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# Notes and Comments

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# NOTES AND COMMENTS

**Bankruptcy—Factors to Consider in Choosing Between Chapter X and Chapter XI for the Adjustment of Unsecured Debts**

In *SEC v. American Trailer Rentals Co.*,[1] the debtor's affiliate company sold 5,866 automobile trailers to hundreds of purchasers throughout the western states. The debtor then leased the trailers from the owners and placed them with service station operators who acted as agents for the debtor in renting the trailers to the public. When operating expenses far exceeded the return on the rentals, the debtor petitioned[2] for an arrangement under chapter XI of the Bankruptcy Act to adjust its obligations to trailer owners and other unsecured creditors. Chapter XI permits such adjustment by the settlement, satisfaction or extension of time of payment of the debtor's *unsecured* debts "upon any terms"[3] proposed by the debtor.[4] The debtor's proposed plan offered stock in a new trailer rental corporation formed by persons interested in the debtor in exchange for cancellation of the lease obligations and other unsecured claims.[5] Some of the shares were to be given debtor's stockholders. There

[1] 379 U.S. 594 (1965).

[2] "If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication." Bankruptcy Act § 322, 52 Stat. 907 (1938), 11 U.S.C. § 722 (1958).

[3] Bankruptcy Act § 356, 52 Stat. 910 (1938), 11 U.S.C. § 756 (1958).

[4] One of the key distinctions between chapter X and chapter XI is that the debtor proposes the plan in the latter proceeding, Bankruptcy Act § 306, 52 Stat. 906 (1938), 11 U.S.C. § 706 (1958), while either the debtor, trustee, creditor or stockholder may propose the plan in the former. Bankruptcy Act § 169, 52 Stat. 890 (1938), 11 U.S.C. § 569 (1958).

[5] At the time of filing the chapter XI petition, the debtor stated its total assets at $685,608 and total liabilities at $1,367,890. The plan proposed an exchange of stock in Capitol Leasing Corporation, a new company, in satisfaction of all but $55,557 of the outstanding claims. These latter were to be paid in cash in full. The stock exchange, giving trailer owners some 866,000 shares in Capitol Leasing, would eliminate all claims of trailer owners against the debtor, and in addition would vest title to the trailers in Capitol Leasing Corporation. The debtor was to transfer its old rental system to Capitol in exchange for 107,000 shares in the new corporation. These shares in turn were to be issued to debtor's stockholders. Officers and directors of debtor and certain trade and general creditors would receive about 104,000 shares in satisfaction of their claims. The debtor estimated that former trailer owners would hold 79.4% of the stock of the new corporation after the exchange. Other creditors excluding shareholders would hold 2.5%, creditor-shareholders, 6%, and shareholders of the debtor, 12.1%. Brief for Appellee, pp. 6-8.

was evidence that relevant data concerning the stock were not made known to the creditors in securing their acceptances of the plan[6] and that corporate funds of the debtor had been misappropriated.[7] It was undisputed that the company had never operated profitably, or that widespread debts were being adjusted. The SEC intervened,[8] seeking to dismiss the chapter XI proceeding, on the ground that it should have been brought under chapter X of the Bankruptcy Act and therefore chapter XI was not available. Chapter X, unlike chapter XI, permits the alteration or modification of rights of stockholders and of creditors generally, either *secured* or *unsecured*.[9] The SEC alleged that (1) more than a mere arrangement with unsecured creditors was in effect proposed and required, (2) public "investor creditors"[10] required a disinterested trustee to protect their interests, (3) rights of investor creditors could be adjusted only in a chapter X proceeding, and (4) the creditors should receive full compensation for their claims absent fresh contribution from debtor's stockholders who were to retain their equity under the plan.[11] The district court denied the SEC's motion to dismiss, and

[6] The S.E.C. alleges that at the time debtor was sending letters to the trailer owners urging them to exchange their trailers for shares of Capitol Leasing stock, the president of Capitol and the officers and directors of the debtor were withdrawing their trailers from debtor and were leasing them to another concern engaged in a similar business, and were also urging their relatives to do the same. This was not disclosed to the trailer owners, nor were trailer owners furnished information of Capitol's financial condition or its management. Trailer owners were not told of pending proceedings involving other stock fraud charges against Capitol.

*In re* American Trailer Rentals Co., 325 F.2d 47, 52 (10th Cir. 1963).

[7] The misappropriation, totaling at least $141,000, was attributed "almost completely" to a deceased member of debtor's original management group. 379 U.S. at 600.

[8] The authority to intervene in a chapter XI proceeding is given the SEC by Bankruptcy Act § 328, 66 Stat. 432 (1952), 11 U.S.C. § 728 (1958).

[9] Bankruptcy Act § 216, 52 Stat. 895 (1938), 11 U.S.C. § 616 (1958).

[10] The Court and the SEC refer to this class of creditors as "investment creditors" presumably because their interests are predicated on investment contracts. For purposes of this note it is presumed that the rental agreements between the debtor and the trailer owners were investment contracts. The question was not adjudicated in the principal case. For a discussion of investment contracts, see note 44 *infra*.

[11] This argument is an application of the "fair and equitable" test requiring that in any plan of corporate reorganization, unsecured creditors are entitled to priority over stockholders to the full extent of their claims, and that any plan is inadmissible which retains stockholders' interests without first fairly compensating unsecured creditors. The Court in the principal case outlines the history of the "fair and equitable" test before concluding that a 1952 amendment, Bankruptcy Act § 366, 66 Stat. 433

the court of appeals affirmed.[12] On certiorari to the Supreme Court, the decision was reversed. The Court reasoned that the widespread nature of the debts coupled with a "quite major" adjustment were facts alone sufficient to bar a chapter XI proceeding where, as here, there was a demonstrated need for a trustee's investigation, for which chapter XI does not provide.[13] Moreover, the plan amounted to a chapter X reorganization rather than a chapter XI arrangement. However, contrary to the SEC's argument, the Court refused to hold that a chapter X proceeding is mandatory in *all* cases involving rights of public investor creditors.

The statutes do not enumerate,[14] nor have the courts announced,[15] clear distinctions determinative in every case of a proper selection between chapter X and chapter XI for the adjustment of *unsecured* debts. The essential factor is not the size of the debtor, but the needs of the debtor to be served.[16] A chapter X proceeding is likely to be required where misdeeds of management have caused the debacle,[17] or where a need for new management is more pressing

(1952), 11 U.S.C. § 766 (1958), makes it inapplicable in a chapter XI proceeding. 379 U.S. at 611-612.

[12] *In re* American Trailer Rentals Co., 325 F.2d 47 (10th Cir. 1963).

[13] In so holding [to dismiss], we indicate no opinion as to whether or not a Chapter X reorganization would be appropriate in this case . . . . We merely hold that all issues relevant to the possible financial rehabilitation of respondent must here be determined within the confines of a Chapter X, rather than a Chapter XI proceeding.

379 U.S. at 620 n.20.

[14] While we do not doubt that in general . . . . the two chapters were specifically devised to afford different procedures . . . . we find in neither chapter any definition or classification which would enable us to say that a corporation is small or large, its security holders few or many, or that its securities are "held by the public," so as to place the corporation exclusively within the jurisdiction of the court under one chapter rather than the other.

SEC v. United States Realty & Improvement Co., 310 U.S. 434, 447 (1940).

[15] The surface alignment of the six leading decisions becomes plastic in the hands of those who, by a process of selective emphasis that disregards context, find statements in the opinions and facts in the records that seemingly can be moulded to fit either side of rival arguments in a particular case.

*In re* Herold Radio & Electronics Corp., 191 F. Supp. 780, 784 (S.D.N.Y. 1961), citing General Stores Corp. v. Shlensky, 350 U.S. 462 (1956), SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940), *In re* Lea Fabrics, Inc., 272 F.2d 769 (3rd Cir. 1959), *vacated,* SEC v. Lea Fabrics, Inc., 363 U.S. 417 (1960), SEC v. Liberty Baking Corp., 240 F.2d 511 (2d Cir.), *cert. denied,* 353 U.S. 930 (1957), SEC v. Wilcox-Gay Corp., 231 F.2d 859 (6th Cir. 1956), and *In re* Transvision, Inc., 217 F.2d 243 (2d Cir. 1954), *cert. denied,* 348 U.S. 952 (1955).

[16] General Stores Corp. v. Shlensky, 350 U.S. 462 (1956).

[17] *Ibid.*

than readjustment of the debt.[18] If the rights of interested parties will be prejudiced in the absence of a thorough investigation under chapter X, the chapter XI proceeding should be dismissed.[19] A chapter XI proceeding is improper where a plan of arrangement is contrary to the best interests of creditors.[20] There is no absolute rule that debtors with widespread, publicly-held securities must get relief under chapter X; but generally when such corporations propose to adjust widely scattered public debts, a chapter X proceeding is appropriate to assure judicial control over the formulation of a plan, SEC participation, and employment of a disinterested trustee to better serve the public and private interests concerned.[21] Even where public debt is not being adjusted, and the plan deals only with trade creditors, the need for a trustee's investigation of the management or a complicated debt structure may require a chapter X proceeding.[22] In determining to leave adjustments to chapter XI, courts have been influenced by the fact that the debtor has already undergone a thorough investigation,[23] that only the claims of trade and commercial creditors, rather than public investors, are involved,[24] or that trade creditors have stated their unwillingness to deal with a chapter X trustee while they will cooperate with current management.[25] Numerous other considerations may be pertinent under the facts of a particular case.[26] Underlying any choice between chapter X and chapter XI is "the basic assumption of Chapter X . . . that the investing public dissociated from control or active participation

[18] *In re* Transvision, Inc., 217 F.2d 243 (2d Cir. 1954), *cert. denied,* 348 U.S. 952 (1955).

[19] *Ibid.*

[20] In one case, the debtor's income exceeded expenses, exclusive of bond obligations, by $35,000 annually. The plan of arrangement would have paid one per cent a year for ten years on the bonded indebtedness of $1,200,000. Thus the payments would be only $12,000 annually and debtor would retain $23,000 above all expenses. The court said, with regard to this surplus: "Some explanation is surely due the creditors before they should be obliged to accept 10 cents on the dollar for their principal and nothing at all for their long overdue interest." Mecca Temple of Ancient Arabic Order of Nobles of Mystic Shrine v. Darrock, 142 F.2d 869, 871 (2d Cir. 1944).

[21] SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940).

[22] General Stores Corp. v. Shlensky, 350 U.S. 462 (1956).

[23] SEC v. Wilcox-Gay Corp., 231 F.2d 859 (6th Cir. 1956).

[24] *In re* Transvision, Inc., 217 F.2d 243 (2d Cir. 1954), *cert. denied,* 348 U.S. 952 (1955).

[25] Grayson-Robinson Stores, Inc. v. SEC, 320 F.2d 940 (2d Cir. 1963).

[26] For a discussion of some of the considerations that may be decisive, see *In re* Herold Radio & Electronics Corp., 191 F. Supp. 780, 786-87 (S.D.N.Y. 1961).

in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems."[27]

The decision to dismiss the chapter XI proceeding in the instant case accords with prior case law. Misappropriation of assets and the probable need for new management would require an independent trustee's examination under the principles stated. That the interests of public investors could best be protected in a chapter X proceeding was demonstrated by their acceptance of the chapter XI plan although pertinent data were withheld from them. Moreover, the debt was publicly held—not in the hands of trade creditors. There also was doubt that the plan was in the best interest[28] of trailer owners since they would be surrendering a tangible asset—title to their trailers—for an intangible interest in a corporation whose management had already failed in a similar endeavor.

The Court's alternative statement that the plan was in fact a "complete corporate reorganization" requiring a chapter X proceeding sheds little light on a vague area of bankruptcy law. May the debtor's stockholders and creditors be given securities in a *new* corporation as part of an arrangement? Under the statutes, a chapter XI proceeding may modify only the rights of *unsecured* creditors, upon any terms.[29] A leading authority notes: "No provision of the Act permits an arrangement proposed under Chapter XI to deal with the rights of secured creditors or with the rights of stockholders."[30] In the early district court case of *In re Credit Service, Inc.*,[31] the question was whether chapter XI permitted claims of unsecured creditors to be satisfied by exchange for stock in the debtor's subsidiary corporation, where the liabilities of the debtor-parent exceeded its assets. Since there was no stockholders' equity in the debtor to be protected, the court said, the proceeding

[27] SEC v. United States Realty & Improvement Co., 310 U.S. 434, 448-49 n.6 (1940).

[28] A plan proposed in chapter XI must be in the "best interests" of creditors before it can be confirmed by the court. Bankruptcy Act § 366, 66 Stat. 433 (1952), 11 U.S.C. § 766 (1958). It has been said that "best interests" refers to a comparison between what the creditors would receive under an arrangement, and what they would receive under liquidation of the assets. *In re* Village Men's Shops, Inc., 186 F. Supp. 125 (S.D. Ind. 1960).

[29] Bankruptcy Act §§ 306, 356, 52 Stat. 906, 910 (1938), 11 U.S.C. §§ 706, 756 (1958).

[30] 9 COLLIER, BANKRUPTCY, ¶ 8.01(3), at 155 (14th ed. 1964).

[31] 30 F. Supp. 878 (D.C. Md. 1940), *appeal dismissed per stipulation*, SEC v. Credit Service, Inc., 113 F.2d 940 (4th Cir. 1940).

could be under chapter XI. A year later the same court faced the situation where assets of the debtor exceeded liabilities, and the plan in chapter XI proposed the transfer of all debtor's assets to a new corporation in exchange for stock in the new corporation. The court said rights of debtor's stockholders were affected because they still had an equity in the debtor-parent; hence, the proceeding should be in chapter X.[32] In neither of these cases, as in the principal case, was it proposed that debtor's stockholders share in distribution of stock of a new or subsidiary corporation. The principal case does not note the distinction. It concludes only that the plan is a reorganization barred from Chapter XI because creditors' interests are being exchanged for stock in a *new* corporation—and this without regard to the nature of the insolvency.[33] Hence it appears that the Court has announced the rule that any plan including a provision for satisfaction of unsecured claims through exchange for stock in a new corporation is barred from chapter XI. Still to be answered by the Court is whether a chapter X proceeding is required where the debtor proposes to satisfy unsecured claims, not with stock in a new corporation, but in exchange for stock in a subsidiary corporation—the situation faced by the district court in *In re Credit Service, Inc.*[34] Apparently, such a plan would require a chapter X proceeding where the debtor's assets exceeded its liabilities,[35] while chapter XI would suffice where liabilities exceed assets.[36]

[32] *In re* May Oil Burner Corp., 38 F. Supp. 516 (D.C. Md. 1941).

[33] The Court gave only passing notice to participation by debtor's stockholders. It called the plan a reorganization because "the trailer owners are exchanging their entire interests, including a sale of their trailers, in exchange for stock in a new corporation, in which other creditors of respondent, including respondent's officers and directors, as well as respondent itself will have substantial interests." 379 U.S. at 615.

[34] 30 F. Supp. 878 (D.C. Md. 1940), *appeal dismissed per stipulation,* SEC v. Credit Service, Inc., 113 F.2d 940 (4th Cir. 1940).

[35] Where the debtor corporation has assets in excess of liabilities, its stockholders retain an equity in the corporation. To the extent that stock in a subsidiary corporation is exchanged for claims against the parent, the equitable interest of the parents' stockholders in the subsidiary corporation is diminished. Hence their interest is "affected" within the meaning of Bankruptcy Act § 107, 52 Stat. 884 (1938), 11 U.S.C. § 507 (1958), so that a proceeding in chapter XI would seem to be improper.

[36] Stockholders retain no equity where liabilities exceed assets. Hence they have no interest that could be affected in a chapter XI proceeding. An arrangement includes the modification of rights of unsecured creditors upon any terms for any consideration, Bankruptcy Act § 356, 52 Stat. 910 (1938), 11 U.S.C. § 756 (1958), and consideration includes "stock and certificates of beneficial interest therein." Bankruptcy Act § 306, 52 Stat. 906 (1938), 11 U.S.C. § 706 (1958). It would seem to follow, therefore,

A final question is whether, as the SEC argued,[37] every adjustment affecting the rights of public investor creditors should be in chapter X. Although the Court affirmed the use of chapter X as a general rule, the argument that it applies exclusively was rejected on the dual grounds that Congress had not so provided[38] and that the Court in *General Stores Corp. v. Shlensky*[39] had decided that such adjustment could be effected within narrow limits in a chapter XI proceeding. The reliance on *Shlensky* clearly seems wrong, as that case dealt not with investor creditors but with trade and commercial creditors.[40] And, as the Court in the principal case acknowledges, it was the character of the debtor, not the nature of the debt, which controlled in the *Shlensky* case.[41] In the light of the purposes of the Securities Act of 1933[42] it is submitted that Congress should give statutory sanction to the SEC argument requiring that chapter X be utilized whenever the rights of creditors, whose interests are predicated on the purchase of investment contracts required to be registered with the SEC,[43] are involved. A preliminary determination would be required to ascertain whether the security involved is in fact an investment contract within the

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that stock in a subsidiary corporation could be given in satisfaction of creditors' claims in a chapter XI proceeding where the debtor was insolvent in the bankruptcy sense.

[37] Brief for Appellant, p. 16.

[38] "The short answer is that . . . . Congress has drawn no such absolute line of demarcation between Chapters X and XI." 379 U.S. at 613.

[39] 350 U.S. 462 (1956).

[40] "It [the debtor] proposed an arrangement of its general unsecured trade and commercial debts, none of which is evidenced by any publicly held security. Petitioner has indeed no debts of any nature by way of bonds, mortgage certificates, notes, debentures, or obligations of like character, publicly held." *Id.* at 463.

[41] 379 U.S. at 614.

[42] The preamble to the act reads: "An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74. The Court in a leading case said: "The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953). See generally 1 Loss, SECURITIES REGULATION 118-128 (2d ed. 1961).

[43] Section 5 of the Securities Act of 1933, 48 Stat. 77, 15 U.S.C. § 77e (1958), requires that a registration statement of securities covered under the act be filed with the SEC. Section 7, 48 Stat. 78, 15 U.S.C. § 77f (1958), sets forth the information required, and under § 8(b), 54 Stat. 857, 15 U.S.C. § 77h(b) (1958), the statement can be determined ineffective if the necessary information is not provided. Section 9(a), 72 Stat. 945, 15 U.S.C. § 77i(a) (1958), permits judicial review of commission orders.

purview of the statute.[44] Such a rule would assure SEC intervention and independent trustee's investigation for the protection of the investing public just as these safeguards are provided today for the protection of stockholders and secured creditors whose rights are materially and adversely affected in an adjustment proceeding.

DOUGLAS G. EISELE

**Corporations—Disposition of Corporate Assets**

Where does the control by shareholders over the disposition of corporate assets begin and the control by management end? Most statutes give the shareholder the right of control when the sale constitutes "substantially all" the corporate assets. But the confusion engendered over the definition of "substantially all" gives no precise answer to the question. The final determination of consent rights is one of policy—of balancing the shareholder's interest in protecting his investment against the director's interest in having efficient centralized management.[1]

[44] The determination of whether a particular agreement is an investment contract is often difficult to make. The term "investment contract" has been defined judicially in these terms:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

SEC v. W. J. Howey Co., 328 U.S. 293, 298-99 (1946). A district court has said that "the elements that make up an 'investment contract' within the statutory definition, as distinguished from some other form of security, are not amenable to characterization in absolute terms. Consideration must be given to all surrounding and collateral arrangements." SEC v. Los Angeles Trust Deed & Mortgage Exchange, 186 F. Supp. 830, 888 (S.D. Calif. 1960), *modified and aff'd*, 285 F.2d 162 (9th Cir. 1961). For illustrative cases, see Farrell v. United States, 321 F.2d 409 (9th Cir. 1963); Roe v. United States, 287 F.2d 435 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961); Woodward v. Wright, 266 F.2d 108 (10th Cir. 1959); Penfield Co. v. SEC, 143 F.2d 746 (9th Cir. 1944).

[1] The primary purpose of this note is to discuss the concepts behind one of the fundamental corporate changes: the sale, lease, or exchange of all or substantially all the corporate assets. The focal point will be on the right of shareholders to approve such dispositions. For related works on this subject, see Note, 38 CALIF. L. REV. 913 (1950); Note, 9 SYRACUSE L. REV. 269 (1958); Note, 67 YALE L.J. 1288 (1958). This note will not discuss the procedure for obtaining shareholder consent, the value of consideration received, or fraudulent transfers of assets. For such discussion, see Note, 58 COLUM. L. REV. 251 (1958). The other fundamental changes of consolidation and merger are not discussed. For a comparison of these

At common law, the sale of all the assets of a prosperous, going concern required unanimous shareholder consent.[2] This doctrine was based on a theory of an implied contract between the shareholders to pursue the business for which the corporation was chartered. Since a disposition of the assets would destroy the corporate purpose, the sale could not be consumated without complete mutual cancellation by the shareholders of their contract.[3] The doctrine also found support in a public policy against corporate suicides.[4] When the corporation was insolvent, the unanimous approval rule was relaxed to permit the directors[5] or a majority of shareholders[6] the right to approve a sale of all the assets. Because of the restriction on the alienation of assets and because a dissenting shareholder could demand an exorbitant price for his concurring vote,[7] the common law rules are supplanted in all states except Arizona[8] by statutes that reduce the shareholder vote requirement[9] when all[10]

subjects with sale of assets, see BALLENTINE, CORPORATIONS § 280 (rev. ed. 1946) [hereinafter cited as BALLANTINE].

[2] See, *e.g.*, Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921); Tillis v. Brown, 154 Ala. 403, 45 So. 589 (1908); People v. Ballard, 134 N.Y. 269, 32 N.E. 54 (1892). See generally Note, 94 U. PA. L. REV. 412 (1946).

[3] Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264, 47 N.W. 797 (1891). See generally BALLANTINE § 281; 6A FLETCHER, PRIVATE CORPORATIONS § 2950 (perm. ed. rev. repl. 1950) [hereinafter cited as FLETCHER].

[4] See People v. Ballard, 134 N.Y. 269, 32 N.E. 54 (1892). For a criticism of the rule requiring unanimous shareholder approval, see Warren, *Voluntary Transfers of Corporate Undertakings,* 30 HARV. L. REV. 335 (1916).

[5] Beardstown Pearl Button Co. v. Oswald, 130 Ill. App. 290 (1906).

[6] See, *e.g.*, Butler v. New Keystone Copper Co., 10 Del. Ch. 371, 93 Atl. 380 (1915); Oskaloosa Sav. Bank v. Mahaska County State Bank, 205 Iowa 1351, 219 N.W. 530 (1928) (the rights of shareholders to have the business continue becomes subordinate to creditors' rights when the corporation is insolvent).

