UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 3 Article 7

4-1-1968

# Notes

North Carolina Law Review

# NOTES

## Contracts—Meeting of the Minds and U.C.C. § 2-204

In a recent Illinois decision, *Euclid Engineering Corporation v. Illinois Power Company*,[1] the court had to determine the extent to which the liberal approach of the Uniform Commercial Code[2] toward contract law would be applied in the formation of a contract. Defendant wrote plaintiff a letter inviting offers on certain generator units "subject to our acceptance of purchaser's assurance that the units will be used outside of the Illinois area." Following a telephone conversation between the parties, plaintiff offered by letter to pay 30,000 dollars for the units "subject our inspection and approval." Defendant accepted the offer by letter and, had no further correspondence ensued, plaintiff would have proved the existence of a contract. But plaintiff then mailed a check for the amount with a letter stating, "It is regrettable that our negotiations for the purchase of the equipment should result in controversy regarding our ultimate disposition for re-sale," and clarifying its intention to be free in disposing of the units throughout the United States except for the Illinois area.

On the basis of section 2-204[3] of the Code plaintiff argued that the correspondence between the parties constituted a valid contract. The existence of a contract under that section became the decisive issue on appeal. It appears that this court faced the dilemma of having not only to do justice between the parties but also to promote uni-

---

[1] 79 Ill. App. 2d 145, 223 N.E.2d 409 (1967).

[2] UNIFORM COMMERCIAL CODE § 1-102(1): "This Act shall be liberally construed and applied to promote its underlying purposes and policies." [Hereinafter cited as Code; textual section references are to the Code unless otherwise indicated.]

[3] Code § