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THE SUFFICIENCY OF A COMPLAINT, RES JUDICATA AND THE STATUTE OF LIMITATIONS—A STUDY OCCASIONED BY RECENT CHANGES IN THE NORTH CAROLINA CODE

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In 1965 the General Assembly of North Carolina, apparently acting upon the recommendation of a member of the bar of North Carolina, added to one of the demurrer statutes significant additional language (hereinafter sometimes referred to as the "addition"), as follows:

Within thirty days after the return of judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action, *and if there has been no appeal from the judgment sustaining the demurrer the plaintiff may, one time, commence a new action in the same manner as if the plaintiff had been nonsuited.*¹

The purpose of this additional language is not, on its face at least, apparent, but possibilities emerge on reflection. There are two important problems common to the institution of new actions after demurrers have been sustained or nonsuits granted—the possible application of the statute of limitations and the principle of res judicata. Under well-settled common law and North Carolina practice a nonsuited plaintiff may ordinarily begin again, free from the plea of res judicata,² and, if he begins within a year, free under

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¹ N.C. GEN. STAT. § 1-131 (Supp. 1965). (Emphasis added.)

² *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 392, 394, 395 (1913); *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 264 (1880); *Walker v. Story*, 256 N.C. 453, 124 S.E.2d 113 (1962); *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488(4) (1956) [hereinafter cited as *McINTOSH*]. If, however, the complaint in the new action contains substantially identical allegations and the evidence is substantially the same, the court may sustain a plea of res judicata at trial. *Walker v. Story*, 256 N.C. 453, 124 S.E.2d 113 (1962). Technically this is a plea of direct estoppel, *RESTATEMENT, JUDGMENTS* § 49, comment *b* (1942), which does not pre-

N.C. GEN. STAT. § 1-25 (1953)³ from a defense of the statute of limitations. But a plaintiff beginning a new action after a demurrer has been sustained for failure to state a cause of action has no such immunity from the statute of limitations and the extent of the application of *res judicata* is unclear. Was it then the intent of the legislature to give plaintiff in the demurrer situation immunities similar to those enjoyed in the nonsuit situation? The statement that "plaintiff may, one time, commence a new action" suggests *prima facie* an intention to deal with the principle of *res judicata*; the phrase "in the same manner as if the plaintiff had been nonsuited" may suggest an intention to incorporate N.C. GEN. STAT. § 1-25 (1953) into the demurrer situation.

There is apparently no formal legislative history of this enactment. Furthermore, apparently no other body, such as the bar association, the General Statutes Commission⁴ or the Courts Commission,⁵ considered the proposal or issued a report on it.

There is, however, one extant manifestation of legislative purpose. The attorney who proposed the statute to the legislature has stated privately to this writer, since the statute's enactment, that he intended to deal only with the problem of *res judicata*.⁶ He was not concerned with the statute of limitations, and the possible application of the addition's language to it did not occur to him. Such after-the-fact statements of private persons are obviously not controlling. But, in the face of ambiguous legislative purpose and

vent a third new action, rather than *res judicata* as bar, which does. The Supreme Court of North Carolina has held, however, that after such a dismissal in the second action, the judgment in the first will be treated as an adjudication on the merits. *Hampton v. Rex Spinning Co.*, 198 N.C. 235, 151 S.E. 266 (1930).

³ This section provides as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited . . . the plaintiff . . . may commence a new action within one year after such nonsuit . . . if the costs in the original action have been paid by the plaintiff before the commencement of the new suit. . . ." It has been applied to voluntary, as well as compulsory, nonsuits. *Van Kempen v. Latham*, 201 N.C. 505, 160 S.E. 759 (1931).

⁴ N.C. GEN. STAT. § 164-12 to -19 (1964). This is a commission engaged in continuous statutory research and correction.

⁵ S. Res. 155, N.C. Sess. Laws 1815 (1963).

⁶ The attorney is Harry Rockwell, Esq., of Greensboro, North Carolina. His interest in this subject was aroused as a result of his participation as counsel for plaintiff in *Davis v. Anderson Indus., Inc.*, 266 N.C. 610, 146 S.E.2d 817 (1966). The addition was enacted before the institution of the second action, cited above, in which the defense of *res judicata* only was involved.

nonexistent legislative history, should such statements be ignored?

Lacking any other apparent purpose, I conclude tentatively that the legislature intended to deal with one or both of the aforementioned defenses and turn to an examination of each in detail, beginning with the principle of *res judicata*.

I. RES JUDICATA

The application of *res judicata* to the reassertion in a new action of claims to which a demurrer has been sustained for failure to state a cause of action⁷ serves the familiar purposes of that principle.⁸ In this application, however, these purposes are ordinarily less demanding. A demurrer may successfully attack the form, as well as the substance, of a claim and thereby threaten its existence without a hearing on the merits. And such an attack usually occurs soon after the commencement of litigation,⁹ before a significant investment in time and effort has been made.¹⁰ Furthermore, a successful attack ordinarily creates no problem, since plaintiff usually files an amended complaint. Thus the instant problem of *res judicata* arises only if a final judgment dismissing the action is entered after leave to amend is denied, is not sought, or is granted but not availed of.

All should agree that if a claim is dismissed on demurrer because it is found positively to lack substantive merit, its reassertion in a new action should be barred by *res judicata*.¹¹ All should also agree that if a claim falls before a demurrer for a defect in form or pleading

⁷ The FED. R. CIV. P. 12 (b) (6) employs a motion to dismiss for failure to state a claim for relief. To avoid unnecessary verbiage, I shall employ, when speaking generally, only the substantially equivalent common law and code terminology. When speaking solely of the Federal Rules, I shall, of course, employ their terminology.

⁸ Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 344 (1948).

⁹ Ordinarily an attack on the form of a complaint, as opposed to its substance, is waived or viewed with great disfavor if not raised by demurrer or answer. CLARK, CODE PLEADING 531 (2d ed. 1947) [hereinafter cited as CLARK]. See also *Kern v. United Ry. of St. Louis*, 214 Mo. App. 232, 259 S.W. 821 (1924). Defects of substance are never waived until, in some jurisdictions, verdict, but such attacks, if successful, ordinarily terminate the proceedings for all time. The concern here is primarily with curable deficiencies, which are ordinarily exposed or waived in the preliminary stages of litigation. Some jurisdictions like North Carolina, however, permit an attack for the first time in the appellate court on significant, but potentially curable, pleading deficiencies, such as the omission of an essential allegation. *McINTOSH* § 1194 (Supp. 1964).

¹⁰ *Keidatz v. Albany*, 39 Cal. 2d 826, 249 P.2d 264 (1952).

¹¹ RESTATEMENT, JUDGMENTS § 50, comment c (1942).

only, its reassertion in some manner—whether by amendment or new action—should ordinarily be permitted. The problem then is to decide whether a claim may be reasserted in a new action, as well as in an amended complaint, and, if so, to decide whether the reasserted claim was defective in form only.

The desirable approach to this distinction between form and substance is through the question: Does the new complaint supply further facts or allegations the omission of which made the first complaint demurrable?¹² If so, the defect was one of form and a new action is not barred.¹³ Thus the pleader will be permitted to supply omitted essential allegations of the cause of action,¹⁴ facts sufficient to make specific "bare legal conclusions"¹⁵ or additional allegations that take the cause of action out of a fatal admission or affirmative defense disclosed on the face of the complaint.¹⁶

More difficult questions arise when the pleader seeks to change or omit from the first complaint allegations found fatal to the cause of action. If the allegations were untrue and the product of mistake or inadvertence, their correction or omission should, upon explanation, be permitted.¹⁷ The "correction" may, of course, be only a manufactured response, a possibility that will undoubtedly be called to the jury's attention. But this eventuality is hardly a deterrent to credible fabrications. It would seem best to forbid the institution of a new action by labeling the defect one of substance.¹⁸ The circumstances of the mistake will ordinarily be fresh at the time the demurrer is sustained. Accordingly, plaintiff should be required to explain immediately in an application for leave to amend. If he discovers the mistake only after judgment is entered, he may still move to open it.

The common law made an almost identical distinction between substance and form to decide when a general or special demurrer

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*; *Gould v. Evansville & C.R.R.*, 91 U.S. (1 Otto) 526 (1876); *Annot.*, 106 A.L.R. 437, 444 (1937); *Annot.*, 13 A.L.R. 1104, 1113 (1921).

¹⁵ *Ibid.*

¹⁶ *Gilmer v. Morris*, 46 Fed. 333 (C.C.M.D. Ala. 1891); *Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266 (1901); *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580 (1884); *Birch v. Funk*, 59 Ken. (2 Met.) 544 (1859); *Bonni-field v. Price*, 1 Wyo. 223 (1875).

¹⁷ *Wennerholm v. Stanford Univ.*, 20 Cal. 2d 713, 128 P.2d 522 (1952); *but cf. Kautzmann v. James*, 66 So. 2d 36 (Fla. 1953).

¹⁸ *RESTATEMENT, JUDGMENTS* § 50, comment c (1942).

would lie.¹⁹ However, it was usually applied when the special demurrer had been waived.²⁰ The technical question was whether the complaint stated a cause of action and the practical question was whether the defect was waived. Not surprisingly the general demurrer was found to reach complaints omitting essential allegations²¹ or disclosing affirmative defenses,²² and these were, therefore, defects of substance. Such a conclusion is unthinkable when the right to amend or to bring a new action is involved and the pleader is able to supply the omission. This necessary difference in result highlights the dangers implicit in the use of such all-purpose labels and the desirability of asking only the underlying question of whether a new action is available or a general demurrer lies.

Similar problems arise in deciding whether leave to amend should be granted. The essential question, however, is whether the defect is potentially curable,²³ not whether it has been cured. The labels may again be whether the defect is one of substance or form. Where, however, plaintiff can potentially cure the defect but is guilty of undue delay, bad faith or repeated failures to cure it by amendments previously allowed, he may properly be denied leave to amend,²⁴ even though he may later begin a new action.²⁵ This seeming inconsistency, which is implicit in a system permitting new actions, is justified as a safety valve for unreasonable exercises of the discretionary amendment power. In fact, it would seem to encourage such conduct.

Even though a new action is theoretically possible, the first judgment is not a nullity. There has been an adjudication that the original complaint failed to state facts sufficient to constitute a

¹⁹ SHIPMAN, COMMON LAW PLEADING § 148 (3d ed. Ballantine 1923). STEPHEN, PRINCIPLES OF PLEADING 158-61 (1824).

²⁰ See note 9 *supra*.

²¹ 71 C.J.S. *Pleading* §§ 221, 225 (1951).

²² *Mercantile Nat'l Bank v. Carpenter*, 101 U.S. 567 (1879); *Wall v. Chesapeake & Ohio R.R.*, 200 Ill. 66, 65 N.E. 632 (1902); 41 AM. JUR. *Pleading* § 212 (1942). This was the equity or later common law view. The strict common law view treated such allegations as immaterial. CLARK 251-52.

²³ 3 MOORE, FEDERAL PRACTICE ¶ 15.10 (2d ed. 1966) [hereinafter cited as MOORE]. See also *Fuhrer v. Fuhrer*, 292 F.2d 140 (7th Cir. 1961); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961).

²⁴ *Foman v. Davis*, 371 U.S. 178, 182 (1962); JAMES, CIVIL PROCEDURE § 5.3 (1965).

²⁵ New actions, unlike most amendments, do not require leave of court. Courts ordinarily do not have discretion to forbid new actions. RESTATEMENT, JUDGMENTS § 50, comment c (1942).

cause of action. A new complaint that did not supply the deficiency would be barred immediately by *res judicata*, or more precisely by a partial application thereof known as direct estoppel.²⁶ A dismissal of the second action pursuant to a plea of direct estoppel is not a judgment on the merits, however.²⁷ The pleader may file additional new actions until the statute of limitations runs or he is permanently enjoined from doing so through a bill of peace.²⁸

A final problem remains. Demurrers often question both the form and substance of a complaint. And orders sustaining them ordinarily do not specify the fatal defect or its nature, even though this problem would be entirely and simply eliminated if they did. If the claim is reasserted in a new action, how should the court rule if *res judicata* is pleaded and the basis of the original ruling cannot otherwise be determined? The answer seems quite simple; the plea must be rejected. No claim should be barred unless its lack of substance has clearly been once adjudicated. If the new complaint does state a cause of action, it is in all probability not based on a claim originally and correctly found to lack substance. Furthermore, *res judicata* is an affirmative defense upon which defendant has the burden on proof.²⁹ If he cannot show that the original court found the claim to be without merit, he has not discharged his burden.³⁰ Most jurisdictions so hold.³¹ Surprisingly, a number presume conversely that the original demurrer went to the merits.³² Given the practice of allowing new actions, this latter conclusion seems entirely inconsistent with the relevant policy and doctrine.

The second basic question—whether plaintiff may, at his option, supply the omission in a new action rather than in an amended com-

²⁶ *Id.* at § 49, comment *b.* *Id.* at § 50, comment *d* (1942). See also *Keidatz v. Albany*, 39 Cal. 2d 826, 249 P.2d 264 (1952). Direct estoppel applies when the cause of action and the question are the same; collateral estoppel applies when the questions are the same but the causes are different. RESTATEMENT, JUDGMENTS § 68 (1942). In both cases the estoppel applies only to questions actually litigated. *Ibid.* Only *res judicata* as merger or bar applies to questions that might have been, but were not actually, litigated.

²⁷ RESTATEMENT, JUDGMENTS § 50, comment *d* (1942).

²⁸ *Hampton v. Rex Spinning Co.*, 198 N.C. 235, 151 S.E. 266 (1930).

²⁹ *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955); *Hacker v. Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950).

³⁰ *Hacker v. Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950).

³¹ *Bissell v. Township of Spring Valley*, 124 U.S. 225 (1888) (dictum); *Hacker v. Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950); Annot., 106 A.L.R. 437, 443 (1937); Annot., 13 A.L.R. 1104, 1112 (1921).

³² Annot., 106 A.L.R. 437, 443 (1937); Annot., 13 A.L.R. 1104, 1112 (1921).

plaint—has been answered three ways. Many common law and code jurisdictions permit plaintiff to begin again, regardless of whether leave to amend was denied, sought, or availed of in the previous action.³³ Massachusetts permits new actions, except where leave has been granted and an amended complaint is not filed.³⁴ And some jurisdictions generally do not permit a new action.³⁵ This last solution has been accepted by most modern procedural systems,³⁶ notably the Federal Rules of Civil Procedure,³⁷ and is today undoubtedly the majority view.

The common law code rule permitting new actions, to which many states still adhere, emphasized the desirability of preserving meritorious claims from premature termination. It was perhaps a necessary response to the rigors of common law and code practice—*i.e.*, rigidly enforced technical requirements of pleading,³⁸ fre-

³³ Gould v. Evansville & C.R.R., 91 U.S. (1 Otto) 526 (1876); Keidatz v. Albany, 39 Cal. 2d 826, 249 P.2d 264 (1952); CLARK 530 n.115; RESTATEMENT, JUDGMENTS § 50, comment c (1942); Annot., 106 A.L.R. 437, 444 (1937); Annot. 13 A.L.R. 1104, 1113 (1921).

³⁴ Hacker v. Beck, 325 Mass. 594, 91 N.E.2d 832 (1950); Keown v. Keown, 231 Mass. 404, 121 N.E. 153 (1918); Capaccio v. Merrill, 222 Mass. 308, 110 N.E. 626 (1915).

³⁵ CLARK 531 n.116; Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 319-20 (1929); Annot., 106 A.L.R. 437, 444 (1939); Annot., 13 A.L.R. 1104, 1113 (1921).

³⁶ Note, 29 So. CAL. L. REV. 502, 511 (1956); 9 J.B.A. KAN. 159 (1950).

³⁷ Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); Mul-len v. Fitz Simons & Connell Dredge & Dock Co., 172 F.2d 601 (7th Cir.), cert. denied, 337 U.S. 959 (1949); 1A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 356 (Wright ed. 1960); 2A MOORE ¶¶ 12.10, 12.14. Fed. R. Civ. P. 41(b) gives the trial judge discretion to dismiss without prejudice after granting a motion to dismiss for failure to state a claim for relief. Bartsch v. Chamberlin Company of America, Inc. 266 F.2d 357 (6th Cir. 1959). Good reasons for the exercise of such discretion would probably be required, however. Cf., Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962); 5 MOORE ¶ 41.14.

³⁸ The problems of common law pleading are too well known to require extensive citation. See generally, SHIPMAN, COMMON LAW PLEADING §§ 76-145 (3d ed. Ballantine, 1923). The problems of code pleading can be traced principally to the elusive distinctions, erected by the courts upon the requirement of fact pleading, between statements or conclusions of law and statements of ultimate, material and evidentiary facts that are still resolutely pursued by some state courts—notably among them the Supreme Court of North Carolina, McINTOSH §§ 981, 1189—a generation after a morass of irreconcilable cases has been decided and some of our ablest thinkers have demonstrated the utter futility of the quest and the injustice to which it often leads. See generally CLARK 226; 2 MOORE ¶ 8.12; Cook, 'Facts' and 'Statements of Fact,' 4 U. CHI. L. REV. 233 (1937); Cook, *Statements of Fact in Code Pleading*, 21 COLUM. L. REV. 418 (1921); Pound, Book Review, 33 HARV. L. REV. 326 (1919). This fact pleading requirement of the Code was in Judge Clark's opinion its greatest failure and one of the prin-

quently sustained demurrers, technically burdened, illiberal amendment practice³⁹ and a general disinclination of appellate courts to find abuses of discretion by lower courts in their denials of leave to amend.⁴⁰ Under such conditions the need to permit new actions was overwhelming, and, in a time of uncrowded dockets, new actions ordinarily occasioned little waste or delay.

This view is also supportable in technical procedural thinking. The availability of leave to amend does not alter the fact that the only question positively adjudicated has been the sufficiency of the facts pleaded and not necessarily also the sufficiency of the underlying claim.⁴¹ For similar reasons a compulsory nonsuit for insufficient evidence was generally not treated by the common law as an adjudication on the merits.⁴² And if a plaintiff was entitled to another day in court to supply evidentiary omissions, he was surely entitled to another chance to supply pleading omissions. Furthermore, the availability of a voluntary nonsuit, which could be taken any time before verdict, meant that plaintiff could usually avoid a judgment on the merits anyway.⁴³

The common law practice was not without its problems for defendant, however. He could not always know whether the first claim was found to be without substantive merit and, if not, whether plaintiff was able to, or would seek to, supply the fatal omission. And the threat of a new action could compel him, sometimes unnecessarily, to continue expending resources in the preparation of his defense and in some situations to keep idle resources needed to pay a future judgment. Moreover, in a new action his plea of res judicata⁴⁴ usually asserted new matter that could not always be resolved before trial.⁴⁵ And even if he then prevailed, he was sub-

stantial reasons for the great reform movement that culminated in the Federal Rules of Civil Procedure. CLARK 226.

³⁹ CLARK 715-24.

⁴⁰ *E.g.*, *Mercantile Nat'l Bank v. Carpenter*, 101 U.S. 567 (1879); *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 264 N.C. 79, 140 S.E.2d 763 (1964); 5 AM. JUR. 2d *Appeal and Error* § 722 (1962).

⁴¹ *Bonnifield v. Price*, 1 Wyo. 223 (1875); *Von Moschzisker, Res Judicata*, 38 YALE L.J. 299, 319-29 (1929).

⁴² See note 2 *supra*.

⁴³ *Williams v. Asheville Contracting Co.*, 257 N.C. 769, 127 S.E.2d 554 (1962); *Pescud v. Hawkins*, 71 N.C. 300 (1874); 24 AM. JUR. 2d *Dismissal, Discontinuance and Nonsuit* §§ 19, 27 (1966).

⁴⁴ Defendant would assert either that the first demurrer had gone to the merits or that the new complaint did not supply the deficiency and was barred by direct estoppel.

⁴⁵ Plaintiff ordinarily would not allege in his complaint the prior dis-

ject to plaintiff's whim, until the statute of limitations ran,⁴⁶ to a repetition of the same process.

It is doubtful of course that the incidence of such harassment even approached the level of theoretical possibility. Few plaintiffs would expend their resources on such endeavors; many attorneys would discourage the attempt. And if the claim truly lacked substantive merit, it would in most cases fall before a second demurrer anyway.⁴⁷ Moreover, modern procedural devices like summary judgment⁴⁸ now permit immediate resolution of the defense of *res judicata*.