[7] In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910).

[8] See ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶¶ 2.01, 2.02 (1960, Supp. 1964).

[9] See, *e.g.*, DEL. CODE ANN. tit. 8, § 271 (Supp. 1964) (majority of shares entitled to vote); MICH. STAT. ANN. § 21.57 (1963) (majority of shares outstanding); W.VA. CODE § 3076 (1962) (sixty per cent of the voting power); N.Y. BUS. CORP. LAW § 909 (two-thirds of shares entitled to vote); N.C. GEN. STAT. § 55-112 (1965) (two-thirds of shares outstanding); MO. REV. STAT. ANN. § 351.400 (1952) (three-fourths of shares entitled to vote); S.D. CODE § 11.0709 (1939) (three-fourths of shares outstanding); TEX. BUS. CORP. ACT art. 5.10 (Supp. 1964) (four-fifths of shares outstanding). (The statutes are cited in the order of increasing size of vote requirement.)

[10] See, *e.g.*, DEL. CODE ANN. tit. 8, § 271 (Supp. 1964) (refers to all assets sold). In Fisk v. Toys & Novelties Publishing Co., 259 Ill. App. 368 (1930), the court construed a statute referring to all the assets to include

or substantially all[11] the corporate assets are sold. In addition, thirty-five jurisdictions offer the dissenting shareholder the protection of having his stock judicially appraised and purchased by the corporation when all or substantially all the assets are sold.[12]

Because the disposition does not affect the shareholder's interest or investment, consent statutes do not apply to sales made by nonprofit corporations,[13] and most jurisdictions do not require consent if the corporation is insolvent.[14] The right of shareholders to approve leases,[15] mortgages,[16] and pledges[17] of substantially all assets

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the sale of nearly all the assets terminating the business of the corporation.

[11] See, *e.g.*, N.Y. BUS. CORP. LAW § 909(a); N.C. GEN. STAT. § 55-112(b) (1965).

[12] See ABA-ALI MODEL BUS. CORP. ACT ANN. § 73, ¶¶ 2.01, 2.02 (1960, Supp. 1964). In the absence of statute, some courts will grant appraisal rights to dissenting shareholders. See Tanner v. Lindell Ry., 180 Mo. 1, 25-26, 79 S.W. 155, 161 (1904). *But see* Heilbrunn v. Sun Chem. Corp., 38 Del. Ch. 321, 150 A.2d 755 (1959). In the absence of fraud or illegality, some statutes make appraisal the exclusive remedy available to dissenting shareholders. See, *e.g.*, N.Y. BUS. CORP. LAW § 806. Where fraud or illegality occurs, the shareholder may seek other remedies in equity. See Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 Atl. 183 (1931); Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 106 N.E.2d 848 (1952) (rescinding fraudulent sale). If the statute is silent as to the exclusiveness of appraisal as a remedy, courts will generally reach this result. See, *e.g.*, Wick v. Youngstown Sheet & Tube Co., 46 Ohio App. 253, 188 N.E. 514 (1932). See generally Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931); Skoler, *Some Observations on the Scope of Appraisal Statutes*, 13 BUS. LAW. 240 (1958); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964); Note, 58 COLUM. L. REV. 251 (1958); Note, 72 HARV. L. REV. 1132 (1959). For a criticism of the use of appraisal when assets are sold, see Manning, *The Shareholder's Appraisal Remedy*, 72 YALE L.J. 223, 254-57 (1962).

[13] See, *e.g.*, Chamber of Commerce v. Barton, 195 Ark. 274, 112 S.W.2d 519 (1937); Knapp v. Supreme Commandery, U.O.G.C., 121 Tenn. 212, 118 S.W. 390 (1908).

[14] See, *e.g.*, Mills v. Tiffany's, Inc., 123 Conn. 631, 198 Atl. 185 (1938) (sale by insolvent corporation outside statute, unless business continued by another corporation); Petition of Avard, 5 Misc. 2d 817, 144 N.Y.S.2d 204 (Sup. Ct. 1955) (sale by insolvent corporation outside the statute). See also N.C. GEN. STAT. § 55-112(b) (1) (1965), which provides that the directors may sell without shareholder approval if the corporation is "in a failing condition." *But see* Michigan Wolverine Student Co-Operative, Inc. v. Wm. Goodyear & Co., 314 Mich. 590, 22 N.W.2d 884 (1946) (dictum that insolvency is not an exception under Michigan statute); In the Matter of MacDonald, 205 App. Div. 579, 199 N.Y. Supp. 873 (1923) (dictum that the sale of assets by insolvent corporation requires shareholder approval).

[15] A lease of assets, not made in the regular course of business of the corporation, requires shareholder consent. See, *e.g.*, Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 200 Cal. App. 2d 322, 19 Cal. Reptr. 208 (1962) (lease of gold mine requiring shareholder approval). See also N.C. GEN. STAT. § 55-112(b)(3) (1965). If the lease of assets is made in the regular course of business, shareholder consent is not required.

varies among jurisdictions. Either by statute in twenty jurisdictions[18] or by judicial construction in nearly all states,[19] a sale of all or substantially all assets made in the usual and regular course of the corporate business does not require shareholder approval.[20]

Of the exceptions that limit the application of consent statutes, regular course of business is the most important and troublesome. Before the question of whether the sale is substantial can be raised, it must be determined that the sale is outside the regular course of the corporate business.[21] The purpose of the regular-course-of-

See, *e.g.*, Sante Fe Hills Golf & Country Club v. Safehi Realty Co., 349 S.W.2d 27 (Mo. 1961); Janoff v. Sheepshead Towers, Inc., 22 App. Div. 2d 950, 256 N.Y.S.2d 45 (1964) (dictum); Keating v. Coleman, 214 App. Div. 668, 213 N.Y. Supp. 213 (1925). See generally 13 FLETCHER § 5791 (1961).

[16] The trend in current statutes is to allow the board of directors to mortgage all property without shareholder approval, unless the charter provides otherwise. See, *e.g.*, N.Y. BUS. CORP. LAW § 911; N.C. GEN. STAT. § 55-112(a) (1965). Thirteen jurisdictions still require shareholder consent for mortgages. See ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶ 2.02 (1960, Supp. 1964). See also McDonald v. First Nat'l Bank, 70 F.2d 69 (1st Cir. 1934) (mortgage of all assets requires shareholder approval); Commerce Trust Co. v. Chandler, 284 Fed. 737 (1st Cir. 1922). Of these thirteen, eight subject mortgages to the regular course of business exception. See, *e.g.*, CONN. GEN. STAT. § 33-372 (1962).

[17] Pledges are usually subject to the same statutory provisions as mortgages. See note 16 *supra*.

[18] ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶¶ 2.01, 2.02 (1960, Supp. 1964). See, *e.g.*, N.Y. BUS. CORP. LAW § 909(a). Like New York, most statutes refer to the usual and regular course of business. Compare this approach to N.C. GEN. STAT. 55-112(b) (1965), which rejects the general "usual and regular" course of business exception. The statute sets out three specific situations where the sale of assets does not require shareholder approval. They are (1) sales made by a corporation in a "failing condition," (2) sales made by a corporation incorporated for the purpose of liquidation, (3) sales made in furtherance of the business of the corporation. See generally ROBINSON, NORTH CAROLINA CORPORATE LAW AND PRACTICE § 196 (1964).

[19] See, *e.g.*, Thayer v. Valley Bank, 35 Ariz. 238, 276 Pac. 526 (1929); Jeppi v. Brockman Holding Co., 34 Cal. 2d 11, 206 P.2d 847 (1949); Bradford v. Sunset Land & Water Co., 30 Cal. App. 87, 157 Pac. 20 (1916); Pollack v. Adwood Corp., 321 Mich. 93, 32 N.W.2d 62 (1948); Tuttle v. Junior Bldg. Corp., 227 N.C. 146, 41 S.E.2d 365 (1947); Painter v. Brainard-Cedar Realty Co., 29 Ohio App. 123, 163 N.E. 57 (1928); Van Buren v. Highway Ranch, Inc., 46 Wash. 2d 582, 283 P.2d 132 (1955); Gottschalk v. Avalon Realty Corp., 249 Wis. 78, 23 N.W.2d 606 (1946).

[20] To determine if the sale is in the regular course of business, "the test applied by courts is not the amount involved, but the nature of the transaction, whether the sale is in the regular course of the business of the corporation and in furtherance of the express objects of its existence, or something outside of the normal and regular course of business." In the Matter of Miglietta, 287 N.Y. 246, 254, 39 N.E.2d 224, 228 (1942).

[21] This is not always the case. Several New York decisions seem to rely solely on the regular course of business test set forth in In the Matter

business exception is to facilitate easy transfers by companies whose stock in trade consists of tangible assets.[22] For example, a company organized for and engaged in the sale of real estate[23] or in the liquidation of assets[24] need not obtain shareholder approval for the sale of its assets. The exception enables a corporation to sell its assets without shareholder approval if the sale is in furtherance of the corporate business.[25] However, if the corporation disposes of part of its franchise so as to divest the corporation of one of the powers conferred by its charter, it is not a sale in the regular course of business.[26]

In applying this exception to a sale, a court must first identify the selling corporation's regular course of business. Two approaches have been developed for making such a determination: one based solely upon the language of the corporate charter,[27] and the other upon the history and actual operations of the enterprise.[28] Given

of Miglietta, *supra* note 20, to determine shareholders' rights. These cases seem to grant consent rights if the sale is outside the regular course of business without regard for the effects of the sale on the ability of the corporation to carry on its operations. See In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953), *aff'd mem.*, 306 N.Y. 967, 120 N.E.2d 228 (1954).

[22] See Thayer v. Valley Bank, 35 Ariz. 238, 276 Pac. 526 (1929).

[23] See, *e.g.*, Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957), 67 YALE L.J. 1288 (1958); In the Matter of Rosenshein, 16 App. Div. 2d 537, 229 N.Y.S.2d 14 (1962); Tuttle v. Junior Bldg. Corp., 227 N.C. 146, 41 S.E.2d 365 (1947). *But see* Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932) (consent required if real estate corporation sells its sole asset); Borea v. Locust Court Apartments, Inc., 234 App. Div. 450, 255 N.Y. Supp. 215 (1932).

[24] See, *e.g.*, Jeppi v. Brochman Holding Co., 34 Cal. 2d 11, 206 P.2d 847 (1949); Roehner v. Gracie Manor, Inc., 6 N.Y.2d 280, 160 N.E.2d 519, 189 N.Y.S.2d 644 (1959); In the Matter of Miglietta, 289 N.Y. 246, 39 N.E.2d 224 (1942). See also N.C. GEN. STAT. § 55-112(b)(2) (1965).

[25] See Murphy v. Washington American League Base Ball Club, Inc., 293 F.2d 522 (D.C. Cir. 1961); Petition of Hake, 285 App. Div. 316, 136 N.Y.S.2d 817 (1955); Petition of Avard, 5 Misc. 2d 817, 144 N.Y.S.2d 204 (Sup. Ct. 1955).

[26] In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910).

[27] See *In re* United Gas Corp., 58 F. Supp. 501 (D. Del. 1944); Sewell v. East Cape May Beach Co., 50 N.J. Eq. 717, 25 Atl. 929 (Ch. 1893); Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957); In the Matter of Rosenshein, 16 App. Div. 2d 537, 229 N.Y.S.2d 14 (1962); Wattley v. National Drug Stores Corp., 122 Misc. 533, 204 N.Y. Supp. 254 (Sup. Ct.) (dictum), *aff'd*, 208 App. Div. 836, 204 N.Y. Supp. 956 (1929).

[28] See Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106 (S.D.N.Y. 1951); In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953), *aff'd mem.*, 306 N.Y. 967, 120 N.E.2d 228 (1954); Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928). The new N.Y. BUS. CORP. LAW § 909(a) now follows this approach, overruling the decision of Eisen v. Post, *supra* note 27. For a case interpreting this pro-

the predominance of multipurpose charters[29] and broad powers granted corporations under statute,[30] the charter approach is an inaccurate means of ascertaining the business of the corporation.[31] On the other hand, the actual-operations approach affords the shareholder realistic protection because his investment is based not on what the charter says the corporation may do, but on what the corporation actually does. And, assuming the shareholder's investment is based on actual operations, a sale held to be in the regular course of business within the charter provisions could substantially change his investment without granting him adequate protection.

When the corporation contemplates a continued existence, the sale of all or substantially all the assets in the regular course of business should necessarily be under the control of the board of directors, as a part of their duty to carry on the corporate business. But the exception should not be used to evade shareholder consent and appraisal rights if the financially sound corporation anticipates eventual liquidation. Unfortunately, some courts have often ignored the ultimate purpose of the sale, and have only looked to the present effect of the sale upon the shareholder's interests.[32]

Once the sale is considered outside the regular course of business, it is necessary to decide if the particular sale involves substantially all the assets. The problem arises in determining the meaning of "substantially all."[33] An examination of the common law rules and subsequent statutory history indicates that the purpose of most consent statutes is to protect the shareholder from

vision of the statute, see Boyer v. Legal Estates, Inc., 2 CHH CORP. LAW GUIDE ¶ 10935 (152 N.Y.L.J. 15, 1964).

[29] See, *e.g.*, DEL. CODE ANN. tit. 8, §§ 101-02, 121-22 (1953, Supp. 1964).

[30] See, *e.g.*, statutory sections cited in note 29 *supra*.

[31] As said by Lord Wrenbury in Cotman v. Brougham, [1918] A.C. 514, 523, the function of the charter is "not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms." See BALLANTINE § 82.

[32] See Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957) (sale of the corporation's only asset virtually ending corporate existence held to be in regular course of business). *But see* Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932) (sale by real estate corporation of its only asset requires shareholder consent). See generally ISRAELS, CORPORATE PRACTICE 286 (1963).

[33] It should be noted that most of the litigation concerning this question involves appraisal rights granted to the dissenting shareholder. Most consent and appraisal statutes have identical requirements that the sale must meet before shareholder's rights are granted. *Compare* N.Y. BUS. CORP. LAW § 909(a) *with* N.Y. BUS. CORP. LAW § 910(a)(1)(B).

fundamental change, or more specifically, to protect the shareholder from the destruction of the means to accomplish the purposes or objects for which the corporation was incorporated and actually performs.[34] Obviously, a sale of all the assets would destroy the corporate business. The same result could be reached if less than all the assets are sold. The words "substantially all" seem designed to cover such situations. For example, in *Stiles v. Aluminum Products Co.*,[35] the manufacturer of aluminum and stainless steel cooking utensils sold its plant, machinery, and goodwill for 1,406,570 dollars. The corporation retained a realty company, accounts receivables, securities, and an old car, all valued at 760,622.69 dollars. The court held that the sale was of substantially all the assets under the applicable Illinois statute.[36] Though the sale amounted to only 64.7 per cent of the total assets and could not literally be considered substantially all, the sale did destroy what was ostensibly the corporation's business; therefore, the sale had the effect of a sale of all the assets.[37]

In contrast, New York seems to have broadened the ambit of the shareholder's rights. Under the former Stock Corporation Law,[38] the shareholder was afforded protection where the assets sold were an "integral part thereof essential to the conduct of the business of the corporation."[39] For example, a sale of part of the assets and franchise, no matter how small, was considered to be the sale of an integral part of the corporate business even if the sale did not destroy the ability of the corporation to continue operations.[40] Also,

[34] See 2 FLETCHER § 546 (1954).

[35] 338 Ill. App. 48, 86 N.E.2d 887 (1949).

[36] ILL. REV. STAT. ch. 32, § 157.73 (1954) (appraisal statute).

[37] For cases reaching the same conclusion, see Fisk v. Toys & Novelties Publishing Co., 259 Ill. App. 368 (1930); Prince George's Country Club v. Edward R. Carr, Inc., 235 Md. 591, 202 A.2d 354 (1964). *Cf.* Philadelphia Nat'l Bank v. B. S. F. Co., 199 A.2d 557 (Del. Ch.), *rev'd on other grounds*, 204 A.2d 746 (Del. 1964). *But see* Krell v. Krell Piano Co., 23 Ohio N.P. (N.S.) 193, *aff'd*, 14 Ohio App. 74 (1921). For cases concluding the sale was less than substantially all, see Klopot v. Northrup, 131 Conn. 14, 37 A.2d 700 (1944); Frankel v. Tremont Norman Motors Corp., 21 Misc. 2d 20, 193 N.Y.S.2d 722 (Sup. Ct. 1959), *aff'd*, 10 App. Div. 2d 680, 197 N.Y.S.2d 576 (1960), *aff'd*, 8 N.Y.2d 901, 168 N.E.2d 823, 204 N.Y.S.2d 146 (1960); Fontaine v. Brown Country Motors Co., 251 Wis. 433, 29 N.W.2d 744 (1937).

[38] N.Y. STOCK CORP. LAW § 20.

[39] *Ibid.* See Petitions of McKay, 19 App. Div. 2d 815, 243 N.Y.S.2d 591 (1963) (sale of assets accounting for seven percent of gross revenues held to be within § 20); In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953) (sale of one-fourth assets held to be within § 20).

[40] See In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910);

if the disposition affected the shareholder's investment, protection was granted regardless of the size of the sale.[41] The new Business Corporation Law has replaced the integral concept and relies solely on the words "all or substantially all."[42] This change would appear to drastically limit the protection formerly bestowed the shareholder, though some commentators think not.[43]

The use of broad consent statutes, similar to the Stock Corporation Law, affords the shareholder more protection because such statutes do not limit protection to an implied quantity such as substantially all. But there are certain inherent practical disadvantages to the use of a broad consent statute. The board of directors are often unable to predict when or when not to call for a shareholder vote.[44] Because of the diffusion of shareholders throughout the country and the necessity for fast transfers, a shareholder vote cannot always be called to remedy the uncertainty. Until a judicial determination is made, neither the directors nor the purchaser know if the sale is a valid transaction. To avoid this predicament, it is suggested that a single standard, as implied in *Stiles,* be adopted. Because it would be easy to determine if a sale prevents the corporation from carrying out its business,[45] the directors would be able to predict the need for a shareholder vote; shareholder litigation, caused by uncertainty as to how far courts will go, would be reduced;[46] and the purchaser would be protected from having the

Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928). It is questionable whether a sale including franchise affects the corporation's operations any more than a sale without the franchise. See Manning, *supra* note 12.

[41] See In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953) (distribution to shareholders of stock of buying corporation); Borea v. Locust Court Apartments, 234 App. Div. 450, 255 N.Y. Supp. 215 (1932); In the Matter of Drosnes, 187 App. Div. 425, 175 N.Y. Supp. 628 (1919).

[42] N.Y. BUS. CORP. LAW § 909(a).

[43] Comment, 11 BUF. L. REV. 615, 649 (1962).

[44] Manning, *supra* note 12, at 255 n.55.

[45] If the corporation is multipurpose and the sale involves one segment of the multipurpose, some confusion may arise as to the rights of shareholders under N.C. GEN. STAT. § 55-112(b)(3) (1965), which refers only to *"the* business in which the corporation was organized to engage . . . ." (Emphasis added.) See ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 199 (1964). Under most statutes, the problem of the multipurpose corporation would be covered because they refer to the *"usual"* business of the corporation. See, *e.g.,* N.Y. BUS. CORP. LAW § 909(a).

[46] It is interesting to note that most litigation in the area of consent rights has arisen under the N.Y. STOCK CORP. LAW § 20 (1954), which is a very broad statute.

sale declared invalid. The adoption of such an arbitrary limitation on consent rights may seem to sacrifice the shareholder's interests for the goals of uniformity and predictability, but it is suggested that the shareholder sacrifices his interests when he delegates to the directors the duty to carry out the corporate purposes.[47] Any decision to sell assets that does not destroy the ability of the directors to carry on the corporate business should necessarily be within the business discretion of the directors, absent fraud,[48] and such a decision should not be subject to approval because the shareholder dislikes it or suffers by it.

If a sale of all or substantially all the assets is made without the required consent, the shareholder may bring an action to rescind[49] or enjoin[50] the sale, or his sole remedy may be appraisal, depending on the law of his jurisdiction.[51] Because the consent statutes are for the benefit of the shareholder,[52] only he has the right to attack the sale made without consent.[53] If the sale is attacked, it is considered voidable rather than void;[54] therefore, subsequent approval can rectify the situation. Furthermore, the shareholder's attack may be barred by the defense of estoppel[55] and laches.[56]

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[47] See 5 FLETCHER § 2097 (1952).

[48] See, *e.g.*, Robinson v. Pittsburgh Oil Ref. Corp., 14 Del. Ch. 193, 126 Atl. 46 (1924). See generally Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

[49] See Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928).

[50] See Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932).

[51] See note 12 *supra*.

[52] See, *e.g.*, Foss v. Riordan, 84 N.Y.S.2d 224 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 982, 79 N.Y.S.2d 515 (1948).

[53] See, *e.g.*, *ibid.* Those who may not assert the invalidity of a sale because of the failure of consent are: (1) Creditors of the corporation. See, *e.g.*, Long Constr. Co. v. Empire Drive-In Theatres, Inc., 208 Cal. App. 2d 726, 25 Cal. Rptr. 509 (1962); *but see In re* James, Inc., 30 F.2d 555 (2d Cir. 1929) (trust receipts covering automobiles). (2) Receivers in insolvency for the corporation. See, *e.g.*, Manhattan Hardware Co. v. Phalen, 128 Pa. 110, 18 Atl. 428 (1889); *but see* Glover v. Ehrlich, 62 Misc. 245, 114 N.Y. Supp. 992 (Sup. Ct. 1909). (3) Trustee in bankruptcy or assignee of creditors of the corporation. See, *e.g.*, United States v. Jones, 229 F.2d 84 (10th Cir. 1955); *but see* Shapiro v. People's Co-Op. Soc., 125 Misc. 839, 211 N.Y. Supp. 468 (App. Div. 1929). (4) The corporation. See, *e.g.*, Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106 (S.D.N.Y. 1951); *but see In re* Paul De Laney Co., 26 F.2d 961 (2d Cir. 1928) (recognized the possibility).

[54] See, *e.g.*, Long Constr. Co. v. Empire Drive-In Theatres, Inc., 208 Cal. App. 2d 726, 25 Cal. Rptr. 509 (1962); Schneider v. Greater M. & S. Circuit, Inc., 144 Misc. 534, 259 N.Y. Supp. 319 (Sup. Ct. 1932).

[55] Armstrong Manors v. Burris, 193 Cal. App. 2d 447, 14 Cal. Rptr.

