed. 1955).

are: (1) the instrumentality causing the injury must be inherently harmless;[2] (2) the party charged must have had exclusive control of the instrumentality at the time of the injury; and (3) there must be no contributory negligence on the part of the plaintiff or third parties.[3]

The Fourth Circuit Court of Appeals in *Wright v. Huntley Furniture Co.*[4] was called upon to apply the North Carolina doctrine of exclusive control. In this case the plaintiff was injured when he opened the door of a sealed boxcar and was struck by a crate which fell from the top of the cargo being shipped.[5] Since the boxcar had

[2] If the instrumentality is inherently harmless, it is reasoned that any harm resulting from the instrumentality would be caused more likely than not by negligence in making or using it than by the thing itself. 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

[3] Wigmore states that the final shape of the elements cannot be so easily predicted. They should be limited to: "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured." The justice of this doctrine seems to rest in the fact that evidence of the actual negligence, if there is any, is often more accessible to the party charged than to the party injured. 9 WIGMORE, EVIDENCE § 2509, at 380-84 (3d ed. 1940). This is shown in Williams v. Field Transp. Co., 28 Cal. 2d 696, 116 P.2d 884 (1946), where a metal pipe rolled from a truck driven by the defendant and injured the plaintiff. Defendant was presumed liable since negligence was evident and the most logical conclusion was that the negligence was defendant's. The court held that because of his superior knowledge defendant must rebut the logical inference.

Note that the doctrine of res ipsa loquitur concerns the presentation of circumstantial evidence, whereby the plaintiff tries to infer negligence on the part of the defendant. At no time need the plaintiff prove the specific negligence of the defendant; indeed it has been held in some jurisdictions that the attempt to do so will bar the use of the doctrine. See, *e.g.*, Whitcher v. Board of Educ., 233 App. Div. 184, —, 251 N.Y. Supp. 611, 612-13 (1931) where the court stated: "That doctrine does not apply in this case.... 'The doctrine of res ipsa loquitur, although it provides a substitute for direct proof of negligence where plaintiff is unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available .... Hence the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has full knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of.' 45 C.J. 1206."

[4] 299 F.2d 904 (4th Cir. 1962).

[5] The shipment of goods was in interstate commerce and the injury occurred in Massachusetts. Ordinarily, under these circumstances the law of the state in which the injury occurred would control. However, in the principal case both parties agreed that the Massachusetts rules of negligence, contributory negligence, and damages were the same as the North Carolina rules. The cases cited in support of the exclusive control theory were North

been under the control of the shipper at the time of loading and sealing, the plaintiff brought action against the shipper on the theory of res ipsa loquitur. Interference by a third party in this case would have been impossible. The evidence clearly indicated that any negligence could only have been that of the defendant. The court, however, held for the defendant under North Carolina law requiring exclusive control by the defendant at the time of injury.[6]

Those jurisdictions which strictly apply the element of control have interpreted the word "control" literally, requiring proof that the defendant was in actual physical possession of the instrumentality at the time of the injury.[7] The reason for the element of exclusive control is that the doctrine of res ipsa loquitur requires the inferred negligence to be more probably that of the defendant than of another.[8] When this basis is viewed in relation to the strict requirement of control, it is readily seen that any attempt to apply the element strictly to every factual situation without exception can do grave injustice. In the most infamous example of its strict application a customer was denied recovery where she entered defendant's store and sat down in a chair which collapsed. It was decided by the court that the plaintiff was in possession of the chair at the time of the injury.[9] Regardless of plaintiff's physical possession the logical inference of defendant's negligence is readily seen.

Many courts have become aware of the injustice which may occur

Carolina cases. Wright v. Huntley Furniture Co., 197 F. Supp. 117 (M.D.N.C. 1961). The court has recently restated its strict exclusive control rule in Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962).

[6] "At the time of the accident complained of, the shipment was under the exclusive control of the plaintiff and his employer. The doctrine of Res Ipsa Loquitur does not apply 'when the instrumentality causing the injury is not under the exclusive control or management of the defendant.' Lane v. Dorney, 250 N.C. 15, 108 S.E.2d 55 (1959)." 299 F.2d at 906.

[7] These jurisdictions include Colorado, Iowa, Massachusettts, Mississippi, North Carolina and Rhode Island. See Hansen v. Phagan, 146 Colo. 484, 361 P.2d 977 (1961); Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961); Banaghan v. Dewey, 340 Mass. 73, 162 N.E.2d 807 (1959); Denman v. Denman, 242 Miss. 59, 134 So. 2d 457 (1961); Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929); Coia v. Eastern Concrete Prods. Co., 85 R.I. 128, 127 A.2d 858 (1956). See generally 38 AM. JUR. *Negligence* § 300 (1941).

[8] 2 HARPER & JAMES, TORTS § 19.7, at 1085 (1956). See also MORRIS, TORTS § 8, at 133 (1953). Other causes need not be altogether eliminated. Rocona v. Guy F. Atkinson Co., 173 F.2d 661 (9th Cir. 1949). Their probability need be only reduced to such a degree as to point the finger at the party charged. Mintzer v. Wilson, 21 Cal. App. 2d 85, 68 P.2d 370 (Dist. Ct. App. 1937).

[9] Kilgore v. Shepard Co., 52 R.I. 151, 158 Atl. 720 (1932).

through the use of the strict element of control. Some have created exceptions to the basic strict rule while others have reshaped the element of control itself. Generally, these departures have been designed to meet fact situations in which it is evident the strict rule will not be reliable.

The most just approach discards the idea of control altogether, and requires only "that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[10] The plaintiff must indicate negligence on the part of someone and a resulting injury to himself. He then proves the absence of intervening factors and contributory negligence.[11] By following a process of elimination he removes everyone but the defendant.[12] He must also introduce evidence which shows that the apparent cause of the accident is such that the defendant would be responsible for it.[13] In jurisdictions which adopt this application of res ipsa loquitur exclusive control by the party charged ceases to be a prerequisite element and becomes merely one factual method of

[10] PROSSER, TORTS § 42, at 206 (2d ed. 1955). See Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925); Sasso v. Randforce Amusement Corp., 243 App. Div. 552, 275 N.Y. Supp. 891 (1934); Minotti v. State, 7 Misc. 2d 252, 166 N.Y.S.2d 396 (Ct. Cl. 1957); Leach v. Joyce Prods. Co., 66 Ohio L. Abs. 296, 116 N.E.2d 834 (Ct. App. 1952); Fick v. Pilsener Brewing Co., 39 Ohio Op. 158, 86 N.E.2d 616 (C.P. 1948).

[11] See Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959); Rinkel v. Lee's Plumbing & Heating Co., 257 Minn. 14, 99 N.W.2d 779 (1959), 59 MICH. L. REV. 136 (1960); Ryan v. Zweck-Wollenberg Co., 226 Wis. 630, 64 N.W.2d 226 (1954).