Nevertheless, the common law practice still poses disturbing questions. If the trial judge, in his discretion, denies leave to amend after several unsuccessful amended complaints, why should his considered judgment be virtually meaningless in the face of a new

dismissal and defendant, therefore, would be required to plead it affirmatively in his answer. Since speaking demurrers were prohibited and there was no summary judgment procedure or its equivalent under the common law or the code, defendant would, therefore, be compelled in theory to wait until trial to prove his contentions, even though his evidence ordinarily was documentary and undisputed. Often the court would at trial time receive evidence and dispose of the plea before the trial actually began. *Gillikin v. Gillikin*, 248 N.C. 710, 104 S.E.2d 861 (1958). Defendant could sometimes obtain earlier resolution by attacking the legal sufficiency of plaintiff's reply to the plea, if a reply were filed. Under the common law and in some code states, a reply to new matter was required; in some code states it was not, except pursuant to court order upon application of defendant. *JAMES, CIVIL PROCEDURE* § 4.13 (1965). The possibility of resolving an affirmative defense immediately would clearly be an appealing basis for such an order. *Lackawanna Beef Co. v. Adolf Gobel, Inc.*, 1 F.R.D. 538 (M.D. Pa. 1940). After an answer has been filed, North Carolina courts, lacking any statutory summary judgment procedure, will permit the question of *res judicata* to be raised by a motion to dismiss, to which the record in the previous action is attached. *Davis v. Anderson Indus.*, 266 N.C. 610, 146 S.E.2d 817 (1966); *Royster v. Wright*, 118 N.C. 152, 24 S.E. 746 (1896).

⁴⁶ Saving provisions in other states similar to N.C. GEN. STAT. § 1-25 (1953), sometimes apply to any dismissal not on the merits, a provision that includes dismissals on demurrers successfully attacking the form of the complaint. See note 121 *infra*. Such a provision may extend defendant's period of doubt considerably. As suggested already, the addition may be construed to effect a similar result. One state has held, however, that such a saving provision can be used only once; *i.e.*, a third new action will not be saved if the second was. *Denton v. City of Atchison*, 76 Kan. 89, 90 Pac. 764 (1907).

⁴⁷ A second demurrer would not lie if the judge took a different view of the merits or if plaintiff avoided or omitted allegations in his first complaint found fatal to his cause of action. Defendant would then be forced to allege in his answer that the prior judgment was on the merits. See notes 16, 17, 45 *supra* and accompanying text.

⁴⁸ FED. R. CIV. P. 56.

action?⁴⁹ And if plaintiff is able to amend immediately, why should he be permitted at his option to put defendant in such a position of doubt and discomfort?

The Massachusetts practice is a partial answer to the second question. Plaintiff is compelled at his peril to file an amended complaint once leave to amend has been granted,⁵⁰ but he is under no compulsion to seek it.⁵¹ Thus, he still cannot be deprived of an opportunity to replead a badly stated claim and there is recognition of the desirability of doing so immediately. But unless plaintiff is specifically given leave to amend in the order sustaining the demurrer,⁵² he is the only judge of the circumstances in which that desirability should give way to other considerations. Furthermore, a denial of leave to amend still does not bar a new action.⁵³ Thus, if plaintiff were compelled to file an amended complaint, which was thereafter dismissed on demurrer without leave to amend, he could apparently still begin a new action.⁵⁴ The surprising result then is that a dismissal after a denial of leave to amend, which suggests

⁴⁹ The reply to this question would apparently be that the court may have wrongfully assumed it lacked power to allow amendment, abused its discretion or denied leave because of plaintiff's bad faith, delay or previous failure to supply the omission in his complaint, in any of which situations a claim not yet adjudged to be positively without merit would be barred. Considerations of this nature apparently persuaded the Editors of the *Harvard Law Review* to conclude, without explanation, that plaintiff should be allowed to bring a second action whenever leave to amend is denied in the first. Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 837 (1952). The statement is unqualified and presumably was intended to apply to situations in which leave was finally denied after several unsuccessful attempts to amend. It is submitted that this conclusion is naive. The place to correct any wrongful denial of leave to amend, whether an error of law or an abuse of discretion, is in the appellate courts. Such courts should diligently police unreasonable denials. Certainly the federal courts do. *Foman v. Davis*, 371 U.S. 178, 182 (1962); 3 MOORE ¶ 15.10 n.2. If appellate courts fail to exercise this supervisory function properly, it may then be necessary to consider permitting new actions as a safety valve. But initially it is more appropriate to strike at the underlying evil than to erect wasteful counterbalances to it. Finally, in those situations in which plaintiff is properly denied leave to amend for laches, misconduct or repeated failures to correct his complaint, it makes no sense to permit a new action. The policy reasons for terminating the claim in such cases are as applicable to a new action as to amendments. The desire to reach the merits must at some point give way to practical considerations of judicial efficiency and fairness to the defendant.

⁵⁰ See note 34 *supra*.

⁵¹ *Hacker v. Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950).

⁵² *Keown v. Keown*, 231 Mass. 404, 121 N.E. 153 (1918).

⁵³ *Hacker v. Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950).

⁵⁴ *Ibid.*

that plaintiff's claim has no merit, is not with prejudice, but a dismissal after leave has been granted, which suggests that it possibly has merit, is an adjudication on the merits.

Absent special circumstances, new actions are not permitted under the modern practice.⁵⁵ Plaintiff must obtain leave to amend after each demurrer or motion to dismiss is sustained or suffer a dismissal with prejudice.⁵⁶ If the claim is reasserted in a new action, it will quickly be dismissed upon the simple demonstration that it is the same claim.⁵⁷ The balance is clearly cast in favor of judicial economy and efficiency, a necessary expedient perhaps in an era of crowded dockets and the rising cost of litigation. Denials of leave to amend are no longer essentially meaningless, the possibility of harassment and doubt is terminated and the repose of a final judgment is assured.

The important question is whether potentially meritorious claims will be prematurely terminated under such a ruthlessly efficient practice. It is best answered initially in the context of a modern procedural system such as the Federal Rules of Civil Procedure. Under the Federal Rules most pleading deficiencies can be attacked, if at all, only through a motion for a more definite statement.⁵⁸ A motion to dismiss for failure to state a claim for relief does not lie unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief.⁵⁹ But a motion to dismiss may lie where a fatal admission appears on the face of the complaint⁶⁰ or the allegations fall below the minimum standards required by the rules and their official forms.⁶¹

⁵⁵ See notes 36 & 37 *supra*.

⁵⁶ See note 37 *supra*.

⁵⁷ *Ibid.*

⁵⁸ Such a motion lies only when the complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." FED. R. CIV. P. 12(e); see 2A MOORE ¶ 12.08.

⁵⁹ Conley v. Gibson, 355 U.S. 41, 45-46 (1957); 2A MOORE ¶ 12.08.

⁶⁰ Leggett v. Montgomery Ward & Co., 178 F.2d 436 (10th Cir. 1949); compare Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951) (motion to dismiss does not lie when complaint discloses defense of conditional privilege, but fails to allege in avoidance thereof abuse of privilege or malice).

⁶¹ There is some dispute as to whether the correct motion here should be a motion to dismiss or a motion for a more definite statement. Compare Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951), and Louis, Book Review, 44 N.C.L. REV. 880, 883 (1966), with JAMES, CIVIL PROCEDURE § 2.11 (1965). This question, left open by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 47 (1957), requires definitive resolution.

Before the motion is granted, however, plaintiff may one time of right take a voluntary dismissal or amend.⁶² Thereafter, plaintiff must seek leave to do either,⁶³ but leave to amend is freely given unless it does not appear possible for substantive reasons that plaintiff can correct the defect⁶⁴ or he has failed in several attempts to do so and shows no such future likelihood.⁶⁵ If plaintiff is denied leave to amend, his only hope is to persuade an appellate court that the denial was an abuse of discretion. In many appellate courts this demonstration is extremely difficult to make.⁶⁶ The federal courts, however, have often, and quite properly, found such abuses.⁶⁷ In fact the onus, it appears, is upon the trial court to show good reason for its denial.⁶⁸

Under these safeguards the danger to badly pleaded claims is slight and a dismissal after leave to amend has been denied should, therefore, be with prejudice.⁶⁹ Does it also follow that plaintiff should be compelled to apply for leave to amend and to file an amended complaint once leave is obtained? Some argue that plaintiff's failure to do either is an admission that the defect cannot be cured.⁷⁰ This fiction is not very satisfactory, however, when plaintiff actually supplies the deficiency in a second suit. The question

⁶² FED. R. CIV. P. 15(a), 41(a)(1) permit either of right before a "responsive pleading" has been filed. A motion to dismiss is not a "responsive pleading." 3 MOORE ¶ 15.07 (2).

⁶³ *Swan v. Bd. of Higher Educ.*, 319 F.2d 56 (2d Cir. 1963); *Cassell v. Michaux*, 240 F.2d 406 (D.C. Cir. 1956). A few federal courts hold that plaintiff may amend without leave even after a motion to dismiss has been granted. *Fuhrer v. Fuhrer*, 292 F.2d 140 (7th Cir. 1961). Some hold that after a motion to dismiss has been granted, plaintiff's only remedy is to move to open judgment under Rules 59 or 60. 3 MOORE ¶ 15.07(2), 15.10. Leave to take a voluntary dismissal under FED. R. CIV. P. 41(a)(2) would probably be given only when plaintiff had some good reasons for terminating the action and beginning again at a later date. See note 74 *infra*.

⁶⁴ 3 MOORE ¶ 15.10.

⁶⁵ *Foman v. Davis*, 371 U.S. 178 (1962).

⁶⁶ See note 40 *supra*.

⁶⁷ 3 MOORE ¶ 15.10 n.2.

⁶⁸ "[B]ut outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962). It would appear that a trial judge would fall under this admonition if he failed to write an opinion or to give reasons in his order. Quære whether or how such a desirable rule could be enforced in states like North Carolina where trial judges never write opinions?

⁶⁹ The foregoing text represents an additional and cogent reason for the position outlined in note 49 *supra*.

⁷⁰ *Scherff v. Missouri Pac. Ry.*, 81 Tex. 471, 17 S.W. 39 (1891); *McIntosh* § 1189 (Supp. 1964).

then is not whether the cure is available but whether it must be supplied immediately. An affirmative answer seems unavoidable. Beginning a new action is clearly more costly and troublesome than filing an amended complaint and it subjects defendant to unnecessary doubt and discomfort. Accordingly, if plaintiff is able to amend immediately, he should be compelled to do so.