Fortunately, litigation involving failure to obtain the necessary consent is rare. As a matter of policy, many corporations ask for shareholder approval when an important disposition is made, regardless of whether consent is required. Obviously, this policy is desirable, and the fact that consent is granted does not affect a subsequent claim for appraisal rights. Unfortunately, shareholder approval is not always possible. In such situations, the directors should have the power to make necessary dispositions, unless the sale, not in the furtherance of the actual business of the corporation, destroys the corporation's ability to continue its present operations. Such an approach reaches the desired practical balance between protecting the shareholder's investment and having an efficient centralized management.

RICHARD G. ELLIOTT, JR.

**Credit Transactions—Mortgages and Deeds of Trust—Application of Statute of Limitations to Promise of Assuming Grantee**

Debtors gave notes secured by deeds of trust on certain realty. Seven years thereafter, during which period no payments of either principal or interest had been made on the obligations, the equity of redemption in the land was conveyed to grantee who thereupon executed an instrument acknowledging that the land was encumbered by the deeds of trust, that no payments had been made to date, and further that he agreed "to pay the full sum of both notes . . . together with all accrued interest thereon."[1] This instrument was attached to the notes and deeds of trust found among the valuable papers of the creditor after his death. Five years after the conveyance to the grantee, there still having been no payments on the obligations, the defendant trustee attempted to exercise the power of sale contained in the first of the deeds of trust, and this action was instituted by debtors and their grantee to restrain such foreclosure. The North Carolina Supreme Court, in *Lowe v. Jackson*,[2] affirmed the trial court's judgment granting the injunction. The grantee's

338 (1961); Garvin v. Pythian Mut. Industrial Ass'n, 263 S.W.2d 114 (Ky. 1953) (lapse of fourteen years).

[56] Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 200 Cal. App. 2d 322, 19 Cal. Rptr. 208 (1962); Elster v. American Airlines, Inc., 36 Del. Ch. 213, 128 A.2d 801 (1957).

[1] Lowe v. Jackson, 263 N.C. 634, 635, 140 S.E.2d 1, 2 (1965).

[2] 263 N.C. 634, 140 S.E.2d 1 (1965).

agreement to assume the indebtedness was not a novation of the notes and deeds of trust; thus, exercise of the power of sale was barred by the ten year statute of limitations, there having been no payment to interrupt the running of the period.

The case presents the interesting and perplexing question: should the promise of assumption made by a grantee of encumbered lands be sufficient to start anew the running of limitations against him and the security in his hands, even though the circumstances fall short of a novation? The answer, in the vast majority of jurisdictions which have considered the question, has been in the affirmative.[3] As put by Professor Osborne:

> Although a grantee should not be able to bind the mortgagor by any acts which have the effect of extending or reviving the statute of limitations, he clearly should be able to and can bind himself and the property he acquired. If he is an assuming grantee his act will affect his personal liability as well as the time within which the mortgage can be enforced against the property. Indeed, the very act of assuming or of taking subject to the mortgage is one which starts a new period of limitations so far as rights against the grantee [are concerned].[4]

While the indicated result seems generally accepted, there has been disparity in the rationale given by the courts. Some have held that the assuming grantee is estopped to assert the lapse of that portion of the period which occurred prior to the conveyance.[5] The better-reasoned cases, however, have relied upon the principle that the liability of the grantee arises from an agreement independent of that between the grantor and the creditor, and that limitations obviously cannot begin to run on liability before that liability is created.[6]

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[3] *E.g.*, Holmes v. Bennett, 14 Ariz. 298, 127 Pac. 753 (1912); Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107 (1900); Simon v. McMeel, 167 La. 243, 119 So. 35 (1928); Tuthill v. Stoehr, 163 Ore. 461, 98 P.2d 8 (1940); Holcroft v. Wheatley, 112 S.W.2d 298 (Tex. Civ. App. 1937). For the proposition that assumption revives a mortgage already barred, see Davis v. Davis, 19 Cal. App. 797, 127 Pac. 1051 (Dist. Ct. App. 1912). See generally Annot., 142 A.L.R. 615 (1943); Annot., 18 A.L.R. 1027 (1922); 11 CALIF. L. REV. 429 (1923); 51 COLUM. L. REV. 1030 (1951).

[4] OSBORNE, MORTGAGES § 299, at 859 (1951).

[5] Hunt v. Lyndonville Sav. Bank & Trust Co., 103 F.2d 852 (8th Cir. 1939); Davis v. Davis, 19 Cal. App. 797, 127 Pac. 1051 (Dist. Ct. App. 1912).

[6] Holmes v. Bennett, 14 Ariz. 298, 127 Pac. 753 (1912); Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107 (1900); Schmucker v. Sibert, 18 Kan. 104 (1877).

In North Carolina, as in most other jurisdictions, the law in the fields of limitation and foreclosure is largely statutory.[7] Of primary concern in this state are sections 1-47(3)[8] and 45-21.12[9] of the General Statutes. The first of these provides that actions for foreclosure must be brought within ten years "after the forfeiture of the mortgage, or after the power of sale has become absolute, or . . . after the last payment on the same."[10] Since it was held for many years that foreclosure under a power of sale was not an "action" within the meaning of this statute,[11] section 45-21.12[12] was enacted providing that the right to exercise any power of sale is barred where a corresponding "action" would have been barred.

The court in the principal case first concluded that there was no novation of the mortgage contract. This had been determined by the trial court,[13] and no exception had been taken thereto by the defendant.[14] Quoting from Strong's *North Carolina Index*,[15] the court said: "A debt assumption agreement by the purchaser of the equity of redemption is not a novation of the mortgage note, there being no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt."[16] Then, applying the statutes discussed above, it was concluded that "the right to exercise any power of sale contained in a deed of trust is barred after ten years from the maturity of any note or notes secured thereby, *where no payments have been made thereon extending the statute.*"[17]

Thus, it appears that, as against an assuming grantee, the court

[7] The statutes vary as to what acts of the parties will lead to interruption of the period. *Compare* N.C. GEN. STAT. § 1-47(3) (1953) *with* 12 OKLA STAT. ANN. § 101 (1960) which starts the statute running over "when any part of principal or interest shall have been paid, or acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made. . . ."

[8] N.C. GEN. STAT. § 1-47(3) (1953).

[9] N.C. GEN. STAT. § 45-21.12 (1950).

[10] N.C. GEN. STAT. § 1-47(3) (1953).

[11] See Cone v. Hyatt, 132 N.C. 810, 44 S.E. 678 (1903); Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385 (1903). See also 17 N.C.L. REV. 448 (1939).

[12] N.C. GEN. STAT. § 45-21.12 (1950).

[13] 263 N.C. at 636, 140 S.E.2d at 2.

[14] *Ibid.*

[15] 3 STRONG, INDEX TO THE NORTH CAROLINA SUPREME COURT REPORTS, *Mortgages & Deeds of Trust* § 14 (1960).

[16] 263 N.C. at 636-37, 140 S.E.2d at 3.

[17] *Id.* at 637, 140 S.E.2d at 3. (Emphasis added.)

recognizes two methods whereby the bar of the statute may be extended beyond ten years from the date of maturity of the original obligation. First, it is implicit in the language of the *Lowe* decision quoted above,[18] as well as in that of section 1-47(3), that a payment on the obligation would have interrupted the statute.[19] Second, the statute would have run anew had there been a novation. In the instant litigation there had been no payments whatever; and it was obvious that the intentions and acts of the parties fell far short of a novation that would have discharged the grantor from the contract altogether. And since the case was apparently tried and appealed *solely* upon the theory of novation, it is difficult to find fault with the decision reached. But the language of the court seems to indicate that the two methods discussed are the *only* means whereby the statute may be interrupted in a mortgage-assumption case.[20] If this is true, then it is submitted that the *Lowe* opinion is open to serious question; for the North Carolina limitations statutes, when viewed as a whole, do not seem to require any such conclusion.

There appear to be at least two arguments based upon the statutes that could be successfully advanced in behalf of those in the position of this secured creditor. *First*: In section 1-26,[21] it is provided that a written acknowledgment of an obligation, made to the creditor[22] and signed by the person to be charged, will start the statutory period running over from the date of such acknowledgment. Clearly, had there been no conveyance in the principal case, and had this acknowledgment been made instead

[18] See text accompanying note 17 *supra.*

[19] See Harper v. Edwards, 115 N.C. 246, 20 S.E. 392 (1894), where it was held that payments by an assuming grantee on the obligation arrested the running of the statute. For the effect of such a payment upon the liability of the grantor, see the discussion in note *27 infra.*

[20] In its opinion, the court quotes the following language from Spain v. Hines, 214 N.C. 432, 434, 200 S.E. 25, 27 (1938): "The evidence . . . shows no payment *or other transaction* which would take the note out of the bar of the statute of limitations. . . ." 263 N.C. at 637, 140 S.E.2d at 3. (Emphasis added.) The court thus recognizes that there are "other transactions" which would interrupt the running of the statutory period, but it is not clear whether or not novation is the only "other transaction."

[21] N.C. GEN. STAT. § 1-26 (1953).

[22] The cases construing the statute have held that, in order to repel the statute, the promise or acknowledgment must be made to the creditor or his agent. See, *e.g.,* Hussey v. Kirkman, 95 N.C. 63 (1886). In the principal case, it is not made clear to whom the assumption promise was addressed, but the fact that the instrument was found among the papers of the deceased creditor, attached to the notes and deeds of trust, indicate strongly that the promise was in fact directed to him.

by the original debtor, the period would have been interrupted.[23] Equally clear is the fact that a *payment* on the obligation made by either the grantor[24] or grantee[25] would have had similar effect. "A payment of part of a debt resting upon a promise has the same effect in continuing or reviving it, as a new promise itself; and the very act is deemed a promise to pay the residue."[26] Part payment, then, is equivalent to a new promise to pay. And, if a *payment* by a grantee interrupts the statute because it is deemed equivalent to his *written promise to pay,* then it follows logically that his *actual* written promise should effect the same result. It must be remembered that, while the statute would be interrupted where the grantee made a payment, such payment would not work a novation —the grantor would remain a party to the obligation.[27] It seems that grantor could also remain a party where grantee made a promise instead of a payment. Thus, grantee's assumption ought to re-start the statute, notwithstanding the absence of novation.

*Second*: The same result may be reached by employing a slightly different approach. In a dictum in the *Lowe* opinion, the court, while analyzing the relationships among the parties after an assumption agreement, again quoted from Strong's *Index*[28] to the following effect:

> As between the mortgagor and his grantee assuming the debt, the mortgagor is a surety. But as between the mortgagor and mortgagee he remains primarily liable for the mortgage debt . . . even though the mortgagee . . . extends the time of payment without notice to the mortgagor.[29]

This is an accurate statement of the law as it existed in North Carolina for many years.[30] In 1961, however, this rule was changed

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[23] N.C. GEN. STAT. § 1-26 (1953).

[24] N.C. GEN. STAT. §§ 1-26, 1-47(3) (1953).

[25] See Harper v. Edwards, 115 N.C. 246, 20 S.E. 392 (1894).

[26] McDonald v. Dickson, 87 N.C. 404, 406 (1882) (a case not involving a mortgage assumption).

[27] Although the grantor would remain a party, he would not be bound by a revival of the statutory period occasioned by his grantee's acknowledgment or payment. N.C. GEN. STAT. § 1-27 (Supp. 1963). See generally Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

[28] 3 STRONG, *op. cit. supra* note 15, *Mortgages & Deeds of Trust* § 15, at 336.

[29] 263 N.C. at 637, 140 S.E.2d at 3.

[30] See Commercial Nat'l Bank v. Carson, 207 N.C. 495, 177 S.E. 335 (1934). See generally 13 N.C.L. REV. 337 (1935); 11 N.C.L. REV. 96 (1932).

materially by a statute[31] that puts the grantor in the position of a surety not only as to the assuming grantee, but as to the mortgagee as well. While this enactment has no direct application to the problem at hand, it does make the liability of the assuming grantee primary. By virtue of his assumption of the indebtedness, the grantee becomes the principal debtor, the grantor remaining on the obligation as surety. With this in mind, it seems that under section 1-26, the grantee is also the "party to be charged"[32] on the acknowledged obligation, and that his promise should therefore be one which would interrupt the running of the statute.

Reasoning either that the written promise of the grantee is, for the purposes of the statute of limitations, as effective as a payment by him, or that the grantee's act of assumption renders him the principal debtor so that his promise is an acknowledgment by the person to be charged, it becomes abundantly clear that the statutes permit interruption of the period as against an assuming grantee in three ways: (1) by part payment on the obligation or (2) by a written promise to assume it, both of which fall short of a novation, and (3) by a true novation agreement. It appears that the defendant in the principal case, instead of electing to ground his case entirely upon the theory of novation, might well have profited by urging upon the court arguments similar to the ones outlined. More importantly, however, it may be that the court in *Lowe* has established a precedent dangerous to future litigants.[33] It is therefore submitted

[31] N.C. GEN. STAT. § 45-45.1 (Supp. 1963). The provisions of the statute are summarized as follows:

> [W]here there is an assuming grantee an extension of time to him or his release by the secured creditor discharges the mortgagor or grantor, and a release of any of the security property by the creditor or the trustee acting for him releases the mortgagor or grantor to the extent of the value of the property released. When the property is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume it, the binding extension of time releases the mortgagor or grantor to the extent of the value of the property; and the release of any of the security property releases the mortgagor or grantor to the extent of the value of the property released.

Hanft, *Credit Transactions—Some Statutory Changes in 1961,* 40 N.C.L. REV. 82, 84 (1961).

[32] N.C. GEN. STAT. § 1-26 (1953).

[33] See note 20 *supra.* It bears repeating at this point that the court, in a case where the question is squarely and properly raised, may well find that an assumption agreement is one of the "other transactions" from which the statute will run anew. The statements of the court to date do not preclude such a result; and it could be reached without the necessity of overruling established precedent.

that while the conclusion in *Lowe* was apparently inescapable, its use as precedent should not be extended beyond cases identical to it in all essential elements.

HENRY STANCILL MANNING, JR.

**Criminal Law—Admissibility of Confessions**

Davis, a prison escapee, was captured by police, who requested and received permission of the warden of the state prison to keep him temporarily in their custody. They suspected him of a recent rape-murder. On Davis's being delivered to the city jail a notation was made upon the arrest sheet that he was not to be allowed to use the telephone and that no one was to be allowed to see him. Davis was held in the city jail for the next sixteen days. During that time, according to trial court findings, he was adequately fed, never threatened, and, though questioned daily, not questioned overbearingly.[1] On the sixteenth day of his detention, while he was being questioned alone by a police officer acquainted with him and his family, the officer made reference to a Bible held by Davis. Upon inquiry he learned that Davis had been reading from the Bible, but had not been praying because he did not know how. The police officer recited a short, innocuous prayer. A moment later, Davis confessed to the rape-murder.[2]

In December of 1959 Davis was convicted of the offense largely on the basis of his confession. As is the practice in North Carolina, determination of the "voluntariness"[3] of the confession was made by

[1] The facts as alleged by the prosecution and as alleged by defendant are in complete conflict. Davis contended the instruction on the arrest sheet was carried out; the state that it was ignored, which the trial court so held. The defendant alleged that incarceration in the city jail was improper since it was only an "over-night" jail and that prisoners held for more than a day or two were normally detained in the county jail, which had proper facilities for long detention; that rights under N.C. GEN. STAT. § 15-46 (Supp. 1963) had been violated because he had not been properly arraigned; that he had been inadequately fed (the evidence established that he was offered four sandwiches a day); that he was beaten and continually questioned. The trial court found no merit in any of these contentions.

[2] The federal district court, upon hearing for application of a writ of habeas corpus, found that the defendant requested that the officer pray for him. The state court record indicated that the idea of the prayer originated with the police officer. Davis v. North Carolina, 339 F.2d 770, 773 n.6 (4th Cir. 1964).

[3] The terminology "voluntary" and "involuntary" is uncertain of meaning but popular among the judiciary not to be used. See Kamisar, *What Is*

the trial judge.[4] An objection to the confession's admission was taken on the basis that it was involuntarily made. The North Carolina Supreme Court affirmed the trial court's determination that the confession was voluntary.[5] After denial of a petition for certiorari by the United States Supreme Court,[6] defendant sought a writ of habeas corpus in the federal district court.[7] Although the result of this writ has not been finally determined,[8] the Court of Appeals for the Fourth Circuit, in *Davis v. North Carolina,*[9] recently affirmed the district court's denial of the writ. This decision prompts this note.

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*an "Involuntary" Confession?* 17 RUTGERS L. REV. 728, 741-47 (1963). The true criterion is asserted by Professor Wigmore to be, "was the inducement sufficient, by possibility, to elicit an untrue confession." 3 WIGMORE, EVIDENCE § 824 (3d ed. 1940) [hereinafter cited as WIGMORE].

[4] North Carolina adheres to what is commonly called the "Massachusetts rule," *i.e.,* the trial judge determines the voluntariness of the confession in the absence of the jury after hearing all the evidence on that issue. If the confession is admitted by the judge, the jury then considers its probative value. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951). See generally STANSBURY, NORTH CAROLINA EVIDENCE § 187 (2d ed. 1963). The recent Supreme Court decision of Jackson v. Denno, 378 U.S. 368 (1964), expressly approved the Massachusetts rule while holding that any procedure in which the jury determined both voluntariness of the confession and guilt deprives the defendant of liberty without due process of law. See Note, 63 MICH. L. REV. 381 (1964). For a general discussion of the different procedures followed by trial courts in determining voluntariness, see 3 WIGMORE § 861.

[5] State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960), 39 N.C.L. REV. 337 (1961).

[6] Davis v. North Carolina, 365 U.S. 855 (1961).

[7] The writ of habeas corpus sought by Davis was denied after a hearing in which the district court reviewed the state court record. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961). On appeal the Court of Appeals of the Fourth Circuit reversed, holding that the state court's findings of fact were not acceptable in the habeas corpus court, and remanded for a full hearing as to the voluntariness of the confession. Davis v. North Carolina, 310 F.2d 904 (4th Cir. 1962). The district court in an evidentiary hearing made detailed findings of fact and concluded that the confession was voluntary. Davis v. North Carolina, 221 F. Supp. 494 (E.D.N.C. 1963).

[8] Docketed March 8, 1965, Current Term Miscellaneous Docket, No. 37, U.S. Supreme Court.

[9] 339 F.2d 770 (4th Cir. 1964). It is interesting to note that the Fourth Circuit sat en banc when it heard the first appeal from the district court. Chief Judge Sobeloff, who wrote the opinion of the majority, clearly indicated his dissatisfaction with the police tactics used in obtaining the confession. There was only one dissenter, Judge Haynesworth, the author of the majority opinion in the second decision by the court of appeals. In the second appearance before the court of appeals the arguments were originally heard by Judges Sobeloff, Bell, and Haynesworth. By *consent* of counsel the tape recording of the arguments was reheard by the court en banc, and, as a result, the court affirmed the conviction. Judges Sobeloff and Bell dissented.

A majority of the court of appeals, upon their own independent examination of the undisputed facts and the facts as found by the trial court,[10] agreed with the district court in finding the confession voluntary.[11] However, two of the five judges vigorously dissented and would have reversed on the ground that the confession was involuntary.[12] This difference of opinion is understandable when examined in light of Supreme Court decisions on this issue.

Historically a confession was involuntary if the methods employed could have so overborne a defendant's will as to result in the admission of a crime he had not committed, *i.e.*, when the confession was not deemed trustworthy.[13] But, with the Court's decision in *Ashcraft v. Tennessee*,[14] fourteenth amendment due process became a determinate of admissibility.[15] The Court since has all but abandoned the trustworthiness doctrine[16] and has been largely

[10] "[W]e are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both." Lisenba v. California, 314 U.S. 219, 237-38 (1941). The Supreme Court has also adopted a rule whereby it looks at "the totality of the circumstances that preceded the confessions." Fikes v. Alabama, 352 U.S. 191, 197 (1957); *accord*, Reck v. Pate, 367 U.S. 433 (1961). Although the two rules are contrary to one another the Court has never been bothered by this fact.

[11] The petitioner not only argued that the confession was coerced but also that there had been a denial of the right to counsel. If the argument of denial of counsel succeeds, under recent Court decisions the confession would automatically be excluded. Escobedo v. Illinois, 378 U.S. 478 (1964). For a discussion of the question of the right to counsel, see 43 N.C.L. REV. 187 (1964). The court of appeals distinguished the principal case from *Escobedo* on the basis of factual dissimilarity.

[12] "In dealing with the issue of voluntariness of the confession, the court entertains too narrow a concept of the scope of appellate review. It accepts as virtually unreviewable findings of fact what [sic] in reality are erroneous conclusions of law. Also it too readily defers to findings that are clearly erroneous." 339 F.2d at 783 (dissenting opinion).

[13] 3 WIGMORE § 822.

[14] 322 U.S. 143 (1944).

[15] *Id.* at 154.

[16] "To be sure, confessions cruelly extorted may be . . . untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration." Rogers v. Richmond, 365 U.S. 534, 541 (1961). See Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Ashcraft v. Tennessee, 322 U.S. 143 (1944). *But see* INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 152 (1962), who interpret the opinions (there being no majority opinion) in Culombe v. Connecticut, 367 U.S. 568 (1961), as a return by a majority of the Court to the voluntary-trustworthy test. Professor Kamisar concludes "that Justice Frankfurter's generous use of the 'voluntariness' terminology in *Culombe v. Connecticut* has thrown Inbau and Reid off course. Apparently, they

guided by two principal factors in determining voluntariness: (1) the personal characteristics of the defendant[17] and (2) the outside pressures applied to induce a confession.[18] The Court's inability to agree upon which of these factors shall weigh more heavily in determining admissibility has led to much of the disagreement among appellate judges on this issue.[19] An application of both of these factors to a particular factual situation has often been called the subjective test.[20] Characteristics such as age,[21] mentality,[22]

view the 'voluntariness' test as a *synonym* for the 'trustworthiness' or 'reliability' test." Kamisar, *supra* note 3, at 741-42.

[17] *E.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, 367 U.S. 433 (1961).

[18] *E.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961). *Cf.* Lynumn v. Illinois, 372 U.S. 528 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); all demonstrating the use of both factors, one weighing more heavily than the other.

[19] The Supreme Court handed down twenty-six decisions between 1945 and 1964 dealing directly with the question of whether a confession was coerced. Seven of the state court convictions were affirmed—all by divided Courts. Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Stein v. New York, 346 U.S. 156 (1953); Stroble v. California, 343 U.S. 181 (1952); Gallegos v. Nebraska, 342 U.S. 55 (1951). Of the nineteen reversals of state court convictions only three were unanimous. Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959). The remaining sixteen were by divided Courts. Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Johnson v. Pennsylvania, 340 U.S. 881 (1950); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945). Lyons v. Oklahoma, 322 U.S. 596 (1944), marked the final instance of the sole reliance on the trustworthiness test, and all of the above decisions have applied the due process provisions of the fourteenth amendment in determining voluntariness.