[12] "Since of every effect there is a cause, where negligence exists, some one must have been the responsible author . . . . Inferentially some one was negligent . . . . By a process of elimination we get back to the manufacturer, who set the dangerous agency in motion, and upon whom the blame ought inferentially to be fastened." Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 763, 73 S.E. 1087, 1088 (1912).

[13] PROSSER, TORTS § 42, at 206 (2d ed. 1955). This approach seems to be an expansion of the third element of res ipsa loquitur. See note 3 *supra* and accompanying text. From the proof of this element, plus the introduction of circumstances which point to the defendant, his negligence becomes apparent. This method of proof might have brought about a different answer on the question of defendant's negligence in the principal case, since (a) there was an accident which would indicate negligence on the part of someone; (b) the plaintiff was injured; (c) and since the boxcar was sealed, negligence on the part of the railroad was disproved; (d) thus by elimination, the possibility of negligence was narrowed to the plaintiff and defendant. The court concluded from further evidence that defendant was not guilty of negligence of any sort; however, plaintiff was found guilty of contributory negligence. 299 F.2d at 907 (1962). *Quaere:* Is contributory negligence on the part of the plaintiff possible without original negligence on the part of the defendant? A finding of negligence under res ipsa loquitur would have reconciled the later holding of contributory negligence.

establishing the necessary circumstantial evidence.[14] This more flexible rule has been applied to such varied subject matter as exploding bottles,[15] sealed containers holding foreign matter,[16] faucets,[17] dynamite,[18] appliances,[19] and exploding heaters and oil burners.[20]

A few courts have used the above approach to go one step farther. Until recently it was thought that there could not be multiple defendants in cases where res ipsa loquitur was used.[21] The reasoning was based on the fact that where there is more than one defendant, the instrumentality could not have been in the "exclusive control" of any one of them.[22] However, where the courts have abandoned the requirement of actual physical possession they have found that res ipsa loquitur can be more fully implemented. Once this was accomplished the courts felt it necessary to permit multiple defendants.

[14] Thus, where the plaintiff was shocked by a refrigerator which she had owned for almost three years she was allowed to recover from the manufacturer when she showed that there was no intervening negligence on the part of third parties which could have caused the short circuit, and proved the faulty wiring was in a component part which was sealed at the factory. Ryan v. Zweck-Wollenburg, Co., 226 Wis. 630, 64 N.W.2d 226 (1954).

[15] Florence Coca-Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65 So. 2d 169 (1953); Coca-Cola Bottling Co. v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949); Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Hughs v. Miami Coca-Cola Bottling Co., 155 Fla. 299, 19 So. 2d 862 (1944); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941); Johnson v. Coca-Cola Bottling Co., 235 Minn. 471, 51 N.W.2d 573 (1952); Honea v. Coca-Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944); Ferrell v. Royal Crown Bottling Co., 144 W. Va. 465, 109 S.E.2d 489 (1959).

[16] Rutherford v. Huntington Coco-Cola Bottling Co., 142 W. Va. 681, 97 S.E.2d 803 (1957), 60 W. VA. L. REV. 110 (glass in bottle under control of the plaintiff).

[17] Minotti v. State, 7 Misc. 2d 252, 166 N.Y.S.2d 396 (Ct. Cl. 1957), 7 BUFFALO L. REV. 330 (1958) (no mixing valve on hot and cold water faucets being used in a school for the blind).

[18] Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (Texas law applied) (stick of dynamite exploded while in plaintiff's possession).

[19] Peterson v. Minnesota P. & L. Co., 207 Minn. 387, 291 N.W. 705 (1940) (electrical shock from stove).

[20] Chandler v. Automatic Heating, Inc., 40 Ga. App. 280, 149 S.E. 287 (1929); Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 704 (1948); Peterson v. Minnesota P. & L. Co., 207 Minn. 387, 291 N.W. 705 (1940); Schafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961), 30 U. CINN. L. REV. 543; Rafferty v. Northern Util. Co., 73 Wyo. 287, 278 P.2d 605 (1955).

[21] Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N.D. Tex. 1939); Harrison v. Sutter St. Ry., 134 Cal. 549, 66 Pac. 787 (1901); Wolf v. American Tract Soc'y, 164 N.Y. 30, 58 N.E. 31 (1900). See generally Annot., 38 A.L.R.2d 905 (1954).

[22] See Actiesselskabet Ingrid v. Central R.R., 216 Fed. 72, 79 (2d Cir. 1914).

This seems to have resulted for two different reasons: (1) the courts realize that it may be possible for a plaintiff to suffer injury from the concurring negligence of two or more parties, thus creating the difficulty of apportioning damages;[23] (2) the plaintiff cannot in every case pick the negligent party from several persons who may have had control.[24] It is foreseeable the plaintiff might know that several persons had some control over the instrumentality. Because of evidentiary problems[25] he may decide to join them all as defendants, relying on the court to require them to prove their own innocence. The problem then becomes how many potential defendants plaintiff should be allowed to join.[26] Looking at the problem solely from the plaintiff's point of view it is sufficient for present purposes to say the more defendants which are joined the weaker the inference of actionable negligence by any one defendant becomes. There is a point where that inference ceases to exist and res ipsa loquitur will not be available to the plaintiff. Thus, he must weigh the availability of evidence against the desire to use the doctrine.[27]

[23] See Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (Texas law applied). A driller injured by an exploding blasting cap was allowed to use the doctrine against three separate manufacturers who made the component parts.

[24] Thus, where a patient was injured while under sedation, and evidence showed that he was under the care of several parties at different times, each of the defendants was called upon to prove his innocence. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). This case provoked extensive comment. See, *e.g.*, 40 ILL. L. REV. 421 (1946); 18 So. CAL. L. REV. 310 (1945). For the application of res ipsa loquitur to malpractice cases, see generally Klein v. Arnold, 203 N.Y.S.2d 797 (Sup. Ct. 1960); Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932); Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007 (1913); Dux v. Shaver, 105 Pa. Super. 344, 161 Atl. 481 (1932).

[25] These problems may disturb either party in an action at law. Certain defendants may find it impossible to show their innocence. If indiscriminate joinder is allowed parties actually innocent may find themselves held liable due to the inability to prove it. On the other hand plaintiffs often labor under an impossible burden of proving negligence from facts inaccessible to them. The difficulty of weighing these two possibilities may be a factor retarding the acceptance of this approach by more jurisdictions.

[26] In allowing joinder of these defendants the courts have to consider the existence of a duty on the part of the defendant to the plaintiff, as well as other requirements of the jurisdiction concerning joinder, such as concert of action, concurrence of the negligent acts, separability of injuries, etc. Extensive exploration of the problem of separating defendants from the point of view of the court is beyond the scope of this note.

[27] Note that the inference created from the evidence will not carry against everyone who had control, *e.g.*, in the principal case the boxcar being sealed would negative any inference of negligence on the part of the railroad company. This arises from the fact that the type of control which the railroad had was not that type of control which would allow it to either apply its own negligence to the instrumentality or to alter any negligence of the shipper.