Plaintiff should usually know or be able to discover what is wrong with his complaint from the demurrer⁷¹ or motion to dismiss,⁷² his opponent's brief or oral argument, or the court's opinion or order. Only when the demurrer asserts several grounds and is sustained in a general order without opinion is plaintiff potentially in doubt. He may, however, supply all the alleged deficiencies or ask the court for the basis of its ruling. If he lacks knowledge needed to meet requirements of specificity, he may allege on information and belief or seek a continuance and initiate discovery.⁷³

Undoubtedly there are situations in which plaintiff has good reason to terminate the proceedings and, at his option, to begin again later. The desire to seek a new attorney, additional funds or additional evidence are such possibilities. But, in fairness to the defendant, plaintiff should be required to present his reasons to the court, which, if satisfied with them, could dismiss without prejudice under Rule 41(b).⁷⁴

⁷¹ Under some codes the demurrer must distinctly specify the nature of the alleged defect; it is insufficient to allege only that the complaint does not state facts sufficient to constitute a cause of action. *E.g.*, N.C. GEN. STAT. § 1-128 (1953). Regrettably, courts sometimes pay little attention to this requirement.

⁷² Official Form 19 of the Federal Rules permits a motion to dismiss to state only that the complaint fails to state a claim upon which relief can be granted. A motion in this form is, therefore, sufficient, but not desirable. FED. R. CIV. P. 84; 2 MOORE ¶ 12.14.

⁷³ N.C. GEN. STAT. § 1-568.4(1) (1953) permits examination of parties for the purpose of obtaining information necessary to prepare a pleading or amendment to a pleading. Under FED. R. CIV. P. 26(a) depositions may be taken after the action is commenced by the filing of a complaint. FED. R. CIV. P. 3. Ordinarily, however, plaintiff can file a sufficient complaint under the Federal Rules without the assistance of discovery.

⁷⁴ See note 37 *supra*. Alternatively, plaintiff could seek the court's permission to take a voluntary dismissal under FED. R. CIV. P. 41(a)(2). It is doubtful that plaintiff may take a voluntary dismissal without permission after a motion to dismiss has been granted, but he may do so after it has been filed. *Kilpatrick v. Texas & Pacific R.R.*, 166 F.2d 788 (2d Cir. 1948), *cert. denied*, 335 U.S. 814 (1948). See 5 MOORE ¶ 41.02(3). In some states a nonsuit may be taken any time before verdict without permission. See note 43 *supra*. This prevents the orderly enforcement of the modern rule.

Despite all these safeguards, a few potentially meritorious claims will undoubtedly be prematurely extinguished. Some slippage in even the most liberal system is inevitable. It does not seem that this possibility, which should occur only infrequently, necessitates either an abandonment or modification of the modern practice. A poor attorney or judge can prejudice a litigant's claim in a hundred different ways and in each case *res judicata* may impose an ending that is in some ultimate sense unjust. All that can be guaranteed in an admittedly imperfect adversary system is that the means to correct mistakes are readily available, even if the wit or resources to seize them are not. There are other ways to assist the poorly represented litigant. Thus courts may open the judgment in appropriate cases.⁷⁵ But the occasionally imperfect justice that may result from the modern practice does not seem to outweigh the social costs of generally allowing new actions under the common law or Massachusetts practice.

Despite these assurances, nagging doubts persist. Whose interest truly requires the harsh protection of the modern rule? Is it the doubt and discomfort the defendant would otherwise suffer waiting for the statute of limitations to run? He suffers almost identically if plaintiff institutes his first action just before it runs.⁷⁶ Is it the expense to which defendant may be put in defending new actions? A statute requiring the payment of the first action's unassessed costs, including attorney's fees, as a prerequisite to the institution of the second would obviate this problem⁷⁷ and would, in addition, encourage the continuation of the first to a final judgment on the merits. But, although it is desirable that an action, once commenced, should proceed to a definitive conclusion, it is not required by any overwhelming interest of defendant.

Is it then the courts' own interest, the clamoring demands of

⁷⁵ FED. R. CIV. P. 60(b), which is modeled on CAL. CIV. P. CODE § 473 permits relief from judgment for mistake, surprise, inadvertence or excusable neglect. Egregious errors of counsel may qualify under this language. *Barber v. Turberville*, 218 F.2d 34 (D.C. Cir. 1954); *Robins v. Pitcairn*, 3 F.R. SERV. 60b.21, Case 2 (N.D. Ill. 1940); *Greenamyer v. Board of Trustees*, 116 Cal. App. 319, 2 P.2d 848 (1931); 7 MOORE, ¶¶ 60.10, (7), 60.22.

⁷⁶ *Keidatz v. Albany*, 39 Cal. 2d 826, 249 P.2d 264 (1952).

⁷⁷ N.C. GEN. STAT. § 1-25 (1953) requires the payment of costs, which ordinarily may not include attorneys' fees, when a new action is brought thereunder. *Summers v. Southern R.R.*, 173 N.C. 398, 92 S.E. 160 (1917). Under FED. R. CIV. P. 41(a)(2) the federal courts may allow a dismissal upon terms, including the payment of costs. See 5 MOORE ¶ 41.06.

crowded dockets and overworked judges? Similar demands are made upon a court in resolving attacks on process, jurisdiction or venue, but none would contend that a dismissal in these situations should be with prejudice. Such deficiencies do not, of course, involve the merits of a claim, as a failure to state a claim for relief may. But considered here are claims later shown to have potential merit, and clarity of analysis is hardly served by assuming that the prior adjudication proved that they lacked substance.

The best that can be said for the federal practice is that a dismissal for failure to state a claim is so rarely granted that in most cases the claim is in fact without merit. Thus, allowing new actions, with or without a cost taxing system, would probably consume⁷⁸ more than it preserves, especially when voluntary dismissals are available and the possibility of opening the judgment in truly oppressive cases exists. This practical conclusion that a more elaborate game is not worth the candle is, it would seem, the core of the federal practice. There is no definitive way to resolve here, or elsewhere, the competing demands of justice and efficiency. But the Federal Rules do achieve the fairest possible balance.

This judgment is obviously inapplicable to other courts or systems in which the dismissal of claims for pleading errors may occur with greater frequency. Thus, under current North Carolina Code practice, the modern rule would be inappropriate. In North Carolina technical rules of pleading abound,⁷⁹ demurrers asserting violations of these rules, sometimes for the first time on appeal,⁸⁰ are frequently sustained, technical limitations on the right to amend persist⁸¹ and, although the rules for amendment are otherwise

⁷⁸ The added bother would involve the weeding out of reasserted claims that had once been dismissed for reasons of substance or whose deficiency was not supplied. Disputes over the assessment of costs would undoubtedly arise and lead to appeals in some cases. On the other hand there would be no need for appeals from denials of leave to amend or proceedings to open judgment.

⁷⁹ See note 38 *supra*.

⁸⁰ *Stamey v. Rutherfordton Elec. Membership Corp.*, 247 N.C. 640, 101 S.E.2d 814 (1958) (court expressly found a defective statement, not a defective cause).

⁸¹ *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 264 N.C. 456, 142 S.E.2d 18 (1965) (no power to permit amendment bringing in the real party in interest); *Perkins v. Langdon*, 233 N.C. 240, 63 S.E.2d 565 (1951) (action for damages for sale by defendant of warehouse occupied by plaintiff—amendment changing description of contractual arrangement from lease to joint venture forbidden as amendment creating a wholly different cause of action not arising out of the same transaction); *Mills v. Richardson*, 240

liberally articulated,⁸² it does not appear that they have ever resulted in an appellate finding of an abuse of discretion⁸³ in a lower court's denial of leave to amend.⁸⁴ Under such conditions many meritorious claims might be prematurely terminated if the right to bring a new action was eliminated. This right is, therefore, despite the waste and bother it entails, the regrettable but necessary cost of preserving a measure of justice in a procedural system stressing technical pleading requirements.⁸⁵ The appropriate remedy, however, is the elimination of the underlying evil, not the addition of wasteful counterbalances to it. Furthermore, the very existence of such counter-

N.C. 187, 81 S.E.2d 409 (1954) (deficiency labeled defective cause requires dismissal without leave to amend) (dictum).

⁸² Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951); McINTOSH § 1285 (Supp. 1964).

⁸³ To be distinguished are cases in which the trial judge sustains a demurrer to a defective statement and dismisses the action before plaintiff may apply for leave to amend. Such dismissals are errors of law, not abuses of discretion, and will be readily reversed. Murray v. Benson Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963); McINTOSH § 1189, n.55.10 (Supp. 1964). The real question is whether reversal would also be forthcoming if, in each of these cases, the trial judge allowed plaintiff to apply for leave to amend and then denied it in his discretion. Although the result should apparently be the same in all or most cases, there is no North Carolina decision to cite for this premise. In fact most believe that an abuse of discretion ordinarily would not be found. See note 84 *infra*.

⁸⁴ There have been opportunities, however. In Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964), the trial court sustained a demurrer to and motion to strike defendant's counterclaim and cross action. The supreme court found that the counterclaim stated a cause of action, but that its allegations were improperly commingled with those of the cross-claim. In affirming, the court noted that the defendant could move "to amend its answer so as to set out separately in clear and unambiguous terms the facts upon which it relies for a counterclaim . . ." *Id.* at 673, 136 S.E.2d at 66. On remand the trial court, without explanation, denied leave to amend. On appeal the supreme court affirmed per curiam. It stated that its earlier opinion had merely pointed out the availability of, but had not ordered, leave to amend and found "there is no showing or contention that the court abused its discretion." Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 80, 140 S.E.2d 763, 764 (1964). It is submitted that the trial court manifestly abused its discretion and the court should have reversed. Compare the federal approach in note 68 *supra*.

⁸⁵ For similar reasons North Carolina cannot eliminate the wasteful rule permitting a plaintiff who has been nonsuited for insufficient evidence to begin a new action, free for a year under N.C. GEN. STAT. § 1-25 (1953) from the bar of the statute of limitations, until two things are done. First the supreme court must soften, voluntarily or by legislative command, its strict rules on variance. See generally, Whichard v. Lipe, 221 N.C. 53, 19 S.E.2d 14 (1942); Note, 41 N.C.L. REV. 647 (1963). Second, the legislature must modify the provisions of N.C. GEN. STAT. 1-163 (1953) forbidding amendments at trial that change the cause of action.

balances helps to perpetuate and, in a sense, justify the existence of the harsh technical requirements to which they are a response. One of the significant forces for liberal practice in the federal courts is the realization of the judges that a dismissal is final. It is possible that there would be a liberal trend in North Carolina practice if the consciences of its judges were similarly burdened.