[20] See Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53 (1963); Comment, 31 U. CHI. L. REV. 313 (1964); 42 B.U.L. REV. 129 (1962); 18 RUTGERS L. REV. 209 (1963). Other writers on the subject divide the cases since 1944 into two "classes" but do not employ the terms "subjective" and "objective." See Kamisar, *supra* note 3; Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962).

[21] See Gallegos v. Colorado, 370 U.S. 49 (1962) (14 years old); Haley v. Ohio, 332 U.S. 596 (1948) (15 years old); *cf.* Reck v. Pate, 367 U.S. 433 (1961) (19 years old); Payne v. Arkansas, 356 U.S. 560 (1958) (19 years old); Lee v. Mississippi, 332 U.S. 742 (1948) (17 years old).

[22] See Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate,

race,[23] and prior police record[24] are weighed against such police pressures as deprivation of food and sleep,[25] protracted questioning,[26] incommunicado detention,[27] and threats[28] in order to determine "whether the defendant's will was overborne at the time he confessed."[29] The due process grounds for this test are the unreliability of the confession and the requirement of fairness in the criminal process.[30] On the other hand, a strict examination of the methods used by the police to elicit a confession, with less regard to the power of resistance of the defendant or the trustworthiness of the confession, is known as the objective test.[31] The due process basis here is solely the demand for an accusatorial rather than an inquisitorial procedure in the criminal processes, an unattainable goal so long as a "coerced" confession is admissible.[32] The purpose of this re-

367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957).

[23] See, *e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960); Payne v. Arkansas, 356 U.S. 560 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Harris v. South Carolina, 338 U.S. 68 (1949); Watts v. Indiana, 338 U.S. 49 (1949).

[24] See Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Spano v. New York, 360 U.S. 315 (1959).

[25] See Reck v. Pate, 367 U.S. 433 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[26] See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (16 hours); Blackburn v. Alabama, 361 U.S. 199 (1960) (8 hours); Spano v. New York, 360 U.S. 315 (1959) (8 hours); Crooker v. California, 357 U.S. 433 (1958) (16 hours); Leyra v. Denno, 347 U.S. 556 (1954) (23 hours).

[27] See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Leyra v. Denno, 347 U.S. 556 (1954); Harris v. South Carolina, 338 U.S. 68 (1949); Haley v. Ohio, 332 U.S. 596 (1948).

[28] Haynes v. Washington, 373 U.S. 503 (1963); Malinski v. New York, 324 U.S. 401 (1945).

[29] Lynumn v. Illinois, 372 U.S. 528, 534 (1963). "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." Stein v. New York, 346 U.S. 156, 185 (1953).

[30] Lisenba v. California, 314 U.S. 219, 236 (1941).

[31] See note 20 *supra*.

[32] Watts v. Indiana, 338 U.S. 49, 54 (1949). Thus the Court stated in Rogers v. Richmond, 365 U.S. 534, 543-44 (1961), that

> we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the

quirement is no longer as much the protection of individual rights themselves as it is the direct discipline of the police for using unfair (illegal) methods on the accused to secure a confession.[33]

It is currently questionable as to whether the subjective or the objective test should be applied.[34] The most recent decisions of the Court indicate that a majority of the Court favor the objective test.[35] But they are not willing to rely upon it exclusively.[36] Under this test the issue is no longer whether the police action overcame

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behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

[33] See Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959). See generally, Allen, *Due Process and State Criminal Procedures: Another Look,* NW. U.L. REV. 16, 23-25 (1953); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317, 343-44 (1954); Way, *supra* note 20, at 55-56.

[34] *Compare* INBAU & REID, *op. cit. supra* note 16, *with* Kamisar, *supra* note 3. There is currently a marked split between the Supreme Court Justices over the question of which theory is proper. Five of the Justices favor the objective approach (Black, Brennan, Douglas, Goldberg, Warren) and four favor the so called subjective test (Clark, Harlan, Stewart, White). See Haynes v. Washington, 373 U.S. 503 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962).

[35] See, *e.g.,* Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Rogers v. Richmond, 365 U.S. 534 (1961). The *Haynes* decision appears to be conclusive as to this point. There the petitioner was held incommunicado for sixteen hours and the opportunity to see anyone was conditioned upon his confessing. The particular facts made the case an ideal one for application of the subjective test. Yet only a passing note was made of petitioner's prior contacts with police. Failure of the majority to use the subjective approach in holding the police action violative of due process evoked a strong dissent by four Justices (per Clark, joined by Harlan, Stewart, and White). The objective test is the more rational of the two tests so long as the purpose behind the exclusion of a confession is the deterrence of the police action that brought about the inadmissible confession. The subjective and objective test are inconsistent in that under the former the police have everything to gain and nothing to lose in forcing a confession. Only by the adoption of the objective test is deterrence actually realized. For a more complete discussion, see Comment, 31 U. CHI. L. REV. 313 (1964).

[36] Professor Kamisar explains the continued reference to individual characteristics as follows:

> In short, much more often than not, if not always, when the Court considers the peculiar, individual characteristics of the person confessing, it is only applying a rule of *inadmissibility.* "Strong" personal characteristics rarely, if ever, "cure" forbidden police methods; but "weak" ones may invalidate what are generally permissible methods.

Kamisar, *supra* note 3, at 758.

the will of the defendant, but whether the police action was of such a nature that it *could* overcome defendant's will.

In *Davis* the district court and a majority of the court of appeals applied the subjective test in determining that the defendant's confession was voluntary. The dissent made a strict application of the objective test and would have excluded the confession. Thus, the opinions in *Davis* illustrate the divergent results possible under the two tests. Perhaps the recognition of two acceptable tests (perhaps better defined as theories or rationales), both flexible, gives courts a desirable freedom in judging each factual situation. That the two tests may dictate different results in a particular case, however, creates an unfortunate situation: when particular facts are open to interpretation by an appellate court and no clear physical or psychological pressure is evident, the admissibility of a confession is determined by the application of one of either of two *accepted* tests. *Davis* is such a case. The situation is further illustrated by the fact that a majority of the Supreme Court, should it grant certiorari, would probably apply the objective test and thus possibly exclude the confession.[37]

In resolving which test is to be applied, the appellate court must decide for itself what its goal is to be. If it is the condemnation of police methods that make the criminal procedure an inquisitorial rather than an accusatorial process, the objective test must be applied. But if the admissibility of the confession is to depend upon its truth or falsity, the subjective test applies.

Another aspect of *Davis* is the pre-confession prayer. Applying the trustworthiness doctrine to confessions made as a result of religious inducement, the common law courts held that such confessions were admissible.[38] It has been said of such spiritual exhortations that they

> seem, from the nature of religion, the most likely of all motives to produce truth. They are, therefore, of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth—because it is likely to lead to falsehood. If temporal

[37] See cases cited and text at note 34 *supra*.

[38] 3 WIGMORE § 840 and cases collected therein. "We can therefore conclude that, as a general rule, *confessions which result from spiritual exhortations or appeals to morality are admissible in evidence, whether induced by a person in authority or by someone else.*" KAUFMAN, ADMISSIBILITY OF CONFESSIONS 76 (1960). See generally 6 N.C.L. REV. 462 (1928).

> hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.[39]

Not only do some writers disagree with this approach,[40] but all courts have not been in accord.[41] Both the majority and the dissent in *Davis* contributed to the deterioration of this concept of trustworthiness. Although the majority held the above principle binding in *Davis*, they recognized that a confession arising from religious influence, whether prompted by a layman or a clergyman, may be subject to exclusion.[42] Though dealing with the prayer only secondarily (sensing in it a diversion), the dissent implied that such action by police has no place in an accusatorial system and that the "psuedo [*sic*] religious ministrations of a policeman" when a minis ter is readily available clearly cannot withstand the objective test.[43] The Supreme Court has never been faced with the issue. But use of religious adjurations to induce a confession would be hard pressed in withstanding the objective test as applied by the Court.

RALPH MALLOY MCKEITHEN

**Evidence—Expert Medical Testimony on Causation**

In *Lockwood v. McCaskill*[1] the North Carolina Supreme Court seemingly added another dimension to the *could*-or-*might* rule of admissibility of expert testimony as established in *Summerlin v. Carolina & Northwestern R.R.*[2] It has been an accepted rule in

[39] JOY, CONFESSIONS 51-52 (1842).

[40] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1963); Note, 1 WASHBURN L. REV. 415 (1961). The latter is the most complete analysis available regarding the clergyman and coerced confessions. *Cf.* REIK, THE COMPULSION TO CONFESS (1959).

[41] *E.g.*, Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); Denmark v. State, 95 Fla. 757, 116 So. 757 (1928); Johnson v. State, 107 Miss. 196, 65 So. 218 (1914). Forty-four of the states now have a statute making privileged any communications between a member of the clergy and a confessant. These statutes are collected in Professor Reese's article. Reese, *supra* note 40, at 61 n.22.

[42] 339 F.2d at 776.

[43] 339 F.2d at 784-85.

[1] 262 N.C. 663, 138 S.E.2d 541 (1964).

[2] 133 N.C. 550, 45 S.E. 898 (1903).

> It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car, and not by a fall from any other elevated place, or in any other way that might just as well have pro-

this state that it is the safer practice when an expert is to testify as to cause and effect that he must testify that in his opinion the occurrence *could* or *might* have caused the injury or death, and not that it *did* cause, or *was* the cause of the injury.[3] The rationale is that positive opinion testimony on the issue of causation is an opinion as to the ultimate fact upon which the jury must decide and is an invasion of the province of the jury.[4]

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duced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts.

*Id.* at 555-56, 45 S.E. at 900. A careful reading of this case would seem to indicate that it does not establish the *could*-or-*might* rule as firmly as later cases seem to indicate.

[3] In STANSBURY, NORTH CAROLINA EVIDENCE § 137 (2d ed. 1963) [hereinafter cited as STANSBURY], the author says:

> If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such a result. A question in the latter form has been thought to be objectionable as invading the province of the jury, although the real objection would seem to be that it unwarrantedly excludes the possibility of some other cause not referred to in the hypothetical statement. In any event the rule is a technical one, and in several cases the Court has avoided its application by drawing narrow distinctions or by finding that error in admission was harmless, but a rigid observance is the only safe course for counsel to follow.

*Id.* at 332-33. Although the rule is recognized by Stansbury and decisions subsequent to *Summerlin* [see, *e.g.*, Stathopoulos v. Shook, 251 N.C. 33, 110 S.E.2d 452 (1959) (recognized the rule but held improper response to be non-prejudicial error); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942) ("I know the accident did it" held error); J. M. Pace Mule Co. v. Seaboard Air Line Ry., 160 N.C. 252, 75 S.E. 994 (1912) ("mule was jammed up in the car" held error)], there are more exceptions than cases that follow the rule. See, *e.g.*, Hargett v. Jefferson Standard Life Ins. Co., 258 N.C. 10, 128 S.E.2d 26 (1962) ("death resulted from insect sting" was not considered by the court in relation to the rule); Stathopoulos v. Shook, *supra;* Dempster v. Fite, 203 N.C. 697, 167 S.E. 33 (1932) ("the accident caused the injury" held not prejudicial error); Martin v. P. H. Hanes Knitting Co., 189 N.C. 644, 127 S.E. 688 (1925) (testimony as to what caused death was not invasion of province of the jury); Lynch v. Rosemary Mfg. Co., 167 N.C. 98, 83 S.E. 6 (1914) ("was cause of death" not error); Parrish v. High Point, Randleman, Ashboro & Southern Ry., 146 N.C. 125, 59 S.E. 348 (1907) ("the kidney was dislocated by the fall" held proper response to a properly framed hypothetical question). *Parrish* indicates the major withdrawal from a strict application of the *Summerlin* rule, and it appears that except for Patrick v. Treadwell, *supra,* the rule gets no more than lip service from the court. The vitality of the rule appears to come from Stansbury's warning and the tendency of attorneys to take the safe approach. The court is loathe to hold a violation of the rule to be reversible error, yet it has not specifically overruled it.

[4] See Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942); J. M. Pace Mule Co. v. Seaboard Air Line Ry., 160 N.C. 252, 75 S.E. 994 (1912); Summerlin v. Carolina & Northwestern R.R., 133 N.C. 550, 45 S.E. 898 (1903); STANSBURY §§ 126, 135.

In *Lockwood* the plaintiff was injured in an automobile collision with the defendant. Negligence was admitted. There was no denial that the plaintiff sustained injuries to his hip and neck and had suffered severe headaches as a result. The controversy was whether the causation between the accident and an attack of amnesia three months after the accident was established. A jury verdict for 5,000 dollars was affirmed on appeal.[5]

The direct testimony on the matter of causation indicated that after the accident the plaintiff suffered various pains and severe headaches and that he worried about the effect of his absence from his service station, thereby losing sleep. During his absence, one of his employees damaged a customer's automobile, and the plaintiff had to pay 1,200 dollars damages. Several days after he returned to work, he had a severe headache which was followed by the amnesia. He was hospitalized and put under the care of a psychiatrist. It was the psychiatrist's expert testimony that was in question. After qualifying as an expert, he testified in response to a hypothetical question, which the court found acceptable, that, "it [the accident] may have had an influence on his condition."[6] He further testified:

> I feel like there were other contributing factors. . . . basically this man is an insecure person. He is a perfectionist. They worry more—a worrisome individual. The accident was a threat to his security, as well as the precipitating one is the loss of the automobile some several days before at which time his security was threatened and this is a factor. These are precipitating factors in an insecure indevidual.[7]

On cross-examination he stated:

> This employee's . . . wrecking a car, . . . that financial burden, yes, seems to be one of the factors. I thought that was the precipitating factor. He . . . had an insecure feeling which, of course, existed long before this accident. . . . If he had been a normal person, this collision which resulted in some back pain, would not have brought on amnesia.[8]

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[5] Several interesting issues are raised by this case. The issue of proximate cause is discussed in Byrd and Dobbs, *Torts, Survey of N.C. Case Law,* 43 N.C.L. REV. 906 (1965); Note, 43 N.C.L. REV. 1011 (1965). Sufficiency of the evidence to prove a prima facie case where expert medical testimony is involved is discussed in Annot., 135 A.L.R. 516 (1941). See also 20 AM. JUR. *Evidence* §§ 795, 862, 863 (1939).

[6] 262 N.C. at 666, 138 S.E.2d at 543.

[7] *Ibid.*

[8] *Ibid.*

On objection to the admission of the psychiatrist's testimony as being insufficient to support a judgment and therefore inadmissible,[9] the court said that the testimony *taken as a whole* indicated a *reasonable scientific probability* that the plaintiff's amnesia was produced as a direct result of the injuries suffered in the accident.[10] However, of the psychiatrist's testimony that "it may have had an influence on his condition,"[11] the court said: "This statement, considered alone, does not indicate a *reasonable scientific probability* that the attack of amnesia resulted from plaintiff's physical injuries. In this view of the matter the evidence is not admissible."[12] Herein lies the significance of the case as it relates to rules of admissibility of evidence.

It appears that the court is imposing rules of sufficiency on rules of admissibility.[13] It is submitted that the evidence was clearly admissible as expert testimony, and the proper consideration of the court should have been to support a finding of the fact of causation by the jury. Instead, the court seems to have created a new restriction on admissibility of expert testimony.[14]

## I. Sufficiency and Admissibility

The great weight of authority indicates that expert opinion evidence framed in terms of *could* or *might* is admissible.[15] North

[9] Part of the purpose of this note is to indicate that the fact that expert testimony is in itself insufficient to support a judgment for the proponent should not make that testimony inadmissible.

[10] 262 N.C. at 669-70, 138 S.E.2d at 546.

[11] *Id.* at 666, 138 S.E.2d at 543.

[12] *Id.* at 669, 138 S.E.2d at 546. (Emphasis added.)

[13] "The 'could' or 'might' as used by Stansbury refers to probability and not mere possibility." 262 N.C. at 668, 138 S.E.2d at 545. "If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish prima facie the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted, and, if admitted, should be stricken." *Id.* at 669, 138 S.E.2d at 545-46. These indicate that the court was talking in terms of admissibility, and was defining the *could*-or-*might* rule, which is clearly a rule of admissibility. See Stansbury § 137.

[14] This restriction may be stated that expert medical testimony must not only conform to the *could*-or-*might* rule to be admissible, but must also indicate a reasonable probability of the causal relationship. It is not known whether the judge may consider other prior testimony, or whether he must look only to the testimony given by the expert in making his ruling.

[15] *E.g.*, Birmingham Electric Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343 (1948) ("probably due"); Ketcham v. Thomas, 283 S.W.2d 642 (Mo. 1955) ("could"); Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314 (Mo.

Carolina has followed this rule in recent cases.[16] It does not seem that the question of reasonable probability has arisen in relation to admissibility. The general rule indicated by the court has been applied in relation to sufficiency.[17] Whether or not the evidence is in itself sufficient to support a finding of causation by the jury should not determine the admissibility of the evidence offered. The West Virginia court has held that it "was not error to permit . . . [a doctor] to testify as to the 'possible' causal relationship between the plaintiff's condition at the time he treated her and the alleged drinking of a coca-cola with particles of glass in it, but that evidence, standing alone, was not sufficient to establish such a relationship."[18]

It is necessary that there be some form of reasonable probability rule. It is accepted that there is some minimum standard of sufficiency when expert testimony is used, and this is defined in different

App. 1945) ("might be attributable"); Oklahoma Natural Gas Co. v. Kelly, 194 Okla. 646, 153 P.2d 1010 (1944) ("could"). See Annot., 66 A.L.R.2d 1082, 1118-26 (1959); Annot., 136 A.L.R. 965, 990-95 (1942). *But see* Brandt v. Mansfield Rapid Transit, Inc., 153 Ohio St. 429, 41 Ohio Op. 428, 92 N.E.2d 1 (1950); Annot., 66 A.L.R.2d 1082, 1124-26 (1959); Annot., 136 A.L.R. 965, 994-95 (1942). "It seems universally agreed that an expert medical opinion as to the cause of death, disease, or other physical condition is inadmissible if it is solely an unsupported conclusion of the witness, since however well qualified the witness is, and however scientific or abstruse the subject matter is, an opinion must have reference to the material facts of the case as reflected by the evidence." Annot., 66 A.L.R.2d 1082, 1086 (1959). It is doubtful that the court in *Lockwood* was considering the psychiatrist's testimony as being merely speculative when the ruling on admissibility was made.

[16] Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963) (evidence apparently admissible, but not sufficient to support a verdict); Bullin v. Moore, 256 N.C. 82, 122 S.E.2d 765 (1961) ("I think it is possible to attribute"); Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955) ("might or might not").

[17] See Annot., 135 A.L.R. 516 (1941). In *Lockwood* the court referred to this annotation and summarized its contents thusly:

> (1) It appears to be well settled that expert medical testimony that a given accident or injury *possibly* caused a subsequent impaired physical or mental condition—indicating mere possibility or chance of existence of the causal relation—is not sufficient to establish such relation. . . . (2) There is a division of opinion as to whether expert medical testimony of the probability of such causal relation is sufficient. . . . (3) There are a number of cases, however, which have held that expert medical testimony of *possibility* of such causal relation, in conjunction with non-expert testimony indicating that such relation exists (although not sufficient by itself to establish the relation), is sufficient to establish the causal relation.

262 N.C. at 666, 138 S.E.2d at 544. This would indicate that the court was aware that it was superimposing a rule of sufficiency upon the rule of admissibility, or at least that it was dealing with sufficiency.

[18] Rutherford v. Huntington Coca-Cola Bottling Co., 142 W.Va. 681, 692, 97 S.E.2d 803, 809 (1957).

jurisdictions in varying terms.[19] Apparently the great majority of courts hold that mere scientific possibility of an event causing a particular result is not sufficient to prove the prima facie fact of causation.[20] This note makes no attempt to indicate what is North Carolina's rule as to minimum sufficiency, but *Lockwood* has said that the statement, "it *may* have had an influence on his condition,"[21] is not sufficient. This is reasonable, but now the question arises whether or not the use of the words *could* or *might* would be sufficient. It is difficult to see any logical distinction between *may* and *could* or *might*. Assuming that the court does not try to make this distinction and gives the same effect to *could* or *might* as it does to *may*, North Carolina does have a somewhat ill-defined rule of minimum sufficiency where expert testimony on causation is offered. Why has this rule of sufficiency been superimposed on a rule of admissibility? For the sake of orderly procedure, the court should adopt an admissibility rule that will permit testimony in terms of *could* or *might* and restrict the consideration of reasonable probability for a motion of nonsuit. Nevertheless, the court has said that evidence may not be admissible unless it shows reasonable probability.

## II. Could-or-Might Rule and Reasonable Probability Requirement

The *Lockwood* decision brought into clear relief the anomaly that exists between the *could*-or-*might* rule and the reasonable probability requirement. Whether or not the reasonable probability rule be considered a rule of admissibility or one of sufficiency as it relates to causation,[22] it seems that what is required for admissibility may cast doubt on the *sufficiency* of that evidence.[23] In short, what

[19] See Annot., 135 A.L.R. 516 (1941); 20 Am. Jur. *Evidence* § 795 (1939); 32 C.J.S. *Evidence* § 569 (4) b (1964). Without this standard of minimum sufficiency, testimony that expresses any possibility at all would be allowed to go to the jury. For policy reasons there is this realm, usually described as mere scientific possibility, that will not support a verdict for the plaintiff. This writer makes no guess as to when "mere scientific possibility" becomes "reasonable probability." *Lockwood* does not appear to be very illuminating on this point, and it would be dangerous to depend on the facts of that case as a guide.

[20] See notes 17 & 19 *supra*.

[21] 262 N.C. at 666, 138 S.E.2d at 543. (Emphasis added.)

[22] See notes 17 & 19 *supra*.

[23] By requiring that expert testimony be couched in terms of *could* or *might* or *probable*, the evidence automatically becomes suspect under the

is required to get by the *could*-or-*might* rule certainly brings the testimony into the realm where it may be discredited by the reasonable probability rule. It is obvious from the history of the *could*-or-*might* rule that it was intended to restrict expert opinion testimony on causation to the possibility or probability of the event's occurring, and the expert's opinion is directed to the scientific possibility rather than his personal opinion of causation in fact.[24] Supposedly the expert is to go no further because an opinion as to causation in fact is an invasion of the province of the jury.[25] It is also clear that the rule has not had this effect, and doctors, or other experts, are allowed to give their opinion as to causation in fact in terms, less positive than *would* or *did,* that the attorneys think will not run afoul of the rule.[26] This has resulted in a situation where courts do allow opinion evidence as to the ultimate fact of causation; but because attorneys are afraid of the *could*-or-*might* rule, a witness is told to couch his testimony in less positive terms, even though in his expert opinion there is no doubt of the causal connection. It is submitted that the *could*-or-*might* rule has not had the effect of limiting the scope of expert testimony to the scientific probability of causation, but it does have the effect of preventing the jury from hearing the best testimony available, *i.e.,* the precise conviction of the expert as to the fact of causation.

If the policy that the North Carolina court wishes to follow is to prevent opinion testimony on causation in fact, a more adequate rule should be adopted than the *could*-or-*might* rule. If the court does not wish to prevent opinion testimony on causation, then the *could*-or-*might* rule should be abolished altogether. By giving his

reasonable probability rule. There is obviously an area in which the testimony may be in terms of *could* or *might* and show a reasonable scientific probability, but the attorney must be aware that he has both an "upper" and a "lower" limit on the expert opinion testimony that is admissible. He must be careful to negotiate between these two limits. The lower limit of the requirement of reasonable probability as a condition of admissibility was not present prior to *Lockwood,* but by dictum in that case, it suddenly appeared.

[24] See Summerlin v. Carolina & Northwestern R.R., 133 N.C. 550, 45 S.E. 898 (1903); STANSBURY, §§ 126, 137.

[25] See note 24 *supra.*

[26] See, *e.g.,* Hargett v. Jefferson Standard Life Ins. Co., 258 N.C. 10, 128 S.E.2d 26 (1962); Martin v. P. H. Hanes Knitting Co., 189 N.C. 644, 127 S.E. 688 (1925); Moore v. General Accident, Fire & Life Assurance Corp., 173 N.C. 532, 92 S.E. 362 (1917); Lynch v. Rosemary Mfg. Co., 167 N.C. 98, 83 S.E. 6 (1914); Jones v. Warehouse Co., 137 N.C. 337, 49 S.E. 355 (1904).

opinion as to causation, the expert is clearly invading the province of the jury. It is submitted that this is the proper place for "invasion" and if expert testimony is given, it should be given in the language that best describes the opinion, but not in some language that merely allows the testimony to get by an objection based on an outmoded rule of admissibility. The invasion is allowed in the case of an expert because he possesses knowledge and skill above that of the jury.[27] This skill and knowledge is highly useful for the jury in making an accurate determination of the issue before them. If the expert's opinion will assist in making a more accurate determination, it should be admitted.[28] In a situation where an expert has testified only to the scientific possibility of a result following an event, is the jury able to do more than guess whether there was in fact causation? If, however, he continues his testimony and states, in response to a proper hypothetical question, that in his opinion the result was caused by the event, this being based on his expert knowledge, is the jury not better equipped to decide more accurately the matter before them? It is submitted that on the issue of causation as well as in other areas of expert testimony, the doctor should be allowed to give his opinion, and give it in any terms that accurately describe the opinion. In a forceful attack upon the *could*-or-*might* rule, the Iowa court said:

> There is no sound basis in law, reason, or common sense for decisions that a witness may state his opinion as to what "may," "might," "could," or "probably did," cause something, but may not give an opinion as to what "did," "will," or "would," cause it. The true rule is, and should be, that the witness may use such expression as voices his true state of mind on the matter, whether it be possibility, probability, or actuality. To insist that a witness confine his testimony to an expression of possibility or probability, when his real judgment or conviction is actuality, or fact, is unfair, to the witness and the jury, and unjust to the party offering the testimony.[29]

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[27] See, *e.g.*, Seawell v. Brane, 258 N.C. 666, 129 S.E.2d 283 (1963); Tyndall v. Hines Co., 226 N.C. 620, 39 S.E.2d 828 (1946); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942); Hardy v. Dahl, 210 N.C. 530, 187 S.E. 788 (1936); STANSBURY, §§ 132, 134, 135.

[28] See note 27 *supra*.

[29] Grismore v. Consolidated Prod. Co., 232 Iowa 328, 348, 5 N.W.2d 646, 657 (1942). This case has a good discussion attacking the rationale of invasion of the province of the jury. See *id.* at 342-48, 5 N.W.2d at 654-55. It also contains an extensive attack on the *could*-or-*might* rule. See *id.* at 348-60, 5 N.W.2d at 657-663.

## III. Practical Considerations

In the light of the *could*-or-*might* rule and the *Lockwood* decision, it appears that an attorney should carefully coach his expert witness so that he will express in the strongest possible terms short of certainty the fact of causation. It would be wise first to ask the doctor if the result in question is a scientific possibility. The favorable and acceptable answer would be that it happens in a high number of instances and the likelihood of such a causal connection is great. The attorney would then ask the doctor's opinion as to the existence of a causal connection on the facts of the case. Again the favorable and acceptable answer would be that in his opinion, in this case, it was very probable that the event did cause the injury. This clearly indicates more than a mere possibility.

It is possible that with the growing disfavor of the *could*-or-*might* rule, an attorney may violate it, raise it squarely on appeal, and have it overruled. It is also possible that a properly framed hypothetical question and answer may fall within an exception.[30] Either course has its obvious risks. An attorney must be aware of the problems that now have come to light as a result of *Lockwood*. In a situation where an expert is necessary to establish causation, the attorney must proceed with caution and take the safest course allowed by the facts of his case, with a full realization of the unsettled and ill-defined rules that exist.

## IV. Conclusion

It is submitted that the correct view of the law is that consideration of whether reasonable probability is shown by the expert is to be considered on a motion for nonsuit and not on objection to testimony and a motion to strike. This view would mean that all relevant testimony—not merely the isolated testimony of the expert—is to be considered to determine sufficiency if there is other evidence of causation. It is also strongly urged that the *could*-or-*might* rule, as it is applied, be abolished so that expert opinion testimony be allowed in the terms that best describe the opinion of

[30] See Parrish v. High Point, Randleman, Ashboro & Southern Ry., 146 N.C. 125, 59 S.E. 348 (1907). In *Parrish* the court distinguished *Summerlin* to its own satisfaction. Stansbury finds the distinction a narrow one. See note 3 *supra*. For variations of the *Parrish* exception, see cases cited in note 3 *supra*.

the expert. If, on the other hand, the court wishes to retain the notion that expert witnesses be restricted to giving opinion testimony only of scientific possibilities, a different test must be fashioned.

WILLIAM H. CANNON

**Federal Jurisdiction—Non-Federal Ground Rule**

The petitioner in *Henry v. Mississippi*[1] was convicted of disorderly conduct. The conviction was based on corroborating evidence which was admittedly obtained by unlawful means and in violation of the state constitution.[2] This evidence constituted an essential ingredient of the state's case, without which the petitioner could not have been connected with the crime. At the trial, counsel for the petitioner failed to object to the introduction of the corroborating evidence,[3] but a motion for a directed verdict was made at the close of the state's case, which among other things specified that the evidence had been illegally obtained.[4] This motion was renewed at the close of all the evidence.[5] Petitioner appealed to the Supreme Court of Mississippi where the decision was initially reversed and the case remanded for a new trial.[6] The court emphasized the plight of out-of-state counsel unfamiliar with the procedural requirement that the objection to illegally seized evidence must be made at the time it is introduced.[7] After the first opinion, the state filed a Suggestion of Error which pointed out that the petitioner had in fact been represented by competent local counsel. The Mississippi Supreme Court then withdrew its first opinion and affirmed the judgment of the trial court.[8] The court stated that honest mistakes of counsel in respect to policy or strategy "are binding upon the client as a part of the hazards of courtroom battle."[9]

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[1] 379 U.S. 443 (1965).

[2] Henry v. State, 154 So. 2d 289, 294 (Miss. 1963).

[3] Furthermore, the officer who was responsible for obtaining the evidence was cross-examined concerning certain facts relating to its seizure. *Ibid.*

[4] For the text of the motion of a directed verdict, see Henry v. Mississippi, 379 U.S. 443, 459-60 (1965) (Harlan, J., dissenting).

[5] *Id.* at 445.

[6] This opinion appeared in the Southern Reporter advance sheets at 154 So. 2d 289 (Miss. 1963). For a criticism of the decision, see 35 MISS. L.J. 109 (1963).

[7] Henry v. State, *supra* note 6, at 296.

[8] This opinion appears in the bound volume of the Southern Reporter; the volume and page number are the same as that of the first opinion. See note 6 *supra*.

[9] Henry v. State, 154 So. 2d 289, 296 (Miss. 1963) (bound volume).

Petitioner applied to the United States Supreme Court for a writ of certiorari alleging that his constitutional rights had been violated. The state contended that the failure of petitioner's counsel to object to the introduction of the tainted evidence constituted an adequate non-federal ground for the state decision, and hence, the Supreme Court had no jurisdiction to review.[10] The Supreme Court granted certiorari and in a five-to-four decision[11] vacated the judgment of the Mississippi Supreme Court and remanded the case for a hearing on the question of "whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence."[12]

The Court, in what must be regarded as dictum, stated that the Mississippi contemporaneous objection rule served a "legitimate state interest," and intimated that nothing else appearing, it would have constituted an adequate non-federal ground which would preclude review.[13] While expressly declining to decide this question, the Court gave two principal reasons for the remand. First, the Court stated that there was some indication that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court for strategical or other reasons, in which case he would be precluded from thereafter asserting the federal right, whether the state ground be adequate or not.[14] Secondly, the Court stated that:

> a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts.[15]

The Court also implied that even if failure to comply with the contemporaneous objection requirement alone would constitute an adequate non-federal ground for decision, the motion for the directed verdict might have substantially satisfied the purpose of the rule in which case adherence to the rule would not serve a legitimate state

[10] 379 U.S. 443, 446 (by implication).
[11] Justices Black, Harlan, Clark, and Stewart dissented.
[12] 379 U.S. 443, 446.
[13] *Id.* at 448.
[14] *Id.* at 449-50.
[15] *Id.* at 452.

interest.[16] As stated by the Court, it "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case."[17] This line of reasoning generated a vigorous dissent by Mr. Justice Harlan which challenged the Court's intimation that the trial judge should have to sift a general motion for a directed verdict, which in most cases is filed as a matter of course, to ascertain whether error had been committed in the entire proceeding.[18]

Although the remand of the case does not constitute a decision on whether failure to comply with the Mississippi contemporaneous objection rule is an adequate non-federal ground for the state court decision, the Court's reasons for remanding the case signify the continuance of a steady process of erosion of the non-federal ground rule as a limitation on the Supreme Court's review of state court decisions.

Since the Judiciary Act of 1789,[19] the principle has been embedded in our concept of federalism, as it pertains to the judicial system, that where a state court decision rests upon adequate and independent state grounds it is not subject to correction by the Supreme Court.[20] Professor Wright describes the non-federal ground rule as the "most important and most difficult limitation on Supreme Court review of state court decisions."[21] The doctrine applies to both state substantive[22] and state procedural grounds.[23] It is usually said to be jurisdictional rather than dispositional,[24] and although the question is not entirely settled,[25] it has been said that it is derived from the Constitution's prohibition against advisory opinions.[26]

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[16] *Id.* at 448-49.
[17] *Id.* at 449.
[18] *Id.* at 461.
[19] Ch. 20, 1 Stat. 85.
[20] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 91 (2d ed. Wolfson & Kurland 1951) [hereinafter cited as ROBERTSON & KIRKHAM]; STERN & GRESSMAN, SUPREME COURT PRACTICE § 3-31 (3d ed. 1962) [hereinafter cited as STERN & GRESSMAN]; WRIGHT, FEDERAL COURTS § 107 (1963) [hereinafter cited as WRIGHT].
[21] WRIGHT § 107, at 425.
[22] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).
[23] Edelman v. California, 344 U.S. 357, 358-59 (1953).
[24] Ellis v. Dixon, 349 U.S. 458; Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).
[25] *Compare* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), *with* Herb v. Pitcairn, 324 U.S. 117 (1945).
[26] The classic statement purporting to give the non-federal ground rule constitutional status is:

Before the Supreme Court will decline to review a state court decision because of the presence of a non-federal ground, two inquiries must be made. First, it must be determined whether the state court judgment or decree is based either exclusively or alternatively on a non-federal ground.[27] If there be a non-federal ground in the state court decision, then it is the duty of the Court to make an independent determination as to whether the asserted non-federal ground is "adequate."[28]

To be an "adequate" non-federal ground, the basis of the state court decision must be "broad" enough to sustain the state court judgment;[29] it must be "independent,"[30] or sufficiently distinguish-

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The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations on our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). See Note, *The Untenable Nonfederal Ground in the Supreme Court, supra* note 24, at 1378.

[27] This question arises in four basic situations: (1) Where the state court expressly bases its decision upon two grounds one of which is federal and the other non-federal, the Court will determine if the non-federal ground is adequate and independent. *E.g.*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935). (2) Where the state court decision is based solely upon state law, but a timely assertion of a federal claim was made, the Court will determine if the non-federal ground is adequate; it is in no way bound by the state court's determination. *E.g.*, Wood v. Chesborough, 228 U.S. 672 (1913). (3) Where both federal and non-federal questions are raised in the record but the state court considers neither question, the Court will usually presume that the decision rested on a non-federal ground and decline to review. *E.g.*, Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54 (1934). In some cases where the basis of the state court decision is ambiguous, the Court has vacated the judgment and remanded the case to the state court for clarification. *E.g.*, Minnesota v. National Tea Co., 309 U.S. 551 (1940). (4) Where the state court expressly bases its judgment upon the determination of the federal question, the Court will not entertain a contention that the judgment *might* have been decided on a non-federal ground. *E.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192, 197 n.1 (1944). See generally ROBERTSON & KIRKHAM § 91; STERN & GRESSMAN § 3-32; WRIGHT § 107; Note, *The Untenable Nonfederal Ground in the Supreme Court, supra* note 24.

[28] [T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that the constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931).

[29] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875).

[30] Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157

able from the federal ground; and it must be "tenable."[31] Of these three standards of "adequacy," the concept of "tenability" is the most difficult to demarcate.[32] There is a conspicuous absence of any definitive guidelines pervading the decisions on the question of the "untenable non-federal ground."[33] It has been said that the state ground must have "substantial basis";[34] that it must not be "unfair or unreasonable";[35] that it must not be "palpably unfounded";[36] that it must not be "arbitrary or a mere device to prevent a review of the decision upon the federal question";[37] and that it must be "sufficiently well founded to furnish adequate support for the judgment."[38] An examination of the language of the decisions shows a noticeable display of illusiveness. Perhaps the only accurate general statement that can be made about the concept of "tenability" is that the state courts must not purposely utilize state law to evade federal claims or prevent their review by the Supreme Court. Beyond this very broad generalization what the Court will regard as "untenable" depends largely upon the circumstances of the particular case.[39]

The doctrine of the adequate non-federal ground has been termed a "doctrine supported by weighty considerations of law and policy . . . the solid instrument of federalism."[40] Recently, this "solid instrument of federalism" has been attacked from two sources, one of which may be deemed direct and the other collateral.

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(1917). "In such situations [involving a federal ground and a non-federal ground] our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment." *Id.* at 164. The concepts of breadth and independence are hard to distinguish in actual application and are often used to describe the same requirement. See Note, *The Untenable Nonfederal Ground in the Supreme Court, supra* note 24, at 1382.

[31] Terre Haute & I.R.R. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904). *Cf.* Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1919).

[32] See Note, *The Untenable Nonfederal Ground in the Supreme Court, supra* note 24, at 1384-85 (1961). ROBERTSON & KIRKHAM § 95.

[33] *Ibid.*

[34] Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 543 (1930).

[35] Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925).

[36] Johnson v. Risk, 137 U.S. 300, 307 (1890); see Leathe v. Thomas, 207 U.S. 93, 99 (1907).

[37] Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917).

[38] Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 475 (1918).

[39] See, *e.g.*, cases cited in ROBERTSON & KIRKHAM §§ 97-103; cases cited notes 34-38 *supra.*

[40] Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 435 (1961).

The non-federal ground rule has been devitalized directly through the court's application of the illusive concept of "tenability." This devitalization has occurred primarily in the area of state procedural law.[41] It is a settled principle that the state has the right to prescribe the procedural rules for invoking its jurisdiction.[42] Failure to comply with local procedure can be an adequate non-federal ground for decision.[43] Two relatively recent decisions demonstrate how the Court's varying standard of "tenability" has been used to strike down, as a bar to review, state grounds for decision predicated upon failure to comply with state procedural requirements; there was no apparent indication that the state courts in these decisions acted evasively or arbitrarily in applying and adhering to their procedural rules.

In *Williams v. Georgia*,[44] decided in 1955, the Supreme Court held that where the Georgia courts had refused petitioner's extraordinary motion for a new trial—a matter of discretion—because he had not challenged the array of jurors when they were "put upon him," the Court was not precluded from reviewing his constitutional claim that the method of jury selection had deprived him of equal protection of the laws. In respect to the state ground for the decision the Court said: "[W]here a State allows questions of this sort to be raised . . . as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in this particular circumstance is, in effect, an avoidance of the federal right."[45] Thus, it would seem the Court left the door open to strike down as an adequate state ground any discretionary procedural rule for the airing of federal claims.[46] Indeed, the Court

[41] See STERN & GRESSMAN § 3-33; ROBERTSON & KIRKHAM § 103.

[42] Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.
John v. Paullin, 231 U.S. 583, 585 (1913).

[43] It is clear that this Court is without power to decide whether constitutional rights have been violated when federal questions are not seasonably raised in accordance with the requirements of state law. . . . Noncompliance with such local law can thus be an adequate state ground for a decision below.
Edelman v. California, 344 U.S. 357, 358-59 (1953).

[44] 349 U.S. 375 (1955).

[45] *Id.* at 383.

[46] See Note, 20 ALBANY L. REV. 46 (1956). The writer takes the posi-

in *Henry*, although expressly declining to base its decision on *Williams*, stated unequivocally that it stands for the above proposition.[47]

Another decision holding a state procedural default to be untenable as a non-federal ground is *Staub v. City of Baxley*.[48] In that case, the Court held that a procedural rule requiring that each section of an ordinance be specifically and separately attacked when its constitutionality is challenged—in contrast to a blanket assertion of unconstitutionality—to be untenable, and that a state dismissal on these grounds would not preclude review. There was no intimation that the state court had acted evasively, arbitrarily, or intentionally to avoid the assertion and review of the federal claim in applying its procedural rule. The Court set out the following criterion: "To require . . . [petitioner] to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form."[49] Mr. Justice Frankfurter, dissenting, stated that "the relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this Court."[50]

These two decisions would seem to illustrate how seemingly valid and purposeful state procedural rules have been emasculated as adequate state grounds in accordance with illusive and poorly defined standards. *Henry* would seem to be a continuation of this practice in one important respect. The intimation that petitioner's failure to comply with the Mississippi contemporaneous objection rule might not be "adequate" to bar review simply because its purpose might be served by another procedural device available later in the trial—the motion for a directed verdict—is carrying the office of the Court in determining adequacy to an unprecedented level.[51] It would seem that there must now be an examination of the total

tion that *Williams* "contains far-reaching and perhaps mischievous implications." *Id.* at 55.

[47] "We do not rely on the principle that our review is not precluded when the state court has failed to exercise discretion to disregard the procedural default." 379 U.S. 443, 449 n.1 (1965).

[48] 355 U.S. 313 (1958).

[49] *Id.* at 320.

[50] *Id.* at 330.

[51] "[W]here the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions." Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917). See Note, 20 ALBANY L. REV. 46 (1956).

state procedural system for presenting federal claims to ascertain if one admittedly valid rule remains so in context of the total procedural system.

Perhaps the more troublesome and unmarked attack on the non-federal ground rule has come about through the collateral effect of the Court's decision in *Fay v. Noia*,[52] where the non-federal ground rule was held not to apply to federal habeas corpus proceedings.[53] In other words, a procedural default in the state court, no matter what its effect would be on direct review, will not preclude a petitioner from coming into the federal courts, and ultimately to the Supreme Court, through a habeas corpus proceeding.[54] Although the Court in *Fay* gave lip service to the non-federal ground rule as a limitation on direct review,[55] Mr. Justice Harlan, dissenting, predicted that the decision would have grave consequences for the non-federal ground rule and the federal system.[56]

*Henry*, coming only two years after *Fay*, is ample and convincing proof that Mr. Justice Harlan's prophecy was not unfounded. As already noted, one of the principal reasons for the remand of the case in the presence of a seemingly adequate non-federal ground was the ability of the petitioner to vindicate his federal claim in a federal habeas corpus proceeding. The only apparent justification for this action was stated by the Court as follows: "By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial

[52] 372 U.S. 391 (1963); see Comment, 42 N.C.L. REV. 352, 353-60 (1964).

[53] For a discussion of the Court's rationale in rejecting the adequate non-federal ground rule see *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 140-149 (1963).

[54] 28 U.S.C. § 2241(c)(3) (1958) provides that "the writ of habeas corpus shall not extend to a prisoner unless—he is in custody in violation of the Constitution or laws or treaties of the United States. . . ." See generally WRIGHT § 53.

[55] "The fatal weakness of this contention [that the non-federal ground rule applies to habeas corpus proceedings] is its failure to recognize that the adequate state-ground rule is a function of the limitations of *appellate* review." Fay v. Noia, 372 U.S. 391, 429 (1963). For a discussion of the controversy over whether the adequate non-federal ground rule is a limitation on habeas corpus proceedings in the federal courts, see Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Brennan, *supra* note 40.

[56] "This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time." 372 U.S. 391, 448 (1963).

relations."[57] It is interesting to speculate what brand of federalism strips an admittedly valid state procedural rule of its efficacy and finality and forces a busy state court to reconsider a case which under its own procedure—a procedure concededly designed to serve a legitimate state purpose—had been heard and fairly determined.

In *Fay v. Noia,* Mr. Justice Harlan predicted that "the effect of the approach adopted by the Court is, indeed, to do away with the adequate state ground rule entirely in every state case, involving a federal question, in which detention follows from a judgment."[58] It would seem that the Court in *Henry,* with its reliance on the collateral effect of *Fay,* substantiates the warning by Mr. Justice Harlan,[59] and that a concept—by many thought basic to a federal system—has in the course of two years been substantially diluted if not fatally undermined.

RONALD W. HOWELL

**Jurisdiction—Collateral Attack—Bootstrap Doctrine**

In the recent case of *McKee v. Hassebroek,*[1] the United States Court of Appeals for the Tenth Circuit affirmed a federal district court decision allowing the heirs of a joint owner of United States savings bonds to attack collaterally an Oklahoma probate court's distribution of those bonds as a part of the estate of the other joint tenant. The joint tenants, husband and wife, had apparently agreed that the bonds would be included in the husband's estate. The wife, who was co-executrix of her husband's estate and devisee of a life estate in his personal property, considered the bonds a part of his estate and never asserted her own ownership, except as life tenant under the will. After her death intestate, the wife's heirs-at-law gained possession of the bonds, and the remaindermen under the husband's will brought an action in the federal district court to recover them. The Tenth Circuit Court of Appeals affirmed the district court's

[57] Henry v. Mississippi, 379 U.S. 443, 452 (1965).

[58] Fay v. Noia, 372 U.S. 391, 469-70 (1963).

[59] It should be noted in this respect that the Court in *Henry* adopts the same "waiver" concept as that set out by the Court in *Fay*—a deliberate by-passing of state procedural rules. The fact that the Court relies on *Fay* in applying this concept would seem to lend strong support to the conclusion that only the most flagrant procedural defaults will prevent a person detained pursuant to a state judgment from asserting his federal claims either on direct appeal or in a collateral habeas corpus proceeding.

[1] 337 F.2d 310 (10th Cir. 1964).

finding that the state probate court had had no jurisdiction over the savings bonds, since federal regulations, which provide that the surviving joint tenant shall receive absolute title to such bonds upon the death of his co-tenant, must prevail. Thus, the savings bonds were never a part of the husband's estate and the wife's heirs were found to be the proper claimants.

The court of appeals did not concern itself with the question of whether a collateral attack should be allowed under these circumstances, assuming that "since the bonds were never a part of the decedent-husband's estate, the probate court did not acquire jurisdiction over them and the purported exercise of jurisdiction was a nullity,"[2] and collateral attack therefore proper. The court thus adhered to the doctrine of *coram non judice:* if the court rendering a judgment had no jurisdiction, the judgment is void for all purposes.[3] The doctrine of *coram non judice* as applied to jurisdiction of the subject matter has been modified, however, by the United States Supreme Court's decisions that the doctrine of res judicata applies to a court's express[4] or implied[5] determination of its own jurisdiction of the subject matter when the court has jurisdiction of the parties, so that such a determination will prevail over collateral attack of its judgment for want of jurisdiction.

The doctrine of res judicata is grounded in the belief that economy in legal processes and certainty and finality of court judgments are desirable and perhaps necessary elements of a workable legal system.[6] Generally res judicata is thought of as applying to decisions on the merits of an action rather than to decisions on jurisdiction. But it is obvious that someone must decide whether or not a court has jurisdiction of a particular case, and that decision necessarily rests initially with the court in which the action is brought.[7] The Supreme Court has indicated that as long as there

[2] *Id.* at 312.

[3] *E.g., In re* Sawyer, 124 U.S. 200 (1888), where the Court quoted Elliot v. Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828): "But if it [a court] act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." 124 U.S. at 220. See 1 FREEMAN, JUDGMENTS § 322 (5th ed. 1925).

[4] Stoll v. Gottlieb, 305 U.S. 165 (1938).

[5] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[6] See 2 FREEMAN, *op. cit. supra* note 3, § 626; *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1948).

[7] Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or

is no blatant lack of jurisdiction,[8] it is more desirable to give this decision finality beyond appeal than to allow collateral attacks which would frequently result in mere second-guessing. If the rendering court has jurisdiction of the parties so that all have notice and there is no question of lack of due process, it is not unreasonable to require a timely appeal by any party who wishes challenge the court's jurisdiction of the subject matter. "After a party has had his day in court, with opportunity to present his evidence and his view of the law," the Court has said, "a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."[9]

There is no doubt that the state probate court in *McKee* was wrong in its distribution of the savings bonds, for the Supreme Court, in *Free v. Bland*,[10] held that the federal regulations controlling distribution of jointly owned savings bonds must prevail over local laws under the supremacy clause of the Constitution. A wrong decision, however, is not necessarily jurisdictional.[11] And, even if the probate court's error was jurisdictional, perhaps the court should have considered whether the "bootstrap doctrine"[12] should be applied.

It is arguable that the mistake of the Oklahoma probate court in distributing the bonds was mere error which could be corrected only on appeal,[13] since otherwise the doctrine of res judicata would apply to the decision on the merits. A probate court has juris-

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whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.

Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938).

[8] In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), the Court stressed the apparent regularity of the proceeding of the trial court whose judgment was being collaterally attacked. *Cf.* United States v. UMW, 330 U.S. 258 (1947), where the Court, in sustaining a contempt conviction being attacked on grounds that the rendering court had no jurisdiction, stated: "a different result would follow were the question of jurisdiction frivolous and not substantial. . . ." *Id.* at 293.

[9] Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

[10] 369 U.S. 663 (1962).

[11] Burnet v. Desmornes Y Alvares, 226 U.S. 145 (1912).

[12] Application of res judicata to jurisdictional decisions is commonly called the "bootstrap doctrine." Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940).

[13] See generally CHAFEE, *Lack of Power and Mistaken Use of Power—1*, in SOME PROBLEMS OF EQUITY 296 (1950).

diction over the "estate" of a decedent,[14] and necessarily that court must determine initially what the estate is.[15] Can it be said that a mistake as to the total content of the "estate" is jurisdictional?[16] The Supreme Court considered a somewhat analogous situation in *Jackson v. Irving Trust Co.*[17] In that case, the United States attempted to attack collaterally a judgment rendered in a statutory cause of action on grounds that the statute did not authorize recovery by "enemies" of the United States and that the successful claimant was in fact an "enemy." The Court rejected the argument that the rendering court's mistake was jurisdictional and held that appeal was the only proper remedy. Also relevant to the question of whether a particular mistake is erroneous or jurisdictional are cases in which a court of equity has granted equitable relief when there was, in fact, an adequate remedy at law. Some courts have called such a mistake jurisdictional.[18] Chafee, in *Some Problems of Equity,* has made a strong argument that such mistakes are not jurisdictional at all, but mere error, since there is no justifiable reason to single out a particular fact and "put it into a separate category as 'jurisdictional'."[19] To interpret jurisdiction of the subject matter to mean jurisdiction of a particular object rather than jurisdiction over a general area of the law could conceivably open our courts to a virtual flood of relitigation, for the logical conclusion of such an interpretation is that any wrong decision is jurisdictional. Such a view would forsake the rule that "the test of jurisdiction is not right decision, but the right to enter upon

[14] See 3 PAGE, WILLS § 26.3 (Bowe-Parker rev. 1961).

[15] See *In re* Griffin's Estate, 199 Okla. 676, 189 P.2d 933 (1947).

[16] Some courts have held that probate courts have jurisdiction to try title contested under joint tenancy and community property laws. In Robison v. Sidebotham, 243 F.2d 16 (9th Cir. 1957), the court refused to allow a collateral attack by a wife on a probate's distribution of certain property as part of her ex-husband's estate, even though she claimed that the property was not and never had been part of the estate. The wife had submitted a petition claiming the land in probate court, and the present court found that she was therefore not a "stranger to the estate" and was bound by the probate decision. The court mentioned the fact that in California, community property is not subjected to inheritance tax, which would seem to indicate that the state does not consider it a part of an "estate." See *In re* Griffin's Estate, *supra* note 15.

[17] 311 U.S. 494 (1941).

[18] *E.g.,* Denison v. Keck, 13 F.2d 384 (8th Cir. 1926).

[19] CHAFEE, *op. cit. supra* note 13, at 329. See Woodrow v. Ewing, 263 P.2d 167 (Okla. 1953), where the court refused to allow a collateral attack on a proceeding to quiet title on grounds that the person in whom title was quieted was not in fact the owner. The court said this was error only.

the inquiry and make some decision."[20] It would seem that the probate court in *McKee* must necessarily have made some inquiry as to the status of the bonds and come to some decision about them, and, in Chafee's view, "if a court is bound to come to some conclusion, it has jurisdiction."[21]

Jurisdiction of the probate court in *McKee* is further substantiated by the existence in the law of wills of the doctrine of election,[22] application of which is within probate jurisdiction.[23] Under that doctrine, when a testator devises property actually belonging to another to a third party and also devises certain of his own property to the former, the true owner of the property thus devised to the third party must elect either to take his own property and renounce the gift under the will, or renounce his own property and take the gift.[24] Thus, if *T* devises property to *A* and at the same time devises *A*'s property to *B*, *A* must relinquish his own property to *B* in order to take the property devised to him. Acceptance of benefits under the will implies election to take under the will—no express and formal mode of election is required.[25] The *McKee* court refused to apply estoppel on the basis of the wife's conduct because it found she did not benefit from the inclusion of her bonds as part of the estate. This conclusion would seem to be incorrect under the doctrine of election, for the wife in *McKee* was devised and received a life estate in all her husband's personal property.

Hence, it is apparent that under the doctrine of election probate courts do have jurisdiction to distribute property belonging to persons other than the testator if such property owners elect to accept the terms of the will. It would therefore follow that distribution of such property in violation of the federal regulations is more properly considered erroneous than void.[26]

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[20] United States v. Ness, 230 Fed. 950, 953 (8th Cir. 1916).

[21] CHAFEE, *op. cit. supra* note 13, at 308.

[22] See generally 5 PAGE, *op. cit. supra* note 14, §§ 47.1-.46.

[23] See *In re* Williams' Estate, 272 P.2d 397 (Okla. 1954).

[24] *E.g.*, Brossenne v. Schmitt, 91 Ky. 465, 16 S.W. 135 (1891); Brown v. Brown, 42 Minn. 270, 44 N.W. 250 (1890); Bennett v. Bennett, 70 Ohio App. 187, 45 N.E.2d 614 (1942); Fox v. Fox, 117 Okla. 46, 245 Pac. 641 (1926) (dictum). See 5 PAGE, *op. cit. supra* note 14, § 47.13. The defendants in *McKee* would, of course, be bound by their intestate's election as privies.

[25] *E.g.*, Job Haines Home for Aged People v. Keene, 87 N.J. Eq. 509, 101 Atl. 512 (1917). See Matteson v. White, 98 Okla. 190, 224 Pac. 499 (1924).

[26] For cases holding that erroneous judgments are res judicata, see Reed v. Allen, 286 U.S. 191 (1932); Goldsmith v. M. Jackman & Sons,

Assuming lack of jurisdiction of the probate court, however, perhaps the federal court should have disallowed the collateral attack under the bootstrap doctrine. The doctrine has been applied by the Supreme Court in situations where there was a collateral attack on the judgment of a federal court in another federal court[27] or in a state court,[28] but it apparently has not been applied to a state court's determination of its own jurisdiction when that court's judgment has been attacked in a federal court proceeding. The Court has intimated that when there is no "countervailing" federal policy, bootstrap should be applied.[29] However, there is a strong indication that the Court considers the application of the doctrine to a state court judgment to depend upon whether the state itself would apply it.[30] This would appear to be the correct view under section 1738 of the Judicial Code,[31] which requires federal courts to give full faith and credit to state court proceedings. Oklahoma seems to have adopted the bootstrap doctrine.[32]

It can be argued that the bootstrap doctrine should not be applied in *McKee* in any event, since a probate court is an inferior court. The general rule is that an inferior court judgment carries no presumption of jurisdiction, so that it is subject to collateral attack unless jurisdiction clearly appears on the face of the proceedings.[33] However, probate courts usually receive the benefit of a

Inc., 327 F.2d 184 (10th Cir. 1964); Providential Dev. Co. v. United States Steel Co., 236 F.2d 277 (10th Cir. 1956).

[27] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[28] Stoll v. Gottlieb, 305 U.S. 165 (1938).

[29] Kalb v. Feuerstein, 308 U.S. 433 (1940).

[30] *Ex parte* George, 371 U.S. 72 (1962).

[31] 28 U.S.C. § 1738 (1958):

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

It can be argued that § 1738 does not require recognition of bootstrap jurisdiction at all, especially since it was enacted substantially in 1790 (ch. 11, 1 Stat. 122), before the bootstrap doctrine was developed.

[32] Consolidated Motor Freight Terminal v. Vineyard, 193 Okla. 388, 143 P.2d 610 (1943); Fitzsimmons v. Oklahoma City, 192 Okla. 248, 135 P.2d 340 (1942).

[33] *E.g.*, Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173 (1809) (Chief Justice Marshall's dictum). See 1 FREEMAN, *op. cit. supra* note 3, § 397. Although the court whose judgment was being attacked in the *Chicot County* case was an inferior federal court, such courts are not considered "inferior" courts for this purpose. In the case of McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825), the Court said:

presumption of jurisdiction for this purpose,[34] and Oklahoma is clearly in accord.[35] Oklahoma's county courts have general probate jurisdiction,[36] and "their orders and judgments should be accorded like force, effect, and legal presumption as the judgments and decrees of other courts of general jurisdiction. . . ."[37] Further, the Oklahoma Supreme Court has held[38] that probate jurisdiction includes the power to decide whether title to land had vested in a wife at the death of her husband, under a state joint-ownership statute, or was the joint property of both husband and wife, the court considering this an "incidental question . . . within the probate jurisdiction of the county court."[39] The bootstrap doctrine then would seem to be applicable in *McKee* if the federal court gives the state court judgment the effect it would receive in the state itself.

The Supreme Court has created an exception to the bootstrap doctrine: when "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction,"[40] collateral attack is allowed. The Court has applied the exception on two occasions, in the cases of *Kalb v. Feuerstein*[41] and *United States v. United States Fid. & Guar. Co.*[42] In *Kalb,* the Court decided that the Frazier-Lemke Act had pre-empted jurisdiction of a state court to dispossess the petitioners during pendency in a federal bankruptcy court of an action brought under the act. The Court found congressional intent to make such a pre-emption expressed in the act itself, which act provided that

> They [inferior federal courts] are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.

*Id.* at 199.

[34] See 3 PAGE, *op. cit. supra* note 14, § 26.142.

[35] Tiger v. Drumright, 95 Okla. 174, 217 Pac. 453 (1923).

[36] OKLA. CONST. art. VII, § 13.

[37] Tiger v. Drumright, 95 Okla. 174, 176, 217 Pac. 453, 455 (1923).

[38] *In re* Griffin's Estate, 199 Okla. 676, 189 P.2d 933 (1947).

[39] *Id.* at 680, 189 P.2d at 937. A Nebraska court allowed a probate court established under a constitutional provision (NEB. CONST. art. V, § 16) very similar to that of Oklahoma (OKLA. CONST. art. VII, §§ 12-13) to hear a declaratory judgment action to determine ownership of certain United States savings bonds as between decedent and her daughter, who were named as co-owners on the bonds. *In re* Hendricksen's Estate, 156 Neb. 463, 56 N.W.2d 711 (1953).

[40] RESTATEMENT, JUDGMENTS § 10 (1942).

[41] 308 U.S. 433 (1940).

[42] 309 U.S. 506 (1940).

"proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land" shall not be maintained or instituted in other courts except with permission of the bankruptcy judge.[43] Further, the act stated that "all such property shall be under the sole jurisdiction and control of the court in bankruptcy. . . ."[44] In *United States Fid. & Guar. Co.,* the Court held that the policy of governmental immunity outweighed the policy of res judicata when the government had not consented to the suit being attacked. Lower federal courts have made a few additions to the list of "countervailing policies."[45]

How strong is the policy of governmental control over distribution of joint-tenancy savings bonds? Unlike the statute involved in *Kalb,* the distribution regulation involved in *McKee* was not legislated by Congress, but was a regulation of the Secretary of the Treasury[46] made under Congress's general authorization.[47] This would seem to indicate that Congress considered it less important than the Frazier-Lemke Act, in which it expressly manifested its intent to create exclusive federal jurisdiction, and certainly it has less universal effect. The Frazier-Lemke Act was designed as a major force in combating the effects of economic depression, whereas the savings-bond regulation primarily effects only co-tenants of bonds and has no significant importance beyond the parties themselves. The policy of such a regulation would not seem to be strong enough to defeat application of the doctrine of res judicata, which has implications far beyond the parties to any particular litigation. Neither would the regulation seem comparable in importance to the doctrine of sovereign immunity, which has always been a basic tenet of our legal system. One state court has interpreted the policy of the regulation as merely "providing protection to the government if

[43] 47 Stat. 1473 (1933), 11 U.S.C. § 203(o)(2) (1958).

[44] 49 Stat. 943 (1935), 11 U.S.C. § 203(p) (1958).

[45] In Hooper v. United States, 326 F.2d 982 (Ct. Cl.), *cert. denied,* 377 U.S. 977 (1964), the court allowed a collateral attack in federal court on a decision of the Court of Military Appeals because the latter court afforded no appeal. "We believe that an example of such an overriding consideration is present here, since a party should be given his day in a court from which review by the Supreme Court might ultimately be afforded." *Id.* at 985. *Accord, In re* Maier Brewing Co., 38 F. Supp. 806 (S.D. Cal. 1941) (corporate reorganization under the Chandler Act). *Cf.* Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326 (D.C. Cir. 1950).

[46] 31 C.F.R. § 315.61 (1959).

[47] 40 Stat. 291 (1917), 31 U.S.C. 757(c) (1958).

its agents pay the named owner or co-owner."[48] In a situation where an estate of one co-owner successfully challenged the right of the other co-owner to take the bonds under the survivorship regulation, the court said: "It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other."[49]

DORIS R. BRAY

**Taxation—Deductibility of Campaign Expenses**

Two recent decisions of United States district courts have questioned the soundness of the general rule that campaign expenses incurred by a candidate for public office are not deductible in the computation of federal income tax.[1] In *Maness v. United States*,[2]

[48] *In re* Hendricksen's Estate, 156 Neb. 463, 476, 56 N.W.2d 711, 719 (1953).

[49] *Id.* at 477, 56 N.W.2d at 719.

[1] This rule is stated in 4 MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 25.135 (rev. ed. 1960) and in 1 RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 3.03(10) (1964). The Treasury accepts the rule. See Treas. Reg. 103, § 19.23(a)-15 (1940), as amended, T.D. 5196, 1942-2 CUM. BULL. 96, 98; Treas. Reg. 103, § 19.23(o)-1 (1940); Treas. Reg. 111, §§ 29.23(a)-15(b), 29.23(o)-1, 29.23(q)-1 (1943); Treas. Reg. 118, §§ 39.23(a)-15(f), 39.23(o)-1(f), 39.23(q)-1(a) (1953); Treas. Reg. § 1.162-15(c)(1) (1958), as amended, T.D. 6435, 1960-1 CUM. BULL. 79; Treas. Reg. § 1.212-1(f) (1957); Proposed Treas. Reg. § 1.162-20(b)(1)(i), 29 Fed. Reg. 11190 (1964). See also Statement of Assistant Commissioner Sugarman Before the Special Committee of the House of Representatives to Investigate Campaign Expenditures, 82d Cong., 2d Sess. (1952), reprinted in 5 CCH 1953 STAND. FED. TAX REP. ¶ 6029. The Internal Revenue Code of 1954 and the accompanying legislative history have supported the rule. Section 271 disallows the deduction of bad debts owed by a political party to a taxpayer; a taxpayer may generally deduct bad debts under section 166. Section 162(e) clarifies deductibility of lobbying expenses dealt with in Treas. Reg. § 1.162-15(c)(1) (1958), as amended, T.D. 6435, 1960-1 CUM. BULL. 79. By partially changing the rules stated in the regulation it allows some types of lobbying expenses to be deducted. However, the rule stated in the regulation that campaign expenses are not deductible was not changed. Section 162(e)(2)(A) provides that the deduction allowed for certain types of lobbying expenses shall not be construed as allowing the deduction of any amount incurred in political campaigns. For case law supporting the rule see McDonald v. Commissioner, 323 U.S. 57 (1944); Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953); Harry D. Moreland, 29 P-H Tax Ct. Mem. 1036 (1960); George W. Lindsay, 34 B.T.A. 840 (1936); David A. Reed, 13 B.T.A. 513 (1928), *rev'd on other grounds*, 34 F.2d 263 (3d Cir. 1929), *rev'd*, 281 U.S. 699 (1930).

[2] 15 Am. Fed. Tax R.2d 217 (M.D. Fla. 1965).

the taxpayer was required by statute[3] to pay a qualifying fee and a political party assessment in order to become a candidate in the party primary; he also incurred expenses in advertising his candidacy. Deduction of the qualifying fee and the party assessment was allowed, but was disallowed for the advertising expenses. *Davenport v. Campbell*[4] involved a statutory qualifying fee and a party assessment. Both were held to be deductible.

The Internal Revenue Code of 1954 does not expressly allow or disallow deduction of campaign expenses incurred by candidates.[5] Such deductions have been attempted as taxes,[6] losses,[7] depreciation,[8] business expenses,[9] and expenses for the production of income.[10] The decisions have turned upon the types of expenditures involved[11] and the relation of the taxpayers to the public office.[12]

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[3] FLA. STAT. ANN. § 99.031 (1960).

[4] 14 Am. Fed. Tax R.2d 6004 (N.D. Tex. 1964).

[5] The only sections of the Code which refer directly to political campaign expenditures are §§ 162(e)(2)(A) and 271. See note 1 *supra*.

[6] "[T]here shall be allowed as a deduction taxes paid or accrued within the taxable year." Int. Rev. Code of 1954, ch. 1, § 164, 68A Stat. 47. See Maness v. United States, 15 Am. Fed. Tax R.2d 217 (M.D. Fla. 1965).

[7] "There shall be allowed as a deduction any loss sustained during the taxable year . . . incurred in a trade or business . . . ." INT. REV. CODE of 1954, § 165. Campaign expenditures have been contended to be analogous to deductions allowed for worthless securities, losses in the development of new processes, losses in exploring for natural resources and losses incurred in negotiating new contracts. See Brief for Petitioner for Writ of Certiorari, p. 6, McDonald v. Commissioner, 323 U.S. 57 (1944). But in the *McDonald* case Mr. Justice Frankfurter rejected the contention in "short shrift." He reasoned that there was no loss because the taxpayer received exactly what he paid for: "the opportunity to persuade the electors." McDonald v. Commissoner, *supra* at 61.

[8] "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion . . . of property used in the trade or business . . . ." INT. REV. CODE of 1954, § 167. In the *McDonald* case the Supreme Court did not refer to the question of whether the expense was a capital outlay, but the Court of Appeals said that "an outlay of this sort is in the nature of a capital item." McDonald v. Commissioner, 139 F.2d 400, 401 (3d Cir. 1943) *aff'd* 323 U.S. 57 (1944). In Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953), Chief Judge Parker refused to allow the authorization of campaign expenses over the term of office to which the taxpayer was elected.

[9] "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." INT. REV. CODE of 1954, § 162. See McDonald v. Commissioner, 323 U.S. 57 (1944).

[10] "[T]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—(1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income . . . ." INT. REV. CODE of 1954, § 212. See Davenport v. Campbell, 14 Am. Fed. Tax R.2d 6004 (E.D. Tex. 1964).

[11] Campaign advertising expenses directly incurred and paid by the

The Supreme Court disallowed the deduction of a party assessment, not required by statute, and of advertising expenses incurred by an office holder seeking re-election in *McDonald v. Commissioner*.[13] Section 162, permitting the deduction of business expenses, was held inapplicable because (1) the expenses were not incurred in being a public official but in running for public office, which of itself is not a trade or business;[14] (2) the allowance of a business expense deduction to the office holder seeking re-election could not have been granted to his opponent, who sought to establish himself in a new business,[15] and thus would introduce discrimination in favor of

candidate have not been allowed as a deduction. See McDonald v. Commissioner, 323 U.S. 57 (1944); Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953); Maness v. United States, 15 Am. Fed. Tax R.2d 217 (M.D. Fla. 1965); George W. Lindsay, 34 B.T.A. 840 (1936). Political party assessments not required by statute have been allowed as a deduction in Nichols v. United States, 63-2 U.S. Tax Cas. ¶ 9823 (N.D. Ga. 1963), *vacating* 201 F. Supp. 337 (N.D. Ga. 1962), but have been disallowed in the *McDonald* and *Reed*, note 1 *supra*, cases. Political party assessments required by statute to be paid to the state were allowed in *Davenport* when required by statute to be paid to the party. Filing fees required of candidates by statute were allowed in *Maness* and *Davenport*.

[12] None of the cases allow deduction of contributions to the campaign of another. A candidate seeking re-election stands in a more favorable position in seeking the deduction of his campaign expenses than does his opponent. See Davenport v. Campbell, 14 Am. Fed. Tax R.2d 6004 (1964). *But see* McDonald v. Commissioner, *supra* note 11, at 63. Confusion between the merits of the claimed deduction by candidates and noncandidates has led to the overly broad statement that the deduction of campaign expenses is against public policy. See Dohan, *Deductibility of Non-Business Legal and Other Professional Expenses*, N.Y.U. 17TH INST. ON FED. TAX 579, 599, 601 (1958). The public policy argument originated in Charles H. McGlue, 45 B.T.A. 761, 769 (1941). In that case an attorney, not running for office, attempted the deduction of contributions to a political campaign. His theory was that the contributions increased his prestige with the elected officials and that his clients benefited by his preferred position with such officials. The Board of Tax Appeals disallowed the deduction because it believed that expenditures made for the purpose of exerting political influence are contrary to public policy. The Tax Court opinion in Michael F. McDonald, 1 T.C. 738, 740-41 (1943), relied on *McGlue* in saying that the deduction of campaign expenses by a candidate is against public policy. However, *McGlue* fails to support the Tax Court. Since the expenditure in *McGlue* was against public policy, deduction of it was held to be. In *McDonald* the expenditure was not against public policy. Obviously, there is no public policy against a candidate spending a reasonable sum to approach the electorate. Therefore the deduction of the expense cannot be. The subsequent opinions rendered in the *McDonald* case by the court of appeals and the Supreme Court, although affirming the Tax Court, were not based on the public policy argument. See McDonald v. Commissioner, 139 F.2d 400 (3d Cir. 1943), *aff'd*, 323 U.S. 57 (1944).

[13] 323 U.S. 57 (1944).

[14] *Id.* at 60.

[15] Expenses paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal services for compensation are not

incumbents;[16] and (3) the legislative history of section 7701(a)(26), declaring public office holding to be a trade or business within the meaning of section 162, indicates that section 7701(a)(26) had nothing to do with campaign expenses.[17]

*Maness* distinguished *McDonald* as to qualifying fees and party assessments: in *McDonald* these expenses were paid directly to the political party and were not required by statute; in *Maness* they were required by statute to be paid to the state. Therefore they were held to be "taxes" within the general language of section 164 as it existed in the applicable tax year.[18] The "taxes" theory is, however, of minor importance; an amendment to section 164[19] has eliminated the possible use of this distinction for tax years beginning after 1963.

The *Davenport* case indicates that *McDonald* is controlling authority only on identical facts. Finding factual differences, deduction of the qualifying fee and the party assessment was allowed as a business expense under section 162 and as an expense incurred for the production of income under section 212. There was no justifiable indication that had the factual differences been present in *McDonald* the deductions would have been allowed in that case.[20] In allowing

deductible. See William S. Scull II, 33 P-H Tax Ct. Mem. 1483 (1964); Abraham Teitelbaum, 33 P-H Tax Ct. Mem. 932 (1964); Edward R. Godfrey, 32 P-H Tax Ct. Mem. 1 (1963), *aff'd*, 335 F.2d 82 (6th Cir. 1964). See generally Treas. Reg. § 1.212-1(f) (1957); 4 MERTENS, *op. cit. supra* note 1, § 25.08.

[16] 323 U.S. at 63.

[17] *Id.* at 62 n.3, citing 1 *Hearings on H.R. 7835 Before the Senate Committee on Finance*, 73d Cong., 2d Sess. 29 (1934).

[18] See note 6 *supra*. The Internal Revenue Service has taken irresolute views on whether mandatory campaign expenses are taxes. Rev. Rul. 57-345, 1957-2 CUM. BULL. 132, said that the New Mexico primary filing fee required of candidates for political office by N.M. STAT. ANN. ch. 3, art. 11, § 17 (1953) and to be paid to the state was deductible as a tax. The ruling was extended in Nichols v. United States, 63-2 U.S. Tax Cas. ¶ 9823 (N.D. Ga. 1963). In this case the primary filing fee was held to be a tax even though participation in the primary was not required by statute and the filing fee was paid to the political party. Rev. Rul. 60-366, 1960-2 CUM. BULL. 63, revoked Rev. Rul. 57-345 and held the North Carolina primary filing fee, required of candidates for political office by N.C. GEN. STAT. § 163-120 (1964) nondeductible. The *Maness* case refused to follow Rev. Rul. 60-366.

[19] Revenue Act of 1964, § 207(a), 78 Stat. 40, limited the deduction of taxes to: state, local, and foreign real property taxes; state and local personal property taxes; state, local, and foreign income taxes; state and local general sales taxes; and state and local gasoline taxes. Other taxes may be deducted under §§ 162 and 212.

[20] In *Davenport* the expenses were required by statute, TEX. STAT. ANN. arts. 13.07a, 13.08 (Supp. 1964); in *McDonald* they were required only by

the business expense deduction, the court rejected the view stated by Mr. Justice Frankfurter in *McDonald* that a valid distinction exists between expenses incurred in being a public official and in running for public office. Adopted were the arguments made by the taxpayer in *McDonald* that the distinction would create an unreal separation as though each type of expenditure had no relation to the other, and that the taxpayer could not have continued in office without incurring the election expenses.[21] Emphasis was placed on the re-election aspect. By seeking re-election the taxpayer attempted merely to continue his existing business.[22]

The court responded to the discrimination argument relied upon in *McDonald* for disallowance of the business expense deduction under section 162, by holding that both the taxpayer seeking re-election and his opponent seeking a new position could deduct these campaign expenses as being incurred for the production of income under section 212. The applicability of section 212 to campaign expenses involves a statutory construction problem: to what extent must courts be guided by legislative history in interpreting seemingly clear words of a statute?[23]

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the political party. This distinction does not justify refusal to follow *McDonald* because the expenses need only be ordinary and necessary in order to be deductible under §§ 162 or 212. Neither case denied that the expenses were ordinary and necessary. The mandatory nature of the *Davenport* expenses is relevant to whether the expenses were taxes deductible under § 164. But the *Davenport* decision is not based on § 164. In fact, authority is cited that the expenses were not taxes. Furthermore, the court pointed out that, unlike *McDonald,* the taxpayer in *Davenport* was entitled to a refund of any part of his assessment not expended by the party to finance the primary. This fact detracts from, rather than adds to, the view that the expenses are taxes. Another distinction referred to by the court is that in *Davenport,* the assessment would be used locally, whereas in *McDonald* it would be used statewide.

[21] Brief for Petitioner, pp. 19-20, McDonald v. Commissioner, 323 U.S. 57 (1944).

[22] Expenses of continuing or expanding an existing business are deductible. York v. Commissioner, 261 F.2d 421 (4th Cir. 1958); Cornelius Vanderbilt, Jr., 26 P-H Tax Ct. Mem. 916 (1957).

[23] The "plain meaning rule" of statutory interpretation is that a court may not look to the legislative history of an unambiguous statute in order to give it a different meaning. See Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); Caminetti v. United States, 242 U.S. 470 (1917). See criticism of this rule in 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4502 (3d ed. 1943). This rule would support the view that § 212 allows the deduction of campaign expenses. The *McDonald* case took the opposite approach, that the literal words of a statute may be read and relied upon only when the legislative history is unclear. This approach to statutory interpretation has found recent approval in Dean Rostow's statement that "statutes, cases and words have no meaning apart from their contexts. None at all. As words, from the point of view of verbal analysis, linguistic

Uncertainty in the scope of the business expense deduction led to the enactment of section 212. The 1921 position of the Bureau of Internal Revenue was that campaign expenses of a candidate were personal, therefore not deductible.[24] Yet the Bureau also declared that the business expense deduction included "all the ordinary and necessary expenses paid or incurred in the production of taxable income."[25] *Higgins v. Commissioner*[26] rejected that view and disallowed deduction for investment management expenses. Subsequent to *Higgins* the Treasury Department recommended[27] an amendment to restore the deduction of expenses paid or incurred in the production of income. The recommendation was enacted; it now appears as section 212. Regulations[28] appearing shortly after the enactment show clearly that the Treasury in proposing and promoting the amendment did not intend to abandon its earlier declared position that campaign expenses are not deductible. But the intent of Congress in enacting section 212 is unclear.

In *McDonald* the Court was equally divided on whether the section was broad enough to apply to campaign expenses.[29] Mr. Justice Frankfurter believed that it was not:

> In short, the act of 1942 [now section 212] in no wise affected the disallowance of campaign expenses as consistently reflected by legislative history, court decision, Treasury practice and Treasury regulations. . . . Every relevant item of evidence bearing upon the history of this amendment precludes the inference that the Treasury without intent and the Congress without appreciation opened wide the door for the allowance of campaign expenditures as deductible expenses.[30]

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analysis, or a fortiori, from the point of view of their use in law, they are meaningless." Panel Discussion, *"The Computer in Law, Yes or No?"* in M.U.L.L., Sept. 1964, p. 104.

[24] See O.D. 864, 4 CUM. BULL. 211 (1921).

[25] See I.T. 2751, XIII-1 CUM. BULL. 43, 44 (1934).

[26] 312 U.S. 212 (1941).

[27] 1 *Hearings on Revenue Revision Before the House Committee on Ways and Means,* 77th Cong., 2d Sess. 88 (1942); *Hearings Before the Senate Committee on Finance on the Revenue Act of 1942,* 77th Cong., 2d Sess. 50 (1942).

[28] See note 1 *supra.*

[29] Justices Stone, Roberts and Jackson concurred in the opinion of Mr. Justice Frankfurter that § 212 was merely designed to reverse the result in *Higgins,* therefore was inapplicable to the facts in *McDonald.* Mr. Justice Rutledge concurred in result only. Justices Reed, Douglas and Murphy joined in the dissent of Mr. Justice Black to the effect that the language of § 212 was sufficiently broad to allow the deduction of campaign expenses.

[30] 323 U.S. at 62-63.

It is noteworthy that Justice Frankfurter did not have express support for his broad generalization in the committee reports on section 212.[31]

Inferences to be drawn from the committee reports support the view that section 212 should be broadly applied[32] as suggested by the dissent of Mr. Justice Black in *McDonald* and by the *Maness* and *Davenport* cases. This view is supported by arguments that (1) the literal language of section 212 is broad enough to allow such a deduction;[33] (2) advertising expenses of private businesses are deductible;[34] and that (3) it is, unlike the narrow view, consistent with the basic policy of income tax law to tax net, not gross, income.[35]

The *Maness* and *Davenport* cases do not stand alone in abandoning the earlier restrictive interpretation of the scope of section 212 as seen in *McDonald*.[36] There is a growing feeling that an express

[31] Justice Frankfurter said that his view was supported by the committee statement that § 212 is subject to all the limitations that apply to § 162, except the trade or business requirement. However, the committee statement means only that the expenses must be ordinary and necessary, paid or incurred in the taxable year and that they must be expenses rather than capital items. None of these factors were at issue in *McDonald*.

[32] The committee reports listed the expenses excluded from deduction under § 212 as those which are expended "primarily as a sport, hobby, or recreation." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 75 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 88 (1942). Are campaign expenses for political office analogous?

[33] This argument is the basis for the *Davenport* decision. See also McDonald v. Commissioner, 323 U.S. 57, 67 (1944) (Black, J., dissenting). For the text of § 212 see note 10 *supra*.

[34] The deductibility of advertising expenses is subject to only two limitations. They must be primarily to stimulate current business; otherwise they must be capitalized and spread over the life of the asset. They must be ordinary and necessary. See Poletti v. Commissioner, 330 F.2d 818 (8th Cir. 1964); George K. Herman Chevrolet, Inc., 39 T.C. 846 (1963). The *Maness* decision refers to the fact that monies spent in seeking proxies in an "election" for control of a corporation are deductible. *Compare* Graham v. Commissioner, 326 F.2d 878 (4th Cir. 1964), *and* Surasky v. United States, 325 F.2d 191 (5th Cir. 1963), *with* J. Raymond Dyer, 36 T.C. 456 (1961). The *Surasky* case broadens the scope of § 212 by relaxing the degree of proximate relationship an expense must have to the production of income in order to be deductible under § 212. See Surasky v. United States, *supra* at 194-95.

[35] "Taxation on net, not on gross, income has always been the broad basic policy of our income tax laws.... Congress in its Revenue Act of 1942 [adding section 212]... indicated in a most forthright manner its allegiance to the net income tax policy." McDonald v. Commissioner, 323 U.S. 57, 66-67 (1944) (Black, J., dissenting).

[36] The Internal Revenue Code of 1954 broadened the allowable deductions under § 212 to include expenses paid or incurred in connection with the determination, collection or refund of any tax. INT. REV. CODE of 1954, § 212(3).

statutory allowance of a deduction by a candidate for reasonable campaign expenditures as expenses incurred for the production of income should be permitted.[37] However, two decades have passed since *McDonald;* apparently the courts are themselves ready to take action.

BROWN HILL BOSWELL

**Torts—Damages—Aggravation of Pre-existing Injuries**

On February 11, 1963, while the plaintiff in *Lockwood v. McCaskill*[1] was waiting for a traffic light to change, his automobile was struck in the rear by defendant's truck. He was unconscious momentarily and later suffered headaches accompanied by pain in his neck, back, hips and left leg. Because of this pain he was unable to return to the operation of his service station until May 1. During his absence an employee wrecked a customer's car, forcing plaintiff to pay damages in the amount of 1,200 dollars. Plaintiff, " 'basically . . . an insecure person . . . .a perfectionist . . . . a worrisome individual,' "[2] brooded about his financial difficulties in meeting payrolls and other expenses. He had difficulty sleeping because of this worry, pain, and headaches. On the morning of May 20, more than three months after the accident, he suffered an attack of amnesia and was hospitalized until June 15, 1963. During his stay he suffered periods of confusion and depression.

At the trial plaintiff's psychiatrist testified to the effect that "the accident and resulting physical injuries would not have caused amnesia in a person with ordinary susceptibility to worry and insecure feelings, but that plaintiff is more than ordinarily prone to suffer from these mental conditions . . . ."[3] It was further stated that the

> attack of amnesia was induced by a deep sense of insecurity, that . . . the injuries he suffered in the accident and the financial burdens and losses caused by his physical incapacity to work and

[37] 4 MERTENS, *op. cit. supra* note 1, § 25A.17. See Diamond, *The Shadow of McDonald,* 23 TAXES 511, 515 (1945); 39 ILL. L. REV. 298 (1945).

[1] 262 N.C. 663, 138 S.E.2d 541 (1964).
[2] *Id.* at 666, 138 S.E.2d at 543.
[3] *Id.* at 670, 138 S.E.2d at 546.

> attend to his business threatened his security and produced mental stress and worry, and this mental state set the stage for the amnesia attack, which was precipitated . . .[4]

by the employee wrecking the customer's car.

The court, in allowing recovery, held that

> if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility . . . but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plaintiff notwithstanding the fact these damages were unusually extensive because of peculiar susceptibility.[5]

The court was applying what is commonly called the "special sensitivity" or "thin skull" rule.[6] According to this rule, once an impact upon the person of the plaintiff has occurred, the tortfeasor takes his victim as he finds him,[7] even though, because of some peculiar bodily sensitivity, the injury suffered is much greater than that which would have been sustained by an ordinary individual. The wrongdoer is not allowed to mitigate his damages because his particular victim has a dormant or incipient disease or a pre-existing physical injury. Thus, when the impact arouses plaintiff's bony tumor,[8] aggrevates his spondylolistheses[9] or peptic ulcer,[10] lowers his vitality causing him to contract tuberculosis,[11] or aggravates his speech impediment causing a notable increase in his

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[4] *Id.* at 669, 138 S.E.2d at 546.

[5] *Id.* at 670, 138 S.E.2d at 546.

[6] The phrase seems to have originated in the language of Kennedy, J., in the English case of Dulieu v. White & Sons, [1901] 2 K.B. 669.

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

*Id.* at 679.

[7] *E.g.*, United States v. Fotopulos, 180 F.2d 631 (9th Cir. 1950); Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (Dist. Ct. App. 1955); Jonte v. Key System, 89 Cal. App. 2d 654, 201 P.2d 562 (Dist. Ct. App. 1949); Delpido v. Colony, 52 So. 2d 720 (La. App. 1951). See generally 15 AM. JUR. *Damages* §§ 80-81 (1938); 25 C.J.S. *Damages* § 21 (1941); RESTATEMENT, TORTS § 461 (1934).

[8] Garrett v. Taylor, 69 Idaho 487, 210 P.2d 386 (1949).

[9] Rideau v. Los Angeles Transit Lines, 124 Cal. App. 2d 466, 268 P.2d 772 (Dist. Ct. App. 1954).

[10] Land v. Colletti, 79 So. 2d 641 (La. App. 1955).

[11] Hazelwood v. Hodge, 357 S.W.2d 711 (Ky. 1961).

stuttering,[12] the defendant is held liable even though such consequences could not have been reasonably foreseen.

Plaintiff in *Lockwood* is to be distinguished from the plaintiffs in the above cases because his pre-existing condition was mental rather than physical. He could be more accurately described as having "thin skin" in lieu of a "thin skull."

*Quaere* then, does the tort-feasor take his neurotic[13] or psychotic[14] plaintiff as he finds him? In other words, is there also a "thin skin" rule? The courts that have considered the plaintiff with the precarious emotional imbalance indicate that the answer should be in the affirmative.[15] As stated by one court: "conceding plaintiff to be a neurotic nature—even conceding him to be psychoneurotic, such admission can be of little comfort to defendants. It is well settled that the tort-feasor takes his victim as he finds him . . . ."[16] Thus courts have allowed recovery when plaintiff suffers a "traumatic neurosis"[17] following a bump on the chin, "conversion hysteria"[18] accompanying a fracture of the wrist and hand, a

[12] Gallo v. American Egg Co., 76 R.I. 450, 72 A.2d 166 (1950).

[13] Neurosis or psychoneurosis is a form of maladjustment in which a person, although well in touch with reality, uses physical complaints and symptoms to express psychological needs which have arisen from conflicts that are hidden from the conscious mind. Neuroses are generally divided into four types: anxiety neurosis, hysteria, psychoasthenia, and mixed types. Palmer, *Traumatic Neuroses,* 15 OHIO ST. L. J. 399 (1954).

[14] A psychosis is a severe form of personality disease characterized by an extensive disorganization of the various functions. In the typical psychosis the individual has lost his contact with reality and reveals severe disturbances in all areas of his life. The psychotic reaction is a much more thoroughly and severely abnormal type of personality reaction than is the psychoneurosis. ENGLISH & FINCH, INTRODUCTION TO PSYCHIATRY 43 (2d ed. 1957).

[15] Thomas v. United States, 327 F.2d 379 (7th Cir. 1964); Evans v. S. J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963); Hambleton v. United States, 87 F. Supp. 994 (W.D. Wash. 1949); Purity Ice Co. v. Triplett, 257 Ala. 116, 57 So. 2d. 540 (1952); Pederson v. Carrier, 91 Cal. App. 2d 84, 204 P.2d 417 (Dist. Ct. App. 1949); Stark v. Yellow Cab Co., 90 Cal. App. 2d 217, 202 P.2d 802 (Dist. Ct. App. 1949); Flood v. Smith, 126 Conn. 644, 13 A.2d 677 (1940); Kraus v. Osteen, 135 So. 2d 885 (Fla. 1961); Irwin v. St. Louis-S. F. Ry., 325 Mo. 1019, 30 S.W.2d 56 (1930); Kadair v. Pittsburgh Ry., 383 Pa. 50, 117 A.2d 712 (1955); Port Terminal Ry. Ass'n v. Ross, 278 S.W.2d 227 (Tex. Civ. App. 1955); Love v. Port of London Authority [1959] 2 Lloyd's Rep. 541; Bates v. Fraser, [1963] 1 Ont. 539, 38 D.L.R.2d 30; Enge v. Trerise, [1961] 26 D.L.R.2d 529; Smith v. Christie Brown & Co., [1955] Ont. 301.

[16] Briley v. North River Ins. Co., 161 So. 2d 449, 459 (La. App. 1963).

[17] Landrath v. Allstate Ins. Co., 259 Wis. 248, 48 N.W.2d 485 (1951). The American Psychiatric Association does not officially recognize the term "traumatic" as descriptive of a form of neurosis. Modlin, *The Trauma in Traumatic Neuroses,* 24 MENNEGER CLINIC BULL. 49, 50 (1960).

[18] Davidson v. Pennsylvania R.R., 105 F. Supp. 863 (E.D. Pa. 1952).

"psychoneurotic anxiety reaction"[19] following a knee injury, and "reactive depression"[20] accompanying a slight injury to the back.

One way of analyzing the "thin skull" cases is to view them as a proximate cause problem. In one of the leading cases in this field, *Re Polemis & Furness, Withy & Co.*,[21] the court reasoned that to determine whether an act is negligent, it is relevant to determine whether any reasonable person could foresee that the act would cause damage; if so, the fact that the damage that it caused is not the exact kind of damage one would expect is immaterial as long as the damage is traceable to the negligent act. This is sometimes referred to as the "causation" approach.[22] Given a breach of duty which amounts to negligence, and damage directly resulting from that negligence, the fact that the damage which ensues is different from the damage that would be expected is irrelevant. Foreseeability is used here only to determine whether the tort-feasor was negligent in the first instance, but it is not at all determinative of the extent of the damages for which he will be liable once negligence is proven. The *Lockwood* court apparently adopted this rationale when it stated that "the measure of duty in determining whether a wrong has been committed is distinct from the measure of liability when the wrong has been committed."[23]

*Polemis* was overruled forty years later by *Overseas Tankship (U.K.) Ltd. v. Mort's Dock & Eng'r Co.*,[24] commonly referred to as *Wagon Mound*.[25] In *Wagon Mound* the court refused to follow the rule allowing damages for the direct but unforeseeable consequences of a wrongful act. The court reasoned that it would be unjust to hold a defendant liable in negligence for damages of a kind which he could not have reasonably foreseen, although he may have reasonably foreseen that some damage might occur. Liability was limited to the scope of the risk created by the defendant's conduct. This limitation would restrict liability within the scope of the risk originally created, and make foreseeability the test both for responsibility, *i.e.*, liability for damages, and for negligence. Thus, if one has breached a duty of care because he should have foreseen

[19] Feeley v. United States, 220 F. Supp. 718 (E.D. Pa. 1963).
[20] LeJeune v. U.S. Fid. & Guar. Co., 105 So. 2d 327 (La. App. 1958).
[21] [1921] 3 K.B. 560.
[22] PROSSER, TORTS 303 (3d ed. 1964); Williams, *The Risk Principle*, 77 L.Q. REV. 179, 180 (1961).
[23] 262 N.C. at 670, 138 S.E.2d at 546-47.
[24] [1961] A.C. 388 (P.C.) (N.S.W.).
[25] The name of the ship involved in the case.

a particular type of risk, he is negligent by his breach and liable for the harm which he could have reasonably foreseen, but he is not liable for results which occur outside of that risk—as to those results, he is simply not negligent.

Whether or not the "thin skull" and "thin skin" cases are to be considered an exception of the foreseeability test of *Wagon Mound* will depend upon the meaning given to the phrase "damage . . . of such a kind as the reasonable man should have foreseen."[26] For example, "kind" could be interpreted as meaning either "personal" or "physical" injury. If it is interpreted as meaning personal injury, then, if defendant could foresee that some personal injury would occur it may be argued that he would be liable for all physical and emotional injury that did occur because it is of the same "kind" that was foreseeable. However, if "kind" is interpreted as meaning "physical" injury, then "psychic" or "emotional" injury is of a different "kind" than that which could have been reasonably foreseen, and the "thin skin" cases would appear to be a exception to the foreseeability rule.

The English courts deciding "thin skull" cases since *Wagon Mound* have considered them an exception to the foreseeability rule. As one court states, "Wagon Mound . . . did not have what I may call, loosely, the thin skull cases in mind."[27]

In the field of intentional torts it is generally agreed that when a defendant is liable because he has intentionally inflicted harm,[28] his liability is not restricted to the harm intended; the range of responsibility widens with the degree of culpability of his conduct.[29] However, in the "thin skull" cases there is no widening of responsibility once the defendant is negligent, the doors are wide open for

[26] [1961] A.C. 388, 426 (P.C.) (N.S.W.).

[27] Smith v. Leech Brain & Co., [1962] 2 Q.B. 405, 414.

[28] Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (Dist. Ct. App. 1960); St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So. 2d 670 (Fla. 1950); Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527 (1901); Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930); Kopka v. Bell Tel. Co., 371 Pa. 444, 91 A.2d 232 (1952); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924).

[29] "In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account.... For an intended injury the law is astute to discover even very remote causation." Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 463-64, 130 Atl. 145, 152 (1925) (dictum). See cases collected in Bauer, *The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages,* 82 U. PA. L. REV. 583 (1934).

plaintiff and defendant will be held responsible for all damage. Objection may be made to this rule on the ground that it imposes liability which may be far in excess of the slight dereliction in defendant's conduct. A defendant who was guilty only of a minor breach of duty may find his whole fortune exhausted because he was unfortunate enough to strike a particular "sensitive" plaintiff. To this objection the courts have answered that as between the wrongdoer and the innocent plaintiff, there may be good reason for letting the tort-feasor pay. Even though the defendant may have to bear an unreasonable loss, he at least caused that loss and rather he should suffer than an entirely innocent plaintiff.[30]

Assuming that the "he caused it, he should pay for it" reasoning is acceptable when applied to the "thin skull" plaintiffs, would it also be acceptable when applied to "thin skin" plaintiffs? It is submitted that it would not.

The "thin skin" cases are distinguishable in many ways. It is suggested that the problem of causation is much more obscure in the "thin skin" cases. Can it be said that defendant's negligence was a "substantial factor"[31] in causing plaintiff's post accident condition; or, "but for"[32] defendant's negligence plaintiff would not have become neurotic? According to the Freudian theory neurosis or psychosis have their roots in childhood conflict.[33] The origin of neurosis lies in the emotional and mental conflicts which the individual has not resolved but has suppressed in the subconscious.[34] In order for it to develop there must be a pre-existing emotional state or readiness for the neurosis. One author lists six factors[35]

[30] *E.g.,* Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). It would seem to beg the question to argue "If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence." Prosser, *Palsgraf, Revisited,* 52 MICH. L. REV. 1, 17 (1953). "That obvious truism [referring to Prosser] could be urged by every person who might adversely feel some lingering effect of the defendant's conduct, and we would then be thrown back into the fantastic realm of infinite liability." Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963).

[31] A "formula" used to determine actual cause. See PROSSER, TORTS 244 (3d ed. 1964).

[32] The second formula for actual cause. *Ibid.*

[33] ENGLISH & FINCH, *op. cit. supra* note 14, at 101-02.

[34] *Id.* at 41; Smith, *Cross-Examination of Neuropsychiatric Testimony in Personal Injury Cases,* 4 VAND. L. REV. 1, 37 (1950).

[35] They are inheritance, age enoch, sex, environmental factors, occupation and previous attacks. PEARSON, STRECKER'S FUNDAMENTALS OF PSY-

which are of significance in causing mental illness; another[36] likens this pre-existing emotional state to a "vase" with an invisible flaw. Assuming these authorities are correct, the "thin skin" plaintiff is not "caused" to develop his neurosis as a new or original condition. He should be viewed as possessing a pre-existing "injury"[37] and his condition following defendant's negligence should be considered as an aggravation of that pre-existing injury with the neurotic constitution being the major factor in plaintiff's injury.

If the tort-feasor is to take his "thin skin" plaintiff as he finds him, the pre-accident personality of the plaintiff should be closely considered to determine what part of the total injury represents the pre-existing one. The court should also determine whether the pre-existing condition was bound to worsen, in which event an appropriate discount should be made for the damage that would have been suffered in the absence of the defendant's negligence.

Secondly, it is submitted that the neurotic reaction precipitated by defendant's negligence is in many cases much more extreme[38] than the physical reaction suffered by the "thin skull" plaintiff. It has been suggested that there is no relationship between the extent of the physical injury plaintiff sustained and the severity of the subsequent neurosis.[39] One author who has made an extensive study in neurosis following accident cases concludes that they "demonstrate an inverse relationship of accident neurosis to the

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CHIATRY 15 (6th ed. 1963). The author cites the following example to show how the factors produced a mental illness:

> [T]hat the patient was born in difficult instrumental labor; that there was head trauma at the age of 4; that the patient's father "favored" an older child; that at the age of 10 she was frightened by a tramp who exposed his sexual organs to her; that at the age of 12 she was "upset" by her first menstrual period for which she had not been prepared; that at 15 she broke her wrist, and it was badly set and left a deformity; that at 19 she had a very unhappy love experience....

*Id.* at 28-29.

[36] Miller, *Accident Neurosis,* 29 INS. COUNSEL J. 297, 311 (1962).

[37] Smith & Solomon, *Traumatic Neuroses in Court,* 30 VA. L. REV. 87, 120 (1943).

[38] Di Mare v. Cresci, 23 Cal. 772, 373 P.2d 860 (1962); Levy v. Indemnity Ins. Co. of North America, 8 So. 2d 774 (La. App. 1942); Widener v. St. Louis Pub. Sec. Co., 360 Mo. 761, 230 S.W.2d 698 (1950); Griffiths v. Shaffrey, 283 App. Div. 604, 129 N.Y.S.2d 74, *aff'd,* 308 N.Y. 729, 124 N.E.2d 339 (1954); Osgood v. D. W. Winkelman Co., 274 App. Div. 694, 87 N.Y.S.2d 110 (1949); Rice-Stix Dry Goods Co. v. Self, 20 Tenn. App. 498, 101 S.W.2d 132 (1935).

[39] PAGE, ABNORMAL PSYCHOLOGY 149 (1947); Shannon, *Post Traumatic Neuroses,* 28 INS. COUNSEL J. 472, 474 (1961).

severity of the injury,"[40] in other words, the more severe the injury the less likely it is to precipitate a neurosis. It has also been suggested that it is not the physical nature of the injury that is important in precipitating the neurosis but rather the emotional and symbolic meaning given the injury.[41] This is demonstrated by a recent Michigan case, in which defendant's truck ran into the rear of a soft drink truck driven by plaintiff. Plaintiff was not seriously injured, but the liquid dripping from the broken bottles caused him to think his gasoline tanks had ruptured. The dripping noise recalled a previous accident that he had witnessed in which two persons were burned to death in a gasoline fire. As a result plaintiff became psychotic and unable to work. He received a 150,000 dollar verdict.[42]

Thirdly, it is difficult to determine the extent and duration[43] of plaintiff's emotional condition. Present is the possibility that plaintiff is suffering only from a "compensation neurosis." Here, as in other forms of neuroses, plaintiff is not malingering, but sincerely believes in the reality of his symptoms. His symptoms, however, are produced primarily by his subconscious desire for compensation. Prognosis is poor until he receives some type of fiscal therapy, preferably in the form of a speedy settlement.[44]

Today more than one-half of all hospital beds are occupied by mental patients.[45] The National Committee Against Mental Illness estimates that one out of every ten Americans is now suffering from some form of mental illness,[46] and with personal injury litigation assuming a greater proportion in the law, many "thin skin" plaintiffs will be coming before the courts. It would appear that serious questions of public policy are involved when an emotionally imbalanced individual is given a large verdict as a result of a slight physical injury inflicted by a stable, productive individual. It is suggested that letting the tort-feasor take his neurotic plaintiff as he finds him is not the way to solve our mental health problem.

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[40] Miller, *supra* note 36, at 298. Miller also relates the incidence of accident neurosis to social status. Most of the people who "developed gross neurotic sequence were unskilled or semi-skilled workers." *Id.* at 298-99.

[41] Palmer, *supra* note 13, at 399.

[42] Time, Feb. 14, 1964, p. 75.

[43] Smith, *supra* note 34, at 42-43.

[44] PAGE, *op. cit. supra* note 39, at 150.

[45] PEARSON, *op. cit. supra* note 35, at 1.

[46] *Id.* at 4.

The attitude of some courts in their consideration of "thin skin" plaintiffs is reflected by the lawyers' joke which defines "emotional trauma as a 'state of mind precipitated by an accident, stimulated by an attorney, perpetuated by avarice and cured by a verdict.' "[47]

THOMAS E. CAPPS

**Torts—Products Liability—Sale Requirement**

The decline of the requirement of a sale in the field of products liability parallels the decline of the requirement of privity.[1] Both are being replaced by "strict tort liability."

*Delaney v. Towmotor Corp.*[2] reveals the final stage of this development. The court in *Delaney* held a manufacturer of a defective fork lift strictly liable to an injured employee of a prospective buyer who had the lift on a demonstration loan directly from the manufacturer. In overcoming the defendant's argument of "no sale, no warranty," the court went beyond the recognition that a sale is not always a requisite of warranty and stated that products liability should no longer be characterized as warranty liability but rather as "strict tort liability."[3]

In the past, products liability has been limited and confined by the uncertain nature and character of warranty—more specifically by the contractual barriers associated with it.[4] Although the requirement of privity is said to be the major deterrent to new frontiers of products liability,[5] the idea that warranty requires a "sale" also has been an obstacle. It is said that goods are warranted only when supplied under a contract to sell or a sale,[6] generating the conten-

[47] Time, Feb. 14, 1964, p. 75.

[1] For a distinction between the two requirements, see, *e.g.*, Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (elimination of the privity requirement having no effect on the force of the sale requirement); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (benefit of a privity exception having no effect upon the sale requirement).

[2] 339 F.2d 4 (2d Cir. 1964).

[3] *Id.* at 6.

[4] Prosser, *The Assault Upon The Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[5] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 3 (1964).

[6] UNIFORM SALES ACT § 15. Although North Carolina has not adopted the Uniform Sales Act, it could easily be indirectly applied since the act is recognized as a codification of the common law. McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934). Also, recent North Carolina cases state that warranty is an element in a contract of sale. See

tion "that in the absence of a sale to and a purchase by the plaintiff, there is no 'vehicle to carry an implied warranty' by the manufacturer."[7] Some courts have decided warranty litigation on this narrow issue of "sale or no sale," consciously or unconsciously overlooking the possibility that a warranty can arise in the absence of a sale.[8]

In those cases where the crucial issue has been the existence of a "sale," the passage of title to the goods is not required;[9] but either a statutory payment[10] or an executory contract[11] and a delivery[12] are required. These requisites are satisfied in a "sale" of a container because it is essential to the sale of its contents.[13] However, ma-

Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964); Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960). Moreover, the applicability of the Uniform Commercial Code to products liability has been said to be limited to the *sale* of the product. Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963); 19 FOOD DRUG COSM. L.J. 178 (1964).

[7] Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602,——, 6 Cal. Rptr. 320, 323 (1960).

[8] In declaring "no sale, no warranty" of a product used in a beauty treatment, the court in Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963), supports its decision with cases that also stand for the proposition that warranty may arise without sale. The court in its application of the Uniform Commercial Code also overlooks a comment that indicates that the sales language of the warranty sections of the Code is not to be a limitation of the case law growth which has recognized "that warranties need not be confined either to sales contracts or to the direct parties to such a contract." UNIFORM COMMERCIAL CODE § 2-313, comment 2 at 88 (1962 Official Text). See generally, Farnsworth, *Implied Warranties of Quality In Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

[9] Warranty liability imposed upon the owner of a chartered vessel and upon the seller by a conditional sales contract indicates that title passage is not required. Farnsworth, *supra* note 8, at 659-60 & nn. 47 & 48. *But cf.* Brookshire v. Florida Bendix Co., 153 So. 2d 55 (Fla. 1963).

[10] In Haag v. Klee, 162 Misc. 250, 293 N.Y. Supp. 266 (Sup. Ct. 1936), an employee was denied recovery for an illness resulting from a meal served as part of her wages because the statutory sale contemplated payment in personal property and services. This problem with the definition of price, arising from a literal interpretation of UNIFORM SALES ACT § 9(2), has been corrected by UNIFORM COMMERCIAL CODE § 2-304(1), making the price "payable in money or otherwise."

[11] A promise to pay the purchase price is sufficient, Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950), but where only an offer to contract exists such as the mere selection of an item in a self-service store, no warranty is said to arise, Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946); Day v. Grand Union Co., 280 App. Div. 253, 113 N.Y.S.2d 436 (1952). However, handing the article to a checker in such a store will give rise to warranty liability. Sanchez-Lopez v. Fedco Food Corp., 27 Misc. 2d 131, 211 N.Y.S.2d 953 (1961). See generally 1 WILLISTON, SALES § 230(b) (Supp. 1964).

[12] Mechanical delivery of the product, as by a vending machine, is sufficient. Mead v. Coca Cola Bottling Co., 329 Mass. 440, 108 N.E.2d 757 (1952).

[13] There is a sale of the container even though it is returnable. Trust

terial essential to a contract for construction,[14] repair,[15] or professional services[16] is not considered to be sold because the "essence" of the transaction is said to be the sale of the labor or services rendered and not the sale of the finished product. This weighing of the entire transaction reflects the courts' hesitancy to impose strict liability for services and labor by implying a warranty to the material supplied.[17] As consumer demand for more protection increases, however, this attitude changes and transactions are reclassified. The purchase of a meal in a restaurant has undergone such a transition, from one of the services of an innkeeper to a sale of goods,[18] and there are a few indications that other transactions may be treated similarly.[19] Finally, where the transaction has the elements

v. Arden Farms Co., 50 Cal. 2d 217, ——, 324 P.2d 583, 592 (1958) (concurring and dissenting); Mead v. Coca Cola Bottling Co., 329 Mass. 440, 108 N.E.2d 757 (1952). This is true even though no separate consideration is given for it. Faucette v. Lucky Stores, Inc., 219 Cal. App. 2d 196, 33 Cal. Rptr. 215 (1963). North Carolina refuses to extend warranty to a container but without reference to the sale requirement. Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962); Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961).

[14] *E.g.*, Foley Corp. v. Dove, 101 A.2d 841 (D.C. Munic. Ct. App. 1954); Stammer v. Malvancy, 264 Wis. 244, 58 N.W.2d 671 (1953). *Cf.* Annot., 111 A.L.R. 341 (1937).

[15] *Cf.* Sam White Oldsmobile Co. v. Jones Apothecary, Inc., 337 S.W.2d 834 (Tex. Civ. App. 1960).

[16] Blood furnished to perfect a cure is not warranted because a transfusion is just an incidental part of the professional services performed. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). This denial of warranty by an insistence upon a sale has been consistently upheld in the "bad blood" cases. Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. 1965). For criticism of the "bad blood" rationale, see 69 HARV. L. REV. 391 (1955); 37 NOTRE DAME LAW. 565 (1961); 29 ST. JOHN'S L. REV. 305 (1955); 103 U. PA. L. REV. 833 (1955).

[17] "A different line has been followed in England. While most sales rules must be applied to a transaction *in toto* or not at all, warranties may be implied as to only a part—that concerned with goods furnished as opposed to services rendered or labor done." Farnsworth, *supra* note 8, at 664.

[18] *Compare* Rickner v. Ritz Restaurant Co., 13 N.J. Misc. 818, 181 Atl. 398 (1935), *with* Sofman v. Denham Food Serv., Inc., 37 N.J. 304, 181 A.2d 168 (1962). The majority would also find a sale and consequently a warranty in the "extras" of a meal such as salt and pepper or glass of water. Yochem v. Gloria, Inc., 134 Ohio St. 427, 17 N.E.2d 731 (1938). See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 157-80 (1951). The Code endeavors to solve the restaurateur conflict by declaring the serving of food and drink a sale for the purposes of warranty. UNIFORM COMMERCIAL CODE § 2-314(1).

[19] For an example of this transition in the typical service or labor contract, see Burge Ice Machine Co. v. Weiss, 219 F.2d 573 (6th Cir. 1955) (contract for installation of refrigeration *system*); Hanson v. Murray, 190 Cal. App. 2d 617, 12 Cal. Rptr. 304 (1961) (contract for application of weed killer). *Cf.* Gottsdanker v. Cutter Laboratories, 182

of a sale, an implied warranty is not destroyed merely because it is an illegal sale.[20]

More enlightened courts realize and accept that a sale as such is not the only transaction in which warranties are implied.[21] Although still the exception, such courts imply "true"[22] warranty liability to articles bailed for hire or for mutual benefit where a technical sale is obviously missing,[23] to food served in a restaurant irrespective of whether there is a sale of the food,[24] and to the material in a construction contract even though a lack of sale of goods is conceded.[25] Thus the trend appears to be that although the implied warranties of the Uniform Sales Act apply only to sales of goods, "similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified."[26]

Instead of stating in the principal case that a sale is no longer necessary to imply a warranty, the court eliminated warranty liability altogether and with it the requirement of sale. This finality was accomplished by the court's application of *Restatement of Torts*

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Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), where it was declared that a sale in the marketing process would be sufficient to impose warranty upon the manufacturer of a new drug even though the plaintiff's inoculation, like a transfusion, was not a sale. For criticism, see 13 STAN. L. REV. 645 (1961) (public policy misconceived). This inconsistency between a blood transfusion and a new drug innoculation may be realistically settled in the manufacturer's favor based on public policy and not on "sale." RESTATEMENT (SECOND), TORTS § 402A, comment *k* (Tent. Draft No. 10, 1964).

[20] Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). *Contra,* Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

[21] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 19.02 (1964); Farnsworth, *supra* note 8.

[22] In the majority of the bailment cases, the term "implied warranty" actually imposes a negligence requirement, especially when personal injuries are involved. The bailor "impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purposes for which it was hired." McNeal v. Greenberg, 40 Cal. 2d 740, 742, 255 P.2d 810, 812 (1953). See generally Annot., 12 A.L.R. 774 (1921).

[23] *E.g.,* Simpson v. Powered Prods., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963) (personal injuries); Covello v. State, 17 Misc. 2d 637, 187 N.Y.S.2d 396 (1959) (personal injuries); Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923) (property damage).

[24] *E.g.,* Cushing v. Rodman, 82 F.2d 864 (D.C. Cir. 1936); Stanfield v. F. W. Woolworth Co., 143 Kan. 117, 53 P.2d 878 (1936); Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946).

[25] Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P.2d 897 (1961).

[26] *Id.* at 582, 12 Cal. Rptr. at 262, 360 P.2d at 902.

section 402A,[27] a section described as a special rule of strict liability based purely in tort[28] and applicable to sellers of defective products. Aimed at the elimination of the contract rules associated with "warranty,"[29] it adequately handles the requirement of privity[30] and even states that it "is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code; and it is not affected by limitations on the scope and content of warranties, or by any limitation to 'buyer' and 'seller' in those statutes."[31] However, the drafters unfortunately chose to characterize the defendant of this section as a "seller,"[32] thereby limiting the section's significance. *Delaney,* however, lends new life to the section by regarding this restrictive feature

> as a description of the situation that has most commonly arisen rather than as a deliberate limitation of the principle to cases where the product has been sold, intentionally excluding instances where a manufacturer has placed a defective article in the stream of commerce by other means.[33]

The true import of *Delaney* is now evident. A new concept of products liability has been adopted, and it is clearly stated that such future law will not be limited by the requirement of sale.[34]

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[27] RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 10, 1964).
[28] *Id.* comment *m.*
[29] *Ibid.*
[30] *Id.* comment *l.*
[31] *Id.* comment *m* at 10.
[32] *Id.* comments *f* & *l* (illustrations).
[33] 339 F.2d at 6.
[34] If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and "public policy" have reached the point where the change is called for.
Prosser, *supra* note 4, at 1134.