Other innovations in the use of the element of control are nothing more than exceptions. The first of these has been styled the "right to control" maxim.[28] It does not require that the instrumentality be under the actual physical control of the defendant, but refers to his right to control from the time of the alleged negligence to the time of the injury.[29] This creates another problem since it applies only where the defendant's legal relation to the instrumentality is such that he alone has the right of possession and control.[30] It would be of little value in deciding cases in which a third party or plaintiff had not only possession but ownership as well.[31] A second exception has been made which answers the problem created by complexities of title. In this exception the control required does not refer to control at the time of the injury, but to control at the time of the alleged negligent act.[32] This approach is illustrated by the case of *Escola v. Coca-Cola Bottling Co.*[33] where a waitress was injured when a bottle of carbonated drink broke in her hand. In *Escola* the defendant company argued that the bottle was not in its possession or ownership at the time of the injury, therefore recovery on the ground of res ipsa loquitur was not available to the plaintiff. The court answered that the doctrine may be applied on the theory that the defendant had control at the time of the negligent act, although not

[28] "[T]he requirement that the instrumentality be under the management and control of the defendant does not mean . . . actual physical control, but refers rather to the right of control at the time the negligence was committed." McCloskey v. Koplar, 329 Mo. 527, 535, 46 S.W.2d 557, 560 (1932).

[29] See Van Horne v. Pacific Ref. & Roofing Co., 27 Cal. App. 105, 148 Pac. 951 (Dist. Ct. App. 1915), where an owner had installed piping prior to certain work being done by the plaintiff who was later injured because of faulty installation. The owner was held liable since he had the right to control the piping at the time of the negligence.

[30] In all the cases defendant has been the holder of legal title to the instrumentality. See Wright v. Southern County Gas Co., 102 Cal. App. 656, 283 Pac. 823 (Dist. Ct. App. 1929); McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (1932); Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W.2d 509 (1938). But the exception should apply equally to cases where the defendant is a lessee, cestui que use, bailee, etc.

[31] The right to control theory has appeared in North Carolina only once in a dissenting opinion by Clarkson, J., in Armstrong v. Acme Spinning Co., 205 N.C. 553, 556, 172 S.E. 313, 314 (1934).

[32] As stated in a recent case, "'[I]t is not necessary that the instrumentality causing the injury be within the physical control of the person sought to be held liable under the doctrine' . . . . [I]t is only necessary that the instrument be under the control of the defendant at the time of the negligent act causing the injury." Haas v. Carrier Corp., 339 S.W.2d 727, 730 (Tex. Civ. App. 1960), 15 Sw. L.J. 464 (1961).

[33] 24 Cal. 2d 453, 150 P.2d 436 (1944).

at the time of the accident.[34] However, the plaintiff must show that the condition of the instrumentality was not altered by intervening forces.[35] These two exceptions are the primary steps to the final recognition of the fact that the requirement of control cannot be strictly applied.

North Carolina has invented a unique exception to the doctrine of res ipsa loquitur. The requirement of strict control by the defendant at the time of the injury will be waived where the plaintiff can show other "similar instances," *i.e.,* that substantially similar occurrences involving defendant's products have taken place within a reasonable proximity in time.[36] In the cases where this "similar instances rule" has been applied res ipsa loquitur by name[37] has been denied because defendant was not in control of the instrumentality at the time of injury. The court allows the case to go to the jury on the grounds that the similar instances are evidence of negligence on the part of the defendant. However, the evidence remains circumstantial and the plaintiff need not prove defendant's specific negligence.[38]

The rule recognized by the Fourth Circuit in the principal case was first stated in North Carolina in 1841.[39] Since that time North

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[34] *Id.* at 455, 150 P.2d at 438.

[35] *Ibid. Accord* Honea v. City Dairy, Inc., 22 Cal. 2d 614, 140 P.2d 369 (1943); Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352 (Ct. Err. & App. 1941).

[36] North Carolina's sister state to the south also seems to have been inclined to adopt this rule. Boyd v. Marion Coca-Cola Bottling Co., 126 S.E.2d 178 (S.C. 1962).

[37] The distinction, if any, between the "similar instances" rule and res ipsa loquitur is so tenuous and shadowy as to be insubstantial. "O! be some other name: What's in a name? That which we call a rose by any other name would smell as sweet . . . ." SHAKESPEARE, *Romeo & Juliet,* Act II, Sc. ii, l. 42-4.

[38] The rule as stated by Devin, J., in Davis v. Coca-Cola Bottling Co., 228 N.C. 32, 34, 44 S.E.2d 337, 339 (1947), was: "As tending to show actionable negligence on the part of the defendant, it is competent for plaintiff to show that products produced by the defendant under substantially similar conditions and sold by it at about the same time contained the same defects, such similar instances being allowed to be offered as some evidence of defendant's negligence at the time of plaintiff's injury 'when accompanied by proof of substantially similar circumstances and reasonable proximity in time.'" See, *e.g.,* Perry v. Kelford Coca-Cola Bottling Co., 196 N.C. 175, 145 S.E. 14 (1928).

Under circumstances similar to those in *Escola,* plaintiff, injured by an exploding bottle, was refused the right to plead res ipsa loquitur but allowed to recover against the manufacturer on a pure negligence theory because he could show other "similar instances." Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954).

[39] Ellis v. Portsmouth & R.R.R., 24 N.C. 138 (1841).

Carolina has continued to limit the use of res ipsa loquitur to those cases where the defendant is in control of the instrumentality at both the times of negligence and injury.[40] With the exception of the "similar instances rule" there has been no deviation.[41] In many of the North Carolina cases control was no problem since the evidence was quite conclusive as to whose negligence, if any, was the cause of the injury.[42] In other cases where the negligence was not so readily laid to the defendant the court balked at expanding the use of the control element as other jurisdictions have seen fit to do.[43] Absent the availability[44] of the "similar instances rule," North Carolina has refused to allow the use of the doctrine in the "exploding bottle" cases where the plaintiff had possession of the bottle.[45] The doctrine has also been denied where foreign substances in packaged goods have caused injury. The subject matter of these foreign substances has run the gamut from fishhooks to mice,[46] yet unless the defendant has recently made the same mistake there has been no recovery. In

[40] *E.g.*, where the defendant's boiler exploded killing the plaintiff's intestate who was standing nearby, recovery was allowed on the theory of res ipsa loquitur. Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922).

[41] *But see* Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960). The court held res ipsa loquitur not applicable in a case concerning a skidding automobile. It appeared from further language in the decision that the plaintiff was allowed recovery by offering *negative* circumstantial evidence of defendant's negligence. It would appear that use of res ipsa loquitur in these cases may become possible in the near future. For an excellent discussion of this decision and its implications see Note, 39 N.C.L. REV. 198 (1960).