What then was the practice in North Carolina and what changes has the addition to N.C. GEN. STAT. § 1-131 (Supp. 1965) wrought? It appears that North Carolina followed the common-law rule permitting new actions. Two old decisions,⁸⁶ citing familiar common-law precedent,⁸⁷ have specifically suggested that the dismissal of a complaint defective in form only is without prejudice and plaintiff may, therefore, begin a new action. Presumably, the supreme court would follow these decisions today. Decisions sustaining pleas of *res judicata* because the demurrer in the first action went to the merits⁸⁸ are also indicative of the adoption of the common-law rule, since under the modern practice all new actions on the same claim are automatically barred, regardless of the nature of the original demurrer. No case has ever distinguished, however, between defects in substance and form for this purpose, but undoubtedly the court would apply its all-purpose distinction⁸⁹ between a "defective cause

⁸⁶ Willoughby v. Stephens, 132 N.C. 254, 43 S.E. 636 (1903); Halcombe v. Commissioners, 89 N.C. 346 (1883). In McIntosh § 1189 (Supp. 1964) it is said that plaintiff's failure to amend should result in a dismissal on the merits. There is apparently no authority to this effect. The author in fact states that this area of the law is "uncertain" and that his suggestion is more in the nature of a statement of what the law "ought to be," rather than what it "is."

⁸⁷ Willoughby v. Stephens, 132 N.C. 254, 43 S.E. 636 (1903); see also Marsh v. Atlantic Coast Line R.R., 151 N.C. 160, 162, 65 S.E. 911, 912 (1909) (citing the leading federal decision.)

⁸⁸ Davis v. Anderson Indus., 266 N.C. 610, 146 S.E.2d 817 (1966); Jones v. Mathis, 254 N.C. 421, 119 S.E.2d 200 (1961); Swain v. Goodman, 183 N.C. 531, 112 S.E. 36 (1922). In its latest decisions the court, citing language from earlier cases, continues to speak of a "general demurrer to the merits," Davis v. Anderson Indus., 266 N.C. 610, 146 S.E.2d 817 (1966), although general demurrers were abolished almost a century ago. N.C. GEN. STAT. § 1-128 (1953). Presumably, the court means a statutory demurrer to the merits, as opposed to a statutory demurrer to the form.

⁸⁹ This distinction has been used to determine whether (1) plaintiff may be given leave to file an amended complaint, Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954); (2) whether it is an error of law for a trial court to dismiss a complaint and cut off plaintiff's right to apply for leave to amend, Murray v. Benson Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963); (3) whether a defect may be challenged by demurrer *ore tenus* after the answer has been filed, Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949); (4) whether an amended complaint will relate back, George

of action" and a "defective statement of a cause of action."⁸⁰

In two recent decisions⁸¹ new actions were dismissed on the assumption that the original demurrers had gone to the merits.⁸² In fact in neither case was it clear or even probable that this was so.⁸³ Arguably, the court was adopting the minority rule that a

v. Atlanta & C.A.L. Ry., 210 N.C. 58, 185 S.E. 431 (1936); (5) whether a pleading may be attacked by a demurrer or a motion for a more definite statement, Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949). The varying uses to which this distinction is put partially explain the irreconcilable results that the cases reach, especially in the labeling of a complaint that omits an essential allegation. Thus in Broadway v. Town of Asheboro, 250 N.C. 232, 108 S.E.2d 441 (1959), the court allowed a demurrer ore tenus to a complaint omitting essential facts and then gave leave to amend. Allowing the demurrer means there is a defective cause; allowing the amendment means there is a defective statement. See McINTOSH § 1194 n.110 (Supp. 1964). *North Carolina Case Law—Civil Procedure* (Pleading and Parties), 42 N.C.L. REV. 612, 613-14 (1964); Note, 39 N.C.L. REV. 83 (1960).

⁸⁰ The court probably would permit new actions if the second complaint supplies missing facts or allegations, Scott v. Statesville Plywood & Veneer Co., 240 N.C. 73, 81 S.E.2d 146 (1954); Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949); McINTOSH § 1189 (Supp. 1964); or corrects inconsistent neutralizing statements, Hunnicutt v. Shelby Mut. Ins. Co., 255 N.C. 515, 122 S.E.2d 74 (1961). In other words it appears that a new action would be permitted whenever leave to amend could have been allowed. On the other hand, admissions in a complaint negating the cause of action or disclosing an affirmative defense are always labeled defective cause, McINTOSH § 1189, nn.55.50, 55.55 (Supp. 1964), even though it may be possible for plaintiff to plead additional facts removing the defect. See note 16 *supra*.

⁸¹ Davis v. Anderson Indus., 266 N.C. 610, 146 S.E.2d 817 (1966); Jones v. Mathis 254 N. C. 421, 119 S.E.2d 200 (1961).

⁸² In *Davis* the court also noted that no new or different cause of action had been stated. 266 N.C. at 614, 146 S.E.2d at 820. Had this been the case, it would have been irrelevant that the original demurrer had gone to the merits. But such talk only confuses the question since it was perfectly clear that plaintiff was seeking to perfect, rather than change, her original cause of action. Some courts do compare the two complaints in this manner in order to decide whether the new action will be permitted. Note, *Effect of Judgment on Demurrer*, 30 CAL. L. REV. 487 (1942). This is in effect a hearing on a plea of direct estoppel to determine whether the deficiencies have been supplied.

⁸³ In *Jones* the demurrer had charged that the auto accident complaint failed to allege that the operator of the car was defendant owner's agent, that there was no allegation of facts sufficient to constitute actionable negligence and that the facts disclosed contributory negligence as a matter of law. The first two defects go to the form; only the third goes to substance. The demurrer was sustained without specifying the defect and plaintiffs did not seek leave to amend, as they might have. In *Davis* the defendants demurred ore tenus at the beginning of the trial without specifying any particular defect. Although the complaint set forth a recognized cause of action, the demurrers were sustained without comment or discussion and plaintiff's motions to take a nonsuit and for leave to amend were denied. In neither case was it clear what the fatal defects were and whether they went to the substance; in neither appeal did the supreme court bother to inquire. In both the court also found the amended complaints essentially unchanged,

prior dismissal on the merits is presumed in a new action.⁹⁴ But there was no precedent in North Carolina to this effect and accordingly a citation to authority elsewhere and a statement of reasons for choosing the minority rule was certainly to be expected. That neither was given is a likely indication that the court was unaware of the choice presented.

N.C. GEN. STAT. § 1-131 (Supp. 1965) states that if leave to amend is denied, "plaintiff may, one time, commence a new action in the same manner as if plaintiff had been nonsuited." This language seems to effect substantial changes in the common law practice presumably followed in North Carolina and erects a novel but not indefensible scheme for dealing with the problem. Plaintiff is now required to seek leave to amend.⁹⁵ If he does not, or obtains leave and fails to file an amended complaint, his action will be dismissed with prejudice. If he is denied leave to amend and his action is dismissed, he may file a new action once. Thus, in the new action he must obtain leave to amend each time a demurrer is sustained or suffer a dismissal with prejudice. Similarly, if he takes an unsuccessful appeal in the first action from the judgment sustaining the demurrer, he must on remand obtain leave to amend or suffer a dismissal with prejudice.⁹⁶

The addition seemingly gives plaintiff an absolute right to begin findings that would have warranted dismissals for reasons of direct estoppel. But, having found already that the original demurrers had gone to the merits and new actions were, therefore, barred, the findings were gratuitous.

⁹⁴ See note 32 *supra*.

⁹⁵ Although this requirement is not specifically stated in the addition, it is submitted that it is an inevitable requirement of the scheme it erects. The addition is operative only when leave to amend is denied. If plaintiff is not required to seek leave and to file an amended complaint if leave is granted, then he may simply wait for dismissal and begin a new action supplying the deficiency free from the "one time" limitation of the addition. Admittedly in doing so he would surrender his right to apply for leave to amend in return for the right to bring an indefinite number of new actions. But surely the legislature had no desire to encourage new actions at the expense of the more desirable amended complaint. Under this interpretation plaintiff cannot be penalized for seeking leave, since he may begin a new action if it is denied. Nor would it make sense to say this is an available option in a second new action in order to avoid the dismissal with prejudice required by the "one time" rule. Plaintiff in appropriate cases could avoid the bar by taking a voluntary nonsuit, preferably only with the permission of the trial judge.

⁹⁶ Plaintiff may, of course, appeal in the second action the order sustaining the demurrer, dismissing the action or denying him leave to amend. After remand from an unsuccessful appeal in the first action, plaintiff may similarly appeal such orders.

a new action. It would not seem that this was the legislative intent. If the first demurrer went to the merits,⁸⁷ it should bar a new action. And if the deficiency is not supplied, a plea of direct estoppel should lie. Defendant should not be required at his peril to demur again successfully.⁸⁸ These results are admittedly not commanded by the language of the addition. They are, however, implicit in all such schemes, are clearly desirable and are, furthermore, the likely results the supreme court will reach.

Finally, whenever it is unclear whether the original demurrer went to the substance or the form, the new action should be permitted. The purpose of the addition is to enhance the probability that plaintiff will receive a hearing on the merits of his claim. The presumption of substantive insufficiency that the minority rule requires, and the Supreme Court of North Carolina seemingly accepts, is inconsistent with this policy, as well as with the fair and rational operation of any scheme permitting new actions. Hopefully the supreme court will conclude that the addition requires this change.

Curiously, although the apparent purpose of the addition was "remedial," its application is, as outlined above, consistently more restrictive than the common law rule it displaces. This is not to say that a more restrictive practice is undesirable. On the contrary, the common law rule sacrificed judicial efficiency and fairness to defendant in the name of fairness to plaintiff. The balance now struck is clearly a fairer accommodation to both interests. Even under North Carolina's strict pleading rules, plaintiff will rarely fail in two actions, in each of which he may obtain leave to amend, to plead properly a meritorious claim. On the other hand, plaintiff's ability to harass defendant is now substantially limited.

The major failing of the new scheme is its continued denigration of the finality of a discretionary denial of leave to amend. Thus, if plaintiff is given several opportunities to amend and a demurrer to each amended complaint is sustained, he apparently may still file a new action when leave is finally denied and his action is dismissed. It would be desirable, therefore, to forbid, in the trial court's discretion, a new action whenever plaintiff has been permitted to file one or more amended complaints. However desirable such an inter-

⁸⁷ Since the addition is silent on the distinction between substance and form, it will probably be interpreted to adopt by reference the all-purpose distinction between a "defective statement" and a "defective cause." See notes 89 & 90 *supra*.

⁸⁸ See note 47 *supra*.

pretation is, there is little warrant for it in the language of the addition, which, like the original portion of N.C. GEN. STAT. 1-131 (Supp. 1965), seemingly applies without distinction to all demurrers.

Another problem arises from plaintiff's current right to take a nonsuit without prejudice after a demurrer has been sustained but before leave to amend has been denied and the action dismissed.⁹⁹ In this way he may apparently escape both the "one time" and "no appeal" limitations of the addition. Admittedly he gives up his right to apply for leave to amend. But the policy of the addition is to compel him to proceed to a judgment on the merits once an unsuccessful appeal is taken or a second action is begun and a demurrer is sustained. It would be desirable, therefore, to require permission to take a voluntary nonsuit after a demurrer has been sustained, but there is little reason to assume the court would so require.¹⁰⁰

It could be argued that the sole purpose of the addition is to apply N.C. GEN. STAT. § 1-25 (1953) to the demurrer situation. This remedial statute does not expand the application of res judicata¹⁰¹ or shorten the original period of limitations after nonsuit

⁹⁹ *Leggett v. Smith-Douglass Co.*, 257 N.C. 646, 127 S.E.2d 222 (1962). There plaintiff was permitted to take a nonsuit and begin a new action under N.C. GEN. STAT. § 1-25 (1953) after a demurrer had been sustained, the action dismissed and an appeal noticed. The court said the nonsuit was the equivalent of an abandonment or withdrawal of the appeal. But it is difficult to understand how plaintiff could take a nonsuit, allowing a new action under N.C. GEN. STAT. § 1-25 (1953) if the trial court had in fact entered a final judgment dismissing the action. Conceivably the trial court had entered an order sustaining the demurrer and dismissing the action—thus cutting off plaintiff's right to apply for leave to amend—but had not formally entered judgment. In such a case the action may technically still be pending. But since the entry of judgment is a mere ministerial act, it would seem that nothing remained from which a nonsuit could be taken. This difficulty would not be present, of course, if the trial court had merely sustained the demurrer and plaintiff had immediately taken an interlocutory appeal under N.C. GEN. STAT. § 1-130 (Supp. 1965). In such a case the action would still be pending.

¹⁰⁰ There is some precedent for judicially imposed limitations on the right of nonsuit. *Pulman's Palace Car Co. v. Central Transp. Co.*, 171 U.S. 138 (1898); *Chicago & Alton R.R. v. Union Rolling Mill Co.*, 109 U.S. 702 (1884); *City of Detroit v. Detroit City Ry.*, 55 Fed. 569 (E.D. Mich. 1893). Traditionally such limitations have been applied only in equity, 5 MOORE ¶ 41.02(2), but there seems to be no reason why they cannot now be made applicable to all civil actions.

¹⁰¹ *Hayes v. Ricard*, 251 N.C. 485, 112 S.E.2d 123 (1960) (an involuntary nonsuit is, despite N.C. GEN. STAT. § 1-25 (1953), an adjudication on the merits when based on a finding that plaintiff has no claim rather than on a finding of insufficient evidence); *accord*, *American Nat'l Bank & Trust Co. v. United States*, 142 F.2d 571 (D.C. Cir. 1944) (holding that a federal statute similar to N.C. GEN. STAT. § 1-25 (1953) has no effect on res

to one year.¹⁰² It merely extends the statute of limitations if it would otherwise have run before the end of the year allowed. Under this interpretation the addition would not affect the right to bring new actions. It would merely give immunity to some of them from the plea of the statute of limitations. But a second new action, or a first new action following a failure to amend or an unsuccessful appeal, could still proceed if commenced within the original period of limitations.

If this had been the legislative intent, why was this saving provision simply not amended to include demurrers?¹⁰³ And why were the "one time," "no appeal" limitations applied only to demurrers?¹⁰⁴ And finally why weren't all other dismissals not going to the merits included, as other states have done?¹⁰⁵ There is very little reason, therefore, to assume the existence of so limited or so misplaced a legislative purpose. Furthermore, it does not necessarily follow that because the saving statute does not affect the principle of *res judicata*—this itself being a doubtful proposition¹⁰⁶—the ad-

judicata). Similarly N.C. GEN. STAT. § 1-25 (1953) will not save a second action from a plea of direct estoppel at trial if the pleadings and evidence are similar to those found insufficient in the first. *Walker v. Story*, 256 N.C. 453, 124 S.E.2d 113 (1962). In fact the court has held on policy grounds that such a finding retroactively makes the judgment in the first action an adjudication on the merits, thus barring a third action under N.C. GEN. STAT. § 1-25 (1953). *Hampton v. Rex Spinning Co.*, 198 N.C. 235, 151 S.E. 266 (1930). For an argument that N.C. GEN. STAT. § 1-25 (1953) has some effect on *res judicata*, see note 106 *infra*.

¹⁰² *Walker v. Story*, 256 N.C. 453, 124 S.E.2d 113 (1962).

¹⁰³ N.C. GEN. STAT. § 1-25 (1953) has been applied where the dismissal was for misjoinder of parties and causes. *Carolina Transp. & Distrib. Co. v. American Alliance Ins. Co.*, 214 N.C. 596, 200 S.E. 411 (1939). Such a defect is raised by demurrer, N.C. GEN. STAT. § 1-127 (1953) even though the court describes the dismissal as a nonsuit in order to apply N.C. GEN. STAT. § 1-25 (1953). The only explanation of this conclusion is that it is a response to the court's rule that a misjoinder of parties and causes requires a dismissal of the action rather than a division under N.C. GEN. STAT. § 1-32 (1953). *McINTOSH* § 1188 (Supp. 1964). However, there seems to be little likelihood the court would, in the future, apply N. C. GEN. STAT. § 1-25 (1953) to a dismissal for failure to state a cause of action.

¹⁰⁴ There does not seem to be a satisfactory answer here. Under existing case law a plaintiff can bring a new action only one time after a compulsory nonsuit in the first action. *Hampton v. Rex Spinning Co.*, 198 N.C. 235, 151 S.E. 266 (1930). The "no appeal" limitation is apparently a device to discourage frivolous appeals by "encouraging" plaintiff to file an amended complaint whenever possible. See note 112 *infra* and accompanying text. When plaintiff has been nonsuited, however, he cannot cure the defect by amendment. Thus there is less reason for dissuading him from appealing.

¹⁰⁵ A number of foreign saving provisions similar to N.C. GEN. STAT. § 1-25 (1953) cover any dismissal not on the merits. See note 121 *infra*.

¹⁰⁶ N.C. GEN. STAT. § 1-25 (1953) was enacted against the background

dition does not. The "one time," "no appeal" language of the latter has *res judicata* overtones that the language of the former lacks. And it should be recalled that the draftsman of the addition clearly intended to deal with the problem of *res judicata*.¹⁰⁷

There remains one final problem. Under the common law rule plaintiff could begin a new action even after an unsuccessful appeal.¹⁰⁸ He may now begin one only "if there has been no appeal from the judgment sustaining the demurrer." This limitation appears to apply only to an appeal by plaintiff from a judgment dismissing the action entered after a demurrer has been sustained or to an interlocutory appeal¹⁰⁹ from an order¹¹⁰ sustaining a demurrer. It should be inapplicable to any of the following situations: (1) Defendant obtains certiorari¹¹¹ and successfully appeals an order overruling his demurrer; (2) Judgment is entered for plaintiff and defendant successfully appeals the order overruling his demurrer; (3) Defendant successfully demurs *ore tenus* on appeal; (4) After the demurrer is overruled plaintiff appeals an adverse interlocutory order or final judgment and defendant successfully establishes that the demurrer should have been sustained. In none of these situations has plaintiff appealed from "the judgment sustaining the demurrer." Furthermore, in none has he violated the apparent purpose of the "no appeal" rule by taking a potentially frivolous appeal that might

of the common law, code rule permitting a new action after a compulsory nonsuit for insufficient evidence. See note 2 *supra*. An increasing number of jurisdictions today treat such a dismissal as an adjudication on the merits. *Keidatz v. Albany*, 39 Cal. 2d 826, 249 P.2d 264 (1952); *FED. R. CIV. P.* 41(b). In effect it is treated as a motion for a directed verdict. *FED. R. CIV. P.* 50(a). Ordinarily this change is made by statute but there is nothing in the North Carolina law requiring such a result and preventing a judicial change, at least a prospective one. It is arguable, however, that N.C. GEN. STAT. § 1-25 (1953) itself prevents such a change, because a change would in effect render it a nullity. See *Batson v. City Laundry Co.*, 206 N.C. 371, 174 S.E. 90 (1934). Thus N.C. GEN. STAT. § 1-25 (1953) has, by assuming the existence of plaintiff's right to "mend his licks," enacted that right into statute. It does, therefore, have some effect on the application of *res judicata*, even though it does not control it in all situations. See note 101 *supra*.

¹⁰⁷ See note 6 *supra*.

¹⁰⁸ *State v. California Packing Corp.*, 105 Utah 191, 196-97, 145 P.2d 784, 787 (1944).

¹⁰⁹ N. C. GEN. STAT. § 1-130 (Supp. 1965) permits an interlocutory appeal of right from an order sustaining a demurrer.

¹¹⁰ The addition speaks only of a "judgment sustaining the demurrer." This language should be construed to apply to an interlocutory order also. Otherwise, the "no appeal" rule could easily be circumvented by interlocutory appeals.

¹¹¹ See N.C. GEN. STAT. § 1-130 (Supp. 1965) and N.C. SUP. CT. R. 4(1); *McINTOSH* § 1198(3) (Supp. 1964).

have been avoided by the filing of an amended complaint.¹¹² Thus, in each of these situations, while he must still seek leave on remand to amend his complaint under N.C. GEN. STAT. § 1-131 (Supp. 1965),¹¹³ he may begin again if leave is denied.