[42] *E.g.*, Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[43] *Compare* the North Carolina view as stated in Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962), *with* the views stated in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) *and* Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941).

[44] A circumstance more likely than not. It would be difficult to conceive of a rule more conducive to wild imagination. Imagine the prospective plaintiff who has been told by his attorney that he will not have a case unless they can uncover a witness who has also found a mouse in his bottled drink. Plaintiff informs his friends of the state of the law. Suddenly everyone's drink begins to taste strange. Fortunately, two days later plaintiff's nephew finds what he believes to be a mouse in his drink. What a coincidence!

[45] See Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962); Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909).

[46] Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941) (fishhook in plug of chewing tobacco); Tickle v. Hobgood, 216 N.C. 221, 4 S.E.2d 444 (1939) (foreign substance in bottled drink); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935) (dead mouse in a bottled drink); Gill v. Ceases' Lunch System, Inc., 194 N.C. 803, 139 S.E. 925 (1927) (per curiam) (plaintiff's intestate died after eating at defendant's lunch room); Lamb v. Boyles, 192 N.C. 542, 135 S.E. 464 (1926) (injurious substance in ale).

other cases the opportunity to adopt a less stringent control rule was foregone by questionable statements that our rigid requirement was met.[47]

In *Schueler v. Good Friend N.C. Corp.*[48] North Carolina easily disposed of a classic "collapsing chair" case using the doctrine of res ipsa loquitur simply by stating that our control requirement was met.[49] Yet who could actually contend that the defendant had anything more than ownership without possession? In *Eaker v. International Shoe Co.*[50] an employee of the defendant was working a revolving drum to process hides. The employee stopped the drum, reached inside, whereupon the clutch became engaged injuring him. The court applied res ipsa loquitur against the defendant with no discussion of control. The rule of strict control is strongly voiced in North Carolina, but uniformity of its application is wanting.

In North Carolina res ipsa loquitur creates at most an inference of negligence on the part of the defendant.[51] The burden of proof remains on the plaintiff and does not shift to the defendant.[52] Under such protection for the defendant a generous application of the doctrine of res ipsa loquitur as a whole and the control element in particular could be allowed in this state.[53] A change would be desirable in view of the problems of control just discussed. That other jurisdictions have squarely faced these problems is evidenced by the trend toward expansion of the control rule to encompass the

[47] See Turner v. Southern Power Co., 154 N.C. 131, 69 S.E. 767 (1910). Plaintiff was shocked when turning on an overhead light. Res ipsa loquitur was held applicable even though a third party had furnished the appliances for distributing the current to the different lamps. In McAllister v. Pryor, 187 N.C. 832, 123 S.E. 92 (1924), plaintiff was injured by high voltage coming through her iron. Res ipsa loquitur was applied even though a third party had attached the iron to the current.

[48] 231 N.C. 416, 57 S.E.2d 324 (1950).

[49] Compare the North Carolina view and the Rhode Island view discussed in text accompanying note 9 *supra*.

[50] 199 N.C. 379, 154 S.E. 667 (1930).

[51] See Coca-Cola Bottling Co. v. Munn, 99 F.2d 190 (4th Cir. 1938); Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941). See generally Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

[52] The party charged is merely required to go forward with the evidence in an attempt to rebut the inference. The credibility of the evidence remains with the jury and it may find for the defendant. Mitchell v. Saunders, 219 N.C. 178, 183, 13 S.E.2d 242, 246 (1941).

[53] For an excellent discussion of the evidentiary problems facing plaintiffs in the area of inference, prima facie case, etc., see Note, 41 N.C.L. REV. 124 (1962).

difficulties of an advanced society. As our community continues to develop, the individuals of which it is composed become more interdependant. This creates the necessity for liberality in the field of law concerning liability for injuries caused by harmful instrumentalities. Early in the twentieth century the law of implied warranties was forced to yield to the realities of modern life.[54] The time may now be ripe for a similar advance in the doctrines of implied negligence. Where circumstantial evidence appears in such an abundance as to show probable negligence of a defendant, it would seem improper to remove a plaintiff from court solely on the ground that he alone was in control of a harmful device. Although plaintiff was in physical possession and perhaps had ownership, he may not have had such control as would alter a hidden defect caused by the defendant's negligence.

ARNOLD T. WOOD

**Wills—Dissent Statute—Constitutionality of Husband's Right to Dissent From Wife's Will**

Prior to July 1, 1960 a husband could not by will deprive his widow of her dower and other intestate rights in his estate if, pursuant to the privilege given surviving wives by legislation originating in 1784, she duly filed a dissent to his will.[1] On the other hand, no right of dissent was extended to the husband, and his wife could make a will disinheriting him from any share in her estate.[2]

The General Assembly at its 1959 session enacted new laws governing intestate succession by which the estates of dower and curtesy were abolished.[3] Correlated sections permitted either husband or wife to dissent from the will of the deceased spouse where the survivor does not receive one-half or more in value of all the property passing upon the death of the testator.[4] The latter enactments were

[54] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[1] N.C. Pub. Laws 1868-69, ch. 93, §§ 37, 38. A history and explanation of this legislation will be found in Hunter v. Husted, 45 N.C. 97 (1852).

[2] Gomer v. Askew, 242 N.C. 547, 89 S.E.2d 117 (1955); Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903). See DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 18, 48, 158 (1948).

[3] N.C. GEN. STAT. § 29-4 (Supp. 1961).

[4] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961). These sections were rewritten and amended by the 1961 amendment, effective July 1, 1961, for the most part in particulars not material here, except that the right of a surviving spouse to dissent was limited by N.C. GEN. STAT. § 30-1(a) (Supp. 1961)

designed to guarantee to the surviving spouse, whether husband or wife, absolute title to an equal forced share in the other's estate.[5] The survivor is entitled upon dissent to receive his intestate share up to a maximum of one-half of the estate[6] except that where the dissenter is the second or successive spouse of a decedent who is survived by issue, none of whom are also issue of the dissenter, he or she may only take one-half of what they would have received had there been no will.[7]

In *Dudley v. Staton*,[8] the first case to arise under the new dissent statute, the testatrix devised all her property, consisting of four tracts of land, to her only son by a former marriage and his wife to the exclusion of her husband. The husband duly filed a dissent from the will of his deceased wife, and commenced a special proceeding for partition, alleging that by virtue of his dissent he was the owner of a one-fourth undivided interest in the four tracts of land.[9] The clerk of the superior court adjudged the husband and son to be tenants in common and ordered an actual partition of the land. On appeal to the superior court judge, the parties stipulated that the sole issue was whether the provisions of article I, chapter 30 of the General Statutes of North Carolina,[10] insofar as it permits a husband to dissent from his deceased wife's will and take a share of her real and personal property, is in conflict with the provision of article X, § 6 of our state constitution. The constitution provides:

> The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts,

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to those instances where (1) he receives less than his intestate share, or (2) in event the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, he receives less than one-half of the net estate. Otherwise the substance and effect of the 1959 act was not altered for purposes of the question herein discussed. See generally Bolich, *Election, Dissent and Renunciation*, 39 N.C.L. REV. 17 (1960).

[5] N.C. GEN. STAT. § 29-14 (Supp. 1961).

[6] N.C. GEN. STAT. § 30-3(a) (Supp. 1961).

[7] N.C. GEN. STAT. § 30-3(b) (Supp. 1961).

[8] 257 N.C. 572, 126 S.E.2d 590 (1962).

[9] Petitioner is entitled only to a one-fourth interest in the land because the respondent son was issue of the decedent by a prior marriage. N.C. GEN. STAT. § 30-3(b) (Supp. 1961).

[10] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961).

> obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

The judge held that the right of dissent given by the statute was in all respects constitutional, and affirmed the clerk's order.

The North Carolina Supreme Court reversed, holding that the language of the constitutional provision left no room for interpretation and clearly showed an intention not only to remove the common law incapacity of a married woman to dispose of her property by will, but also to secure to her the right to dispose of her property by will as if she were unmarried, so as to put it beyond the power of the General Assembly to impair or abridge such right.[11]

The court in *Dudley* expressly relied on a dictum[12] in *Tiddy v. Graves*[13] in which the court, after concluding that a husband may only be a tenant by the curtesy after the death of his wife intestate, stated: "With this explicit provision in the Constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had remained unmarried."[14] It was acknowledged by the court in *Tiddy* that in the absence of constitutional inhibition the legislature can abrogate the power to devise inasmuch as it is not a natural right; however, the court felt that since the constitution of 1868 gave married women the unrestricted power to devise and bequeath their property such power could not be limited.

By following the rationale of *Tiddy* the court in effect overruled the more recent case of *Flanner v. Flanner*[15] where it was contended

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[11] Prior to this decision North Carolina had held that since the grant of testamentary capacity to married women in the constitution of 1868, a wife could by will deprive her husband of this common-law right of curtesy in her separate estate. Watts v. Griffin, 137 N.C. 572, 50 S.E. 218 (1905); Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903); Walker v. Long, 109 N.C. 510, 14 S.E. 299 (1891); see I MORDECAI, LAW LECTURES 387-89 (2d ed. 1916).

[12] The court stated: "Even if we concede that the statement in *Tiddy v. Graves* . . . is *obiter dictum*, it is sufficiently persuasive to be followed here." 257 N.C. at 581, 126 S.E.2d at 597.

[13] 126 N.C. 620, 36 S.E. 127 (1900).

[14] *Id.* at 623, 36 S.E. at 128.

[15] 160 N.C. 126, 75 S.E. 936 (1912). The court in *Dudley* said: "When the opinion in the *Flanner* case was filed, the writer of the opinion in *Tiddy v. Graves* . . . was *Chief Justice*. Why that case and *Walker v. Long* . . . were not mentioned in the *Flanner* case, we can never know." 257 N.C. at 580, 126 S.E.2d at 596.

that a statute, which provides that a testatrix dies intestate as to an after-born child who is not provided for in the parent's will, was an unconstitutional abridgment of a married woman's right to dispose of her property by will as if she were unmarried. In holding the statute constitutional the court in *Flanner* pointed out that the will was valid except as to such after-born child. After declaring that the defendant's contention involved a misconception of the meaning of article X, § 6, the court stated:

> [The] right to dispose of property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature except where and *to the extent* that same is restricted by constitutional inhibition . . . .
>
> Being properly advertent to this principle, a perusal of the section relied upon will disclose that its principal purpose in this connection was to remove *to the extent stated* the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation. The right conferred is not absolute, but qualified.[16]

Whatever might be said about the apparent conflict between *Tiddy* and *Flanner,* the decision in *Dudley* raises serious questions as to the constitutionality of the after-born child statute as it applies to married women.[17] That section is as much an abridgment of the wife's constitutional power to make a devise as if feme sole as is the statute giving both husband and wife reciprocal rights of dissent, subject to certain statutory qualifications. The effect of either is to diminish her estate disposed of by her will to the extent of the intestate share of the person in whose favor the statute operates; but in other respects the will stands.[18] On the other hand, it would

[16] *Id.* at 129, 75 S.E. at 937. (Emphasis added.)

[17] N.C. GEN. STAT. § 31-5.5(a) (Supp. 1961) provides: "A will shall not be revoked by the birth of a child to or adoption of a child by the the [sic] testator after the execution of the will, but any such after-born or after-adopted child shall be entitled to such share in testator's estate as it would be entitled to if the testator had died intestate . . . ."

[18] See N.C. GEN. STAT. § 31-5.5(a) (Supp. 1961) (quoted in note 17 *supra*), and N.C. GEN. STAT. § 30-3(c) (Supp. 1961) which provides: "If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate . . . shall be distributed to the other devisees and legatees as provided

indeed be sad if the language in *Dudley* has the effect of barring an after-born child, inadvertently left out of its mother's will, from sharing in the estate of the deceased parent.

Married women in North Carolina had no general power to make a will prior to the constitution of 1868, except when such a power was given them in the same instrument by which the property was vested in them.[19] It seems manifest that the specific purpose of article X, § 6 was to remove the common law incapacity of a married woman and, as respects the disposition of her property by will, place her on a par with men and femes sole. The language of the stated provision professes to go no further than its clear import. It is the view of the writer that such language does not confer on married women the right to make a will free of any or all legislative regulation; but rather, inherent therein is recognition that the Legislature is sovereign over the disposition of a decedent's property, except *to the extent* that same is restricted by constitutional inhibition, and that it can abridge, qualify or restrict the power of a married woman to devise her separate estate.[20] That this is so seems clear since the framers of our constitution have bestowed testamentary capacity on married women only *to the extent* of that possessed by femes sole,[21] and there is little doubt that the legislature may, at its pleasure, regulate the power of an unmarried woman to dispose of property by will.[22] Seemingly the only constitutional inhibition on the power of

in the testator's last will, diminished pro rata unless the will otherwise provides."

[19] Newlin v. Freeman, 23 N.C. 514 (1841); see MORDECAI, *op. cit. supra* note 11, at 371.

[20] *In re* Garland's Will, 160 N.C. 555, 76 S.E. 486 (1912); Hodges v. Lipscomb, 128 N.C. 57, 38 S.E. 281 (1901). The court in the principal case distinguished Thomason v. Julian, 133 N.C. 309, 45 S.E. 636 (1903) from *Flanner* on its facts; however, the general rule that the right to make a will is given by statute and may be modified or revoked by statute, for which this case was apparently referred to in *Flanner* was not dealt with.

[21] Article X, § 6 expressly provides that a married woman may devise and bequeath her property and, with the written assent of her husband, convey the same "as if she were unmarried." N.C. CONST. art. X, § 6; restated in N.C. GEN. STAT. § 52-1 (1950).

[22] *E.g.*, Peace v. Edwards, 170 N.C. 64, 86 S.E. 807 (1915) citing with approval the leading case of Pullen v. Commissioners of Wake County, 66 N.C. 361 (1872) where the court said: "The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair. There was a time, at least as to gift by will, it did not exist; and there may be a time again when it will seem wise and expedient to deny it. These are the uncontested powers of the Legislature upon which no article of the Constitution has laid its hands to impair them. If the Legislature may destroy this right,

the General Assembly in this respect is that the right of a married woman to make a will cannot be abrogated since it is conferred upon her by the constitution.[23]

However, article X, § 6 contains not only a grant of testamentary disposition to married women but also an explicit constitutional prohibition against conveyance by the wife of her separate property without the joinder of her husband.[24] The holding of the principal case is difficult to reconcile with the construction given by the North Carolina Supreme Court to statutes dispensing with the necessity of the husband's joinder in conveyances by the wife of her property and making her a free trader in certain instances.[25] These enactments have been upheld as valid legislative limitations on article X, § 6 on the grounds that this was a beneficent provision and not intended to disable, but rather to protect the married woman.[26] This interpretation, in the face of such a specific prohibition, would seem to dispel any notion that all legislative power to regulate the separate property rights of married women was withdrawn by this constitutional provision. Yet, the court in *Dudley* distinguished the instant statute from the free trader acts and condemned the former for the reason that it was not a protection, but rather an abridgment of the widow's constitutional right.[27] This seems to be a rather specious ground on which to base the constitutionality of a statute. Especially is this so in view of the fact that the court could easily have saved

may it not regulate it?" *Id.* at 363-64. It is interesting to note that this pronouncement was made just four years after the adoption of the Constitution of 1868. See generally 57 AM. JUR. *Wills* § 52 (1948); 94 C.J.S. *Wills* § 3 (1956); II MORDECAI, LAW LECTURES 1138 (2d ed. 1916).

[23] It could be argued that despite the right given married women to make a will by Article X, § 6, such right in no way exceeds that extended to femes sole which, subject to the grace of the Legislature, may be regulated to the point of destruction.

[24] N.C. CONST. art. X, § 6 states: "The real and personal property of any female in this State . . . may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[25] N.C. GEN. STAT. § 52-5 (1950) (where separated by divorce or deed; where husband declared insane); N.C. GEN. STAT. § 52-6 (1950) (where wife abandoned or turned out of doors by husband).

[26] Where the husband is a lunatic, the wife may convey her separate estate without the joinder of her husband for the free trader statutes are a valid exercise of legislative power. Lancaster v. Lancaster, 178 N.C. 22, 100 S.E. 120 (1919). If a husband abandons his wife, there is no constitutional inhibition on the power of the legislature to declare where and how she may become a free trader. Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Bachelor v. Norris, 166 N.C. 506, 82 S.E. 839 (1914); Hall v. Walker, 118 N.C. 377, 24 S.E. 6 (1896).

[27] 257 N.C. at 581, 126 S.E.2d at 597.

the dissent statute, had it been so inclined, by adherence to the literal wording of article X, § 6.[28]

The policy of the new act was, in keeping with the modern tendency, to provide for the survivor's support by giving either spouse a non-barrable right to an equal forced share in the other's estate, which is protected against testamentary disposal by reciprocal rights of dissent.[29] The effectiveness of this policy is largely dependent upon the according of equal treatment to both husband and wife. The decision in the principal case will permit a wife, at her whim or caprice, to cut her husband out of all interest and estate in her property.[30] The rationale of the court will not only seriously jeopardize other unrelated statutes[31] but will destroy the symmetry of the new Intestate Succession Act.[32]

If the court adheres to its present position, we are faced with the paradoxical situation of having to restore the rights of downtrodden husbands, either by corrective legislation or by a revision of article X, § 6 of our state constitution which would equalize the rights of a husband with those of his wife.

J. HAROLD THARRINGTON

**Wills—G.S. § 41-6—Doctrine of Worthier Title**

In *Scott v. Jackson*[1] the testator devised land to his niece in fee simple, and in the event she dies without issue, then to the heirs of the testator. Plaintiffs, heirs of the testator's niece who had died without issue, contended that G.S. § 41-6[2] was controlling, and conse-

[28] The general rule is that every presumption will be made in favor of the constitutionality of a legislative act unless its repugnance to the constitution is clear and beyond a reasonable doubt, and that the courts may resort to implication to sustain an act, but not to destroy it. *E.g.*, Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115 (1941); State v. Brockwell, 209 N.C. 209, 183 S.E. 378 (1936).

[29] See, *e.g.*, PA. STAT. ANN. tit. 20, §§ 1.2, 180.8 (Supp. 1961); PA. STAT. ANN. tit. 20, §§ 1.1, 1.5 (1950). See generally 3 VERNIER, AMERICAN FAMILY LAW § 216 (1935); Bolich, *supra* note 4, at 21-24.

[30] ALA. CODE ANN. tit. 61, § 18 (1960) gives only widows the right to dissent from the will of their deceased spouse. This has been criticized as investing married women with a "super-right" capable of creating havoc in the settlement of the husband's estate. 3 ALA. L.J. 30 (1927).

[31] *E.g.*, N.C. GEN. STAT. § 105-20 (1958) (right to impose inheritance tax lien on testator's estate); N.C. GEN. STAT. § 31-5.5 (Supp. 1961) (right of after-born child to take his intestate share).

[32] N.C. GEN. STAT. §§ 29-1 to -30 (Supp. 1961).

[1] 257 N.C. 658, 127 S.E.2d 234 (1962).

[2] N.C. GEN. STAT. § 41-6 (1950) provides: "A limitation by deed, will or

quently, the limitation over should be construed to mean "to the children" of the testator. Since the testator died without children surviving, the plaintiffs argued that the limitation over was void, and they were therefore entitled to the land.[3] The North Carolina Supreme Court held that G.S. § 41-6 was not applicable and the heirs of the testator would take.

While it seems that G.S. § 41-6 was intended to modify the common-law rule that no one is the heir of a living person,[4] the precise limits of the statute have been a source of litigation and speculation for a number of years. It was held in the early case of *Starnes v. Hill*[5] that the Rule in Shelley's Case was unaffected by the statute because the rule "has nothing whatsoever to do with limitations to the heirs of a person unless there is a precedent limitation of a freehold estate to that person . . . ."[6] Therefore, the statute can never apply where there is a precedent freehold estate in the ancestor of the heirs designated in the instrument.

It remains undecided whether the statute is applicable where the limitation is made to the heirs of an ancestor holding a precedent estate of less than freehold, for example, where *T* devises land to *A* for ten years, remainder to the heirs of *A*. It would seem that the statute should be applicable in such a case because of the court's pronouncement in *Starnes* that the statute would not apply where there is a *precedent freehold estate* granted to the ancestor of the heirs mentioned in the instrument. An intervening contingent interest between the freehold estate and the limitation to the heirs would not alter this holding.[7] Likewise the statute does not change the formulas for the creation of fee simple[8] and fee tail estates.[9]

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other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by deed or will."

[3] *Quaere* whether this contention has merit. See 1 SIMES, FUTURE INTERESTS § 179 (1936).

[4] Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893). For an application of the common-law rule, see Timberlake v. Harris, 42 N.C. 188 (1851).

[5] 112 N.C. 1, 16 S.E. 1011 (1893). In this case *G* deeded land to *A* for life, and in the event *B* outlive *A*, then to *B* for life, then to the heirs of *B*. The court held that *B* took a contingent remainder for life, and that until the contingency occurred the Rule in Shelley's Case could not operate to vest a fee simple in *B*. As to the applicability of the statute to the Rule in Shelley's Case see: Jones v. Ragsdale, 141 N.C. 200, 53 S.E. 842 (1906); Marsh v. Griffin, 136 N.C. 333, 48 S.E. 735 (1904).

[6] 112 N.C. at 20, 16 S.E. at 1013. In addition the court found that it was impossible to believe that the drafters of the statute would have omitted any reference to the Rule in Shelley's Case had they intended to abolish the rule.

[7] See Hartman v. Flynn, 189 N.C. 452, 127 S.E. 517 (1925), where there

The statute has been applied where the limitation in a deed was to the heirs of the grantor after a preceding estate in another,[10] where the conveyance was directly to the heirs of a third person,[11] and where the limitation was to the heirs of a third person after an intervening estate.[12] However, where the gift or devise is defeated by the failure of heirs of the first taker, the statutes does not apply. Thus, where *T* devised land to *A* and his heirs, and if no heirs at his death, the land was to return to the nearest relations of *A*, the court held that G.S. § 41-6 would not apply to the words of defeasance because the proper construction of the defeasance clause should be "if *A* die without issue."[13]

In addition to the limitation placed on the statute by *Starnes*, the statute itself contains the limitation that "unless a contrary intention appear by deed or will,"[14] heirs will be construed to mean children.[15] Just when a contrary intention appears is difficult to determine.[16]

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was a deed to *A* for life, then to *A's* bodily heirs, but if *A* dies before his wife, the wife shall hold so long as she remains single. The court held that the contingent estate in the wife did not prevent the operation of the Rule in Shelley's Case; and therefore, the statute could not apply.

[8] Starnes v. Hill, 112 N.C. 1, 22, 16 S.E. 1011, 1017 (1893) (dictum).

[9] The Bank of Pilot Mountain v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942). *Accord,* Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941); Paul v. Paul, 199 N.C. 522, 154 S.E. 825 (1930); Jones v. Ragsdale, 141 N.C. 200, 53 S.E. 842 (1906). A fee tail estate is converted into a fee simple by N.C. GEN. STAT. § 41-1 (1950).

[10] Ellis v. Barnes, 231 N.C. 543, 57 S.E.2d 722 (1950), where *G* reserved a life estate in himself, then to *A* for life, and at his death to issue surviving; and if *A* die without issue, then to the heirs of *G*. See also Thompson v. Batts, 168 N.C. 333, 84 S.E. 347 (1915).

[11] Graves v. Barrett, 126 N.C. 267, 35 S.E. 539 (1900), where *G* made a deed to the heirs of *A*.

[12] Smith v. Brisson, 90 N.C. 284 (1884), where *G* deeded land to *A* and the heirs of his body, but if *A* die without such heirs, then to the heirs of *B*. See Lide v. Wells, 190 N.C. 37, 128 S.E. 477 (1925), where there was an intervening twenty year trust.

[13] Massengill v. Abell, 192 N.C. 240, 134 S.E. 641 (1926). Compare Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940).

[14] N.C. GEN. STAT. § 41-6 (1950).

[15] For a discussion of the problems involved in this construction, see Bolich, *Some Common Problems Incident to Drafting Dispositive Provisions of Donative Instruments,* 35 N.C.L. REV. 17 (1956).

[16] Therrell v. Clanton, 210 N.C. 391, 186 S.E. 483 (1936), where *G* conveyed to her daughter and her husband for their joint lives and for life to the survivor of them, remainder to the daughter's children of such marriage, and if no children, then in fee simple to the "right heirs" of the grantor. The court, looking at the entire instrument and to the fact that the daughter was the only child of the grantor, found that the words "right heirs" in this context showed a contrary intention and that "heirs" was not to mean "children." This case is discussed in 15 N.C.L. REV. 59 (1936). In Ellis v. Barnes, 231 N.C. 543, 57 S.E.2d 722 (1950), *G* reserved a life estate in

In general the court has consistently said that technical construction of a deed or will must not be allowed to defeat the intention of the grantor or testator;[17] however, there have been occasional departures.[18]

In the principal case[19] the court relying both on the rationale of the *Starnes* case and the limitation contained within the statute, held that the limitation to the heirs of the testator after a prior defeasible fee was not affected by G.S. § 41-6. The reasons were: (1) if the purpose of the statute is to avoid the common law construction that there are no heirs of a living person, then there is no necessity for application of the statute since the heirs are determined upon the death of the testator, the testator necessarily being dead when the will becomes operative; (2) the testator had no children when the will was executed, and to place a limited construction on the word "heirs" would deliberately do violence to the intention of the testator.

The effect of G.S. § 41-6 on the doctrine of worthier title[20] has been the subject of much discussion.[21] This doctrine which has its roots in the feudal land law[22] is applicable to both inter vivos conveyances and testamentary dispositions.[23] The question of applica-

herself, then to *A* for life and at *A's* death to issue surviving, and if no issue survive *A*, then to the heirs of *G*. The court held that the statute applied making "heirs" of *G* read "children" of *G*.

[17] In Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940), the court stated: "The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument." *Id.* at 179, 10 S.E.2d at 663.

[18] In Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941) where *G* conveyed to *W* and her heirs by *H*, the court held this to be a fee tail special now converted into a fee simple by G.S. § 41-1. Justices Clarkson and Seawell dissented contending that the court must look to the intent of the grantor as drawn from the entire instrument rather than to technical construction. The dissent felt that the clear intention of the grantor was to have "heirs" construed as "children."

[19] 257 N.C. 658, 127 S.E.2d 234 (1962).

[20] The doctrine of worthier title is stated by Simes as follows: "[I]f an owner of land in fee simple sought to convey a life estate or an estate tail, with a remainder to the grantor's heirs, the remainder was void and the grantor had a reversion in fee simple. A like rule obtained also as to wills, so that, if a testator devised to an heir the precise interest in land which the latter would have inherited in the absence of the provision in the will, the heir was regarded as acquiring the land by descent and not by purchase." 1 SIMES, FUTURE INTERESTS § 144 (1936).

[21] See, *e.g.*, Note, 14 N.C.L. REV. 90 (1935).

[22] See 1 SIMES, FUTURE INTERESTS § 144 (1936).

[23] *Ibid.*

tion of the statute to the doctrine in North Carolina first arose as to an inter vivos conveyance in the case of *Thompson v. Batts*,[24] where the grantor deeded land to his wife for life, the tract to descend to the issue of such marriage in fee simple, and on failure of issue, the tract was to go to the heirs of the grantor. The court held G.S. § 41-6 applicable, thereby making the ultimate limitation read "to the children" of the grantor. Thus, the doctrine of worthier title was inapplicable because a class of remaindermen was created which might have differed from the heirs general.[25]

The *Thompson* case was qualified somewhat in *Therrell v. Clanton*[26] where the ultimate limitation was to the "right heirs" of the grantor after a preceding life estate in the daughter who was the only child of the grantor. The court found from viewing the whole instrument that "right heirs" in the limitation over could not be taken to mean "children" since a life estate had already been granted to the only child of the grantor. Although the court did not mention G.S. § 41-6, it is thought that the court probably considered the issue and found that the limitation in the statute "unless a contrary intention appear" took the point out of consideration because the court felt it clear that the grantor could not have intended to mean "children."[27] It seems, therefore, that the doctrine of worthier title as it pertains to inter vivos conveyances is destroyed by the statute except where the court can find that the grantor intended that the limitation should not be construed as "children."

The doctrine of worthier title applies to testamentary dispositions whenever a devise gives to the heir the same nature and quality of estate as he would have taken by descent.[28] Thus if a devisor devised lands to an heir who would have taken the same estate and in the same manner by descent had the devisor died intestate, the doctrine of worthier title would strike the words of gift from the will and the heir would take by descent. The effect of G.S. § 41-6 on the testamentary branch of the doctrine of worthier title has never been

[24] 168 N.C. 333, 84 S.E. 347 (1915).

[25] In the inter vivos branch of the doctrine of worthier title, heirs must be used in the general, technical sense. Thus, when any remainderman or class of remaindermen is indicated which might differ from the heirs general, the doctrine is not applicable and the land will not pass by descent but by purchase. 1 SIMES, FUTURE INTERESTS §147 (1936).

[26] 210 N.C. 391, 186 S.E. 483 (1936).

[27] See Note, 15 N.C.L. REV. 59, 61 (1936).

[28] For a discussion of the operation of this branch of the doctrine, see 46 HARV. L. REV. 993 (1933).

expressly declared by our court. It has been suggested that the statute would not apply in the case of a will where the limitation was to the heirs of the testator because when the will takes effect, the testator is dead and his children could not be classified as "the heirs of a living person."[29] Although the principal case was not expressly concerned with the doctrine of worthier title, the court did state that "the statute applies only when the conveyance is to the heirs of a living person. Here the contingent and ultimate beneficiaries could not be the heirs of a living person because nothing was given prior to the death of . . . the devisor."[30] Even if the court had applied G.S. § 41-6 to the limitation to the heirs of the testator, the statute would not necessarily prevent the operation of the doctrine of worthier title if the "children" had taken the same nature and quality of estate as they would have taken by descent.[31]

Although G.S. § 41-6 does not seem to affect the doctrine of worthier title as it applies to a testamentary disposition, the status of the doctrine is nevertheless in doubt. At common law there were two areas in which the doctrine was significant: (1) the doctrine of ancestral property, and (2) the rights of creditors of the estate of the testator.[32] The doctrine of ancestral property applied on failure of lineal descendants or issue of the person last seized, and the inheritance descended to the collateral relations of the first purchaser.[32] Estates taken by purchase[33] descended to the nearest relatives irrespective of the blood line, since the acquisition of the land by purchase was deemed to break the line of descent.[34]

In North Carolina both the doctrine of ancestral property and the doctrine of worthier title were incorporated into the fourth canon of descent.[35] The joinder of these two doctrines was necessary

[29] Note, 14 N.C.L. REV. 90, 94 (1935).
[30] 257 N.C. 658, 660, 127 S.E.2d 234, 236 (1962).
[31] See Note, 14 N.C.L. REV. 90, 94 (1935).
[32] ATKINSON, WILLS § 6, at 39 (2d ed. 1953).
[33] "Purchase" as used here means acquiring the property other than by inheritance. Property is taken by purchase through the acts of the parties rather than through inheritance which is by operation of law.
[34] ATKINSON, WILLS § 21, at 77 (2d ed. 1953).
[35] N.C. GEN. STAT. § 29-1(4) (1950) provides: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." Notice that worthier title is embodied and extended in the

because it was considered important that the estates be deemed to pass by descent rather than purchase so that the ancestral lines were preserved. Thus where the testatrix devised property "to her heirs at law" which property had come to the testatrix by descent, and in this particular case the "heirs at law" would have taken the same nature and quality of estate under the will which they would have taken by descent if the testatrix had died intestate, the devise was void, and the heirs took by descent. Since the testatrix had no lineal heirs, the fourth canon of descents applied; therefore, the collateral heirs of the blood line of the testatrix's father took.[36] The new Intestate Succession Act,[37] which became effective on July 1, 1960, abolished the canons of descent, including the fourth canon of descent. Ancestral property also was abolished;[38] and since, as pointed out above, the doctrine of worthier title was incorporated into this canon, it might be argued that the doctrine is no longer applicable in North Carolina. On the other hand, it could be argued that the doctrine is a part of the common law of this state and would be unaffected by the abolition of this canon.

The second significant area of the doctrine of worthier title pertains to the rights of the creditors of the estate of the testator.[39] At common law land which passed by descent was subject to pay the debts of the estate before land specifically devised; consequently, land devised to an "heir" of the devisor would be deemed to have passed by descent under the doctrine of worthier title, and the "heir's" land would be subject to pay debts before land devised to persons who were not heirs.[40] It is thought that this application of the doctrine, as it pertains to creditors of the estate, has been abolished by statute in North Carolina. G.S. § 28-95[41] provides that children and issue

statute "where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced . . . would have been the heir or one of the heirs . . . ."

[36] Yelverton v. Yelverton, 192 N.C. 614, 135 S.E. 632 (1926).

[37] N.C. GEN. STAT. §§ 29-1 to -30 (Supp. 1961).

[38] N.C. GEN. STAT. § 29-3 (Supp. 1961).

[39] See Note, 14 N.C.L. REV. 90, 95 (1935).

[40] 1 SIMES, FUTURE INTERESTS § 144, at 260 (1936).

[41] N.C. GEN. STAT. § 28-95 (1950) provides: "If upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution."

shall be regarded as specific devises and contribution may be enforced against other devisees.

It is submitted that for all practical purposes the testamentary branch of the doctrine of worthier title has been abrogated in North Carolina since both areas of the law where the doctrine was significant have apparently vanished.

TOM D. EFIRD