Interlocutory appeals consume time and money. Therefore if plaintiff is able to amend, he will ordinarily do so. He may, however, question in good faith whether an alleged missing allegation, that may be very difficult or unusually expensive to prove, is an essential element of his cause of action. He might take an appeal here with the expectation that, if unsuccessful, he would be given leave to amend on remand,¹¹⁴ but with the understanding that a denial of leave to amend would be virtually immune from reversal and he would be out of court. To avoid the risk, he might reluctantly choose to include the allegation in an amended complaint, which, to avoid waiving his contention,¹¹⁵ would also restate the original version in an alternative count.¹¹⁶ Then he would have to risk the delay and expense of an unsuccessful trial in order to raise his contention on appeal. If successful on this delayed appeal, he would probably have to retry the case.¹¹⁷

In spite of these difficulties many jurisdictions forbid, for other good reasons, most interlocutory appeals. In order to appeal from a sustained demurrer, plaintiff must, therefore, stand on his complaint

¹¹² *E.g.*, *Wockner v. King*, 48 Wash. 2d 83, 291 P.2d 649 (1955).

¹¹³ The supreme court may suggest this possibility, but ordinarily does not direct the trial court to grant leave on remand. *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 264 N.C. 79, 140 S.E.2d 763 (1965). By contrast a federal district court cannot grant leave to amend on remand unless the appellate court has so ordered. *Ginsburg v. Stern*, 242 F.2d 379 (3d Cir. 1957). And federal appellate courts do not automatically grant such leave. *222 East Chestnut St. Corp. v. Lakefront Realty Corp.*, 256 F.2d 513 (7th Cir.), *cert. denied*, 358 U.S. 907 (1958).

¹¹⁴ It is interesting to speculate what would happen if plaintiff's contentions on appeal were most reasonable, if unsuccessful, but he might readily have amended and avoided the appeal. Would leave to amend then be denied and a meritorious claim dismissed simply because some time and effort had been expended unnecessarily?

¹¹⁵ See *Blazer v. Black*, 196 F.2d 139 (10th Cir. 1952).

¹¹⁶ The court will undoubtedly sustain a demurrer or motion to strike the alternate count, but the error will then be preserved for appeal.

¹¹⁷ When a general verdict is rendered for defendant, a new trial would always be required, unless every other fact were conceded. When a special verdict is used, as is always the case in North Carolina, a remand would be needed only to assess damages if the jury found for plaintiff on all issues except the one in contention. Whether the remand in such cases should be solely to assess damages is another question. *Cf. Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931); *Devine v. Patterson*, 242 F.2d 828 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

and suffer a dismissal. North Carolina has on balance chosen to permit such appeals generally and to permit them from orders sustaining demurrers specifically.¹¹⁸ But now the addition requires plaintiff to make a difficult choice in the one demurrer situation, described above, for which an appeal is most needed.

STATUTE OF LIMITATIONS

N.C. GEN. STAT. § 1-25 (1953) does not by its terms apply to a dismissal after a demurrer has been sustained for failure to state a cause of action.¹¹⁹ Whether the addition has now made it applicable is debatable but, I think, resolvable through an understanding of the underlying problem and existing North Carolina law.

Successful demurrers, unlike nonsuits, ordinarily occur in the pleading stage of litigations before the statute of limitations has run.¹²⁰ Furthermore, they usually result in amended complaints, which are ordinarily permitted to relate back to the date the action was begun. For this reason there is no pressing need to extend saving provisions to demurrers. Such extensions as do exist are relatively few in number and are invariably directed to all dismissals not going to the merits.¹²¹

The essential mechanism then for dealing with this problem is the doctrine of relation back, whose rationale is quite simple. The purpose of the statute of limitations is to prevent the assertion in court of stale claims. A timely complaint, regardless of how badly it is drawn, will usually give defendant sufficient notice of the claim. Any subsequent perfection of the complaint by amendment should not prejudice him, therefore, and accordingly amendments are permitted, if necessary, to relate back.¹²² Obviously there will come a point where the amended complaint is so dissimilar to

¹¹⁸ N.C. GEN. STAT. § 1-130 (Supp. 1965); N.C. GEN. STAT. § 1-277 (1953).

¹¹⁹ See note 103 *supra*.

¹²⁰ Admittedly most jurisdictions will permit the defense of failure to state a cause of action or claim for relief to be asserted at any time, or at any time before verdict. FED. R. CIV. P. 12(h). But, such a belated assertion will ordinarily reach only defects of substance. See note 9 *supra*.

¹²¹ *E.g.*, N.Y. CIV. PRAC. LAW & RULES § 205(a); KAN. GEN. STAT. ANN. § 60-518 (1964); see *Developments In The Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1243 (1950). Such provisions have been found to reach dismissals on demurrers not going to the merits. *Storch v. Gordon*, 37 Misc. 2d 731, 236 N.Y.S.2d 410 (Sup. Ct. 1962).

¹²² *New York Cent. & H.R.R.R. v. Kinney*, 260 U.S. 340 (1922); JAMES, CIVIL PROCEDURE § 5.9 (1965).

the original that adequate notice is not given. Thus, although all jurisdictions allow relation back of some amendments they differ strongly with respect to the degree of difference that will bar it.

Most common law and code jurisdictions do not permit an amended complaint to relate back if it states a cause of action for the first time or contains a new or different cause of action.¹²³ This is not a very satisfactory test. A complaint whose deficiencies are curable, though gross enough to be labelled "substantive" or "defective cause," will still ordinarily give adequate notice of the underlying claim. And a different legal theory will often effect a change in the cause of action, even though the underlying facts, on which notice depends, remain essentially the same.¹²⁴ For this reason the Federal Rules of Civil Procedure and an increasing number of state codes of civil procedure permit relation back whenever the amended claim, though technically a different or new cause of action, arises out of the same transaction or occurrence.¹²⁵

North Carolina follows the older rule,¹²⁶ but regrettably has added to it. An amendment to a complaint containing a defective statement will relate back if the deficiencies are supplied, even though a demurrer pointing out the deficiencies has been filed.¹²⁷ But when the amended complaint is filed *after* the demurrer is actually sustained, it does not relate back, regardless of how minor the defect was or similar the amended complaint is. This rule, which apparently is no longer followed, in any other American court,¹²⁸ was first announced in *Webb v. Eggleston*¹²⁹ in 1948,

¹²³ CLARK 730. Needless to say, the broader the term "cause of action" is defined, the more liberal relation back will be.

¹²⁴ *E.g.*, a change from common law negligence to negligence under federal statute. *Fuquay v. A. & W. Ry.*, 199 N.C. 499, 155 S.E. 167 (1930); CLARK 715-30.

¹²⁵ FED. R. CIV. P. 15(c); CLARK 731.

¹²⁶ MCINTOSH § 1285, n.30.45 (Supp. 1964); Note, 25 N.C.L. REV. 76 (1946).

¹²⁷ *Lassiter v. Norfolk & C.R.R.*, 136 N.C. 89, 48 S.E. 642 (1904).

¹²⁸ A few old cases apply such a rule. *E.g.*, *Mackey v. Northern Milling Co.*, 210 Ill. 115, 71 N.E. 448 (1904); SHIPMAN, COMMON LAW PLEADING § 163 (3d ed. Ballantine, 1923). But the rule has been so completely abandoned that the texts do not mention it anymore, CLARK 729-34, 34 AM. JUR., *Limitation of Actions* §§ 260-68 (1941), or merely note its demise. JAMES CIVIL PROCEDURE 174 n.4 (1965). It is discussed in 54 C.J.S., *Limitations of Actions* § 279(b) (1948), which cites cases from Kansas and Illinois. Both have repudiated the rule by statute. ILL. REV. STAT., ch. 110, § 170(2) (1937); KAN. GEN. STAT. ANN. § 60-215(c) (1964). Furthermore, the rule was discarded in Kansas, even before the statutory change. *Moeller v. Moeller*, 175 Kan. 848, 267 P.2d 536 (1954); *Symposium—Statutes of*

at a time when wholesale abandonment of the older rule was already in progress. There the complaint alleged negligence generally without specifying, as North Carolina requires, the specific acts or omissions causing the rear end collision that killed plaintiff's intestate. The amended complaint, which was filed after a demurrer had been sustained, easily cured what was clearly a defective statement. Nevertheless the court held that the sustained demurrer was the law of the case and the amended complaint, in stating a cause of action for the first time after the statute of limitations had run, did not relate back.¹³⁰ It stated that this case was "on all fours with" and was therefore controlled by an earlier decision.¹³¹ In that case, however, the court specifically noted that the first complaint had contained a defective cause rather than a defective statement,¹³² a distinction carefully noted in the dissenting opinion of Justice Seawell.¹³³

It is difficult to explain the court's decision. It cited no North Carolina authority that was directly in point. It cited none of the few and now totally rejected decisions of other jurisdictions adopting a similar rule.¹³⁴ It completely ignored the vast number of decisions of other jurisdictions applying a contrary rule and the national trend towards a general liberalization of relation back.¹³⁵ And finally it dismissed as almost irrelevant, because of "the long

Limitations, 9 KAN. L. REV. 179, 216 (1960). Thus North Carolina is today the only state, or certainly only one of a few states, still following this rule. Most states hold that the time of the demurrer or motion to dismiss is irrelevant to relation back. *E.g.*, *Wennerholm v. Stanford University*, 20 Cal. 2d 713, 128 P.2d 522 (1942), *FED. R. CIV. P.* 15(c); *cf.* *Thompson v. Barnard*, 142 S.W.2d 238, 241 (Tex. Civ. App. (1940) (dictum)).

¹²⁹ 228 N.C. 574, 46 S.E.2d 700 (1948).

¹³⁰ *Id.* at 577, 46 S.E.2d at 702.

¹³¹ *George v. Atlanta & C. Ry.*, 210 N.C. 58, 185 S.E. 431 (1936).

¹³² *Id.* at 60, 185 S.E. at 432. The theory of this case, that a complaint containing a defective cause does not toll the statute of limitations, was itself apparently new to North Carolina. It was followed elsewhere, however, *Callender v. Marks*, 185 La. 948, 171 So. 86 (1936); *Moeller v. Moeller*, 175 Kan. 848, 267 P.2d 536 (1954), but carefully distinguished from the situation in *Webb*. The rationale of these cases is that a complaint failing to state a cause of action cannot toll the statute of limitations and, therefore, the amended complaint must, *ex hypothesi*, contain a new cause of action. Such a rule carries with it the dangers inherent in the use of such labels as "defective cause." Furthermore, the rule makes little sense in terms of the purpose of the statute of limitations, since a badly pleaded complaint may give adequate notice to defendant. SHIPMAN, *COMMON LAW PLEADING* § 163 (3d ed. Ballantine, 1923); *Wigmore*, 4 ILL. L. REV. 344 (1909).

¹³³ *Webb v. Eggleston*, 228 N.C. 574, 581, 46 S.E.2d 700, 704-05 (1948).

¹³⁴ See note 128 *supra*.

¹³⁵ *Ibid.*

line of decisions" on which it relied, the obvious injustice of its result.¹³⁶

The court clearly does understand the basic concept behind the doctrine of relation back. In a subsequent case that distinguished *Webb* it permitted an identical amendment to relate back because it was filed before a demurrer had been sustained.¹³⁷ What possible difference does the sustained demurrer make? The court says the order sustaining it is the law of the case. Even if this is true, it is irrelevant. It means only that another trial judge cannot thereafter find that the original complaint or an essentially identical amended complaint does state a cause of action.¹³⁸ But what has this to do with whether an amended complaint curing the defect should or may relate back? Certainly it raises no familiar or well accepted doctrinal impediment to relation back¹³⁹ and the court cited no authority to this effect.¹⁴⁰

The court might have argued in mechanistic terms that a badly pleaded complaint cannot toll the statute of limitations, even when it gives adequate notice. But if this were true it would not matter whether the belated cure was supplied before or after the court formally denounced it. Yet the court clearly will permit relation back if the cure occurs first.¹⁴¹ Alternatively, the court might have similarly argued, to distinguish these situations, that there is an hiatus between the time the demurrer is sustained and the amended complaint is filed, during which time the statute runs. But surely

¹³⁶ *Webb v. Eggleston*, 228 N.C. 574, 578, 46 S.E.2d 700, 703 (1948).

¹³⁷ *Davis v. Rhodes*, 231 N.C. 71, 56 S.E.2d 43 (1949). The court sought to distinguish *Webb* on the grounds that there the trial court had adjudged on demurrer that the complaint failed to state a cause of action, that this ruling, though possibly erroneous (apparently on the theory that the defect called for a motion for a more definite statement rather than a demurrer), was the law of the case and the amended complaint, which introduced "new matter" (a new cause of action?), did not, therefore, relate back. *George v. Atlantic & Charlotte Ry.*, 210 N.C. 58, 185 S.E. 431 (1936), was similarly distinguished. Even though a demurrer had been sustained in *Webb* and in *George*, it did not change the deficiency in *Webb* from a defective statement to a defective cause, as was the case in *George*, or the amendment from mere amplification to a new cause. The only difference between *Davis* and *Webb* was that a demurrer had been sustained in the latter, a difference without meaning.

¹³⁸ *Hayes v. Town of Cedar Grove*, 128 W.Va. 590, 37 S.E.2d 450 (1946); see Brandis, *Civil Procedure (Pleading and Parties)*, *Survey of North Carolina Case Law*, 44 N.C.L. Rev. 897, 904 (1966).

¹³⁹ See note 128 *supra*.

¹⁴⁰ The Court relied only on *George*, distinguished above, notes 137 & 132, *supra* and cases holding that a new cause of action does not relate back.

¹⁴¹ See note 137 *supra*.

the statutory period of thirty days in which to obtain leave to file an amended complaint¹⁴² supplies a sufficient bridge between the two pleadings.

Even if it were conceded that there is some merit to these arguments, it is overwhelmed by the harshness of the result to plaintiff and the absence of prejudice to defendant. In plain fact the common law rule prohibiting both amendment and relation back when a new or different cause of action was pleaded was based on nothing more profound than the need for a new writ and the attendant destruction of the court's jurisdiction.¹⁴³ That the rule and its excrescences are still given currency today, long after their *raison d'être* has vanished, is vividly illustrative of the fact that the forms of action still rule us from their graves.

Webb was followed without dissent a decade later in *Stamey v. Rutherfordton Elec. Membership Corp.*,¹⁴⁴ where the amended complaint of another widow was similarly not allowed to relate back. To make matters worse, the defect in the original complaint, a failure to plead proximate cause with sufficient specificity, was noticed for the first time on appeal after a verdict for plaintiff. But in *Gaskins v. Hartford Fire Ins. Co.*,¹⁴⁵ the court retreated. There plaintiff, who sought to recover under a policy of fire insurance for damage to his building, failed to allege an insurable interest therein or consideration for the policy. The parties agreed that a demurrer should be sustained, which agreement was incorporated in an order giving plaintiff leave to amend. To plaintiff's amended complaint, however, defendant cannily pleaded the statute of limitations. The supreme court held that a motion for a more definite statement was the appropriate device to assert these defects and that it would treat defendant's demurrer accordingly.¹⁴⁶ Need-

¹⁴² N.C. GEN. STAT. § 1-131 (Supp. 1965).

¹⁴³ CLARK 716.

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

¹⁴⁵ 260 N.C. 122, 131 S.E.2d 872 (1963).

¹⁴⁶ *Id.* at 123, 131 S.E.2d at 873. The authority for this proposition is *Davis v. Rhodes*, 231 N.C. 71, 56 S.E.2d 43 (1949). There the court clearly states that a motion for a more definite statement lies when the defect is a lack of specificity, which was the case in *Webb*. It was ambiguous as to whether a demurrer is proper when an essential allegation is missing, even though such a defect is properly labeled "defective statement." See notes 89 & 90 *supra*. It also suggested that a demurrer *ore tenus* does not lie to a defective statement. *Davis v. Rhodes*, 231 N.C. 71, 74, 56 S.E.2d 43, 45 (1949). But it subsequently sustained demurrers *ore tenus* to complaints omitting essential allegations. *McINTOSH* § 1194 (Supp. 1964). *A fortiori* a demurrer rather than a motion for a more definite statement lies at the

less to say, demurrers have always been used to attack complaints omitting essential allegations. In any event one wonders why Mrs. Webb and Mrs. Stamey, whose complaints merely lacked specificity, were not, *a fortiori*, candidates for this dispensation.

It is now impossible to say when the court will make this ruling available to others. It has not, to date, even cited *Gaskins*, whose facts were to it especially appealing.¹⁴⁷ Furthermore, there is no evidence that North Carolina attorneys have foresworn the historical practice of attacking badly pleaded complaints with demurrers and there are apparently no cases penalizing them for so doing. Indeed, given the *Webb* rule, and its applicability through *Stamey* to a demurrer ore tenus, the practice offers delectable rewards at little risk to defendants' attorneys having sense enough to delay their attack until the statute of limitations has run.¹⁴⁸

If the foregoing evidences the existence of a problem into which the General Assembly ought to intrude, it also highlights its failure to do so through the addition. For the problem of relation back arises only when leave to amend is granted, whereas the addition offers relief only when leave to amend is denied. Thus it cannot be argued that the addition was intended to save additional new actions

outset of such cases. Thus the result in *Gaskins* is inconsistent with the Court's interpretation of the authority to which it cites.

¹⁴⁷ The asserted defects in *Gaskins* were minor. Defendant insurance company, having insured the building and collected premiums, hardly doubted plaintiff's ability to allege an insurable interest and consideration. But who would say that Mrs. Webb could not have supplied as readily an impressive list of negligent acts and omissions that had caused defendant to drive into the rear of her husband's truck and kill him? Where, however, the deficiencies are not so insignificant, will the court make the dispensation available? And where plaintiff does not consent to the demurrer and the court does not, therefore, suspect defendant of overreaching, will the court find an implied waiver of the statute of limitations, as it did in *Gaskins*?

¹⁴⁸ If defendant knows of the omission from plaintiff's complaint but remains silent, he is deprived only of the few facts easily obtained through discovery, that an amended complaint might provide. He may, therefore, wait for the statute of limitations to run and then demur ore tenus. If the court holds his silence waived the defect, he loses nothing, since plaintiff would undoubtedly have been given leave to amend had timely notice of the defect been given. Defendant does face a "dilemma" if the statute of limitations has not run at the time plaintiff rests his case at trial. If plaintiff has failed to prove every element of his cause of action, he may be nonsuited. If he does attempt to prove the missing element of his cause of action, he may also be nonsuited for failing to lay a foundation in his pleadings for the evidence. The problem is that plaintiff, if nonsuited, may begin a new action within a year without worrying about the statute of limitations. Thus, defendant must choose between moving for nonsuit and disclosing the defect, or risking a demurrer ore tenus on appeal after the statute of limitations has run.

from the statute of limitations in order to correct aberrant case law.¹⁴⁹ Furthermore, such a conclusion creates a dilemma for plaintiff. As seen, he must seek leave to amend or suffer a dismissal with prejudice under the addition. But, if leave is granted, the amended complaint will not relate back unless the *Gaskins* dispensation is made available. Accordingly, although plaintiff must seek leave to amend, he must also urge that it be denied, so that he may file a new action protected by the addition from the defense of the statute of limitations. Such an anomaly and waste of resources could not have been intended and accordingly the conclusion follows that the addition was not intended to incorporate N.C. GEN. STAT. § 1-25 (1953).

There is nothing in the language of the addition that requires such an incorporation. The strongest argument arises from the failure of the final phrase to adopt any real significance, "in the same manner as if plaintiff had been nonsuited," which is also the linguistic source of any incorporation contentions. It must be remembered, however, that the historical inapplicability of *res judicata* to a judgment of compulsory nonsuit is as salient a feature of that practice in North Carolina as is the availability of the saving statute. Accordingly it is not unreasonable to conclude that the final phrase is merely descriptive of the *res judicata* practice detailed in the preceding language.¹⁵⁰ Furthermore, the usual, simplest and most obvious way to borrow from an existing statute is to refer to it specifically. That the addition does not mention N.C. GEN. STAT. § 1-25 (1953), the period of limitations, or a period of grace is certainly some evidence it did not intend to intrude into this area.

These interpretive arguments are admittedly inconclusive, but this is sufficient. For, given the absence of significant need for so limited a saving provision, the legislative failure to deal with the closely related and very serious problem of relation back, the incongruous dilemma for plaintiff to which this failure leads and, finally, the lack of intention of the addition's draftsman to deal with the statute of limitations at all,¹⁵¹ the argument against incorporation appears virtually irrefutable.

¹⁴⁹ It could be argued, of course, that the addition is an admonition to the supreme court to conform its view of relation back to current thinking. But it is not rational to assume that the General Assembly would address itself to the basically nonexistent problem of saving new actions occasioned by a demurrer in order to remedy, by indirection, the related but very real problem of relation back.

¹⁵⁰ See note 104 *supra*.

¹⁵¹ See note 6 *supra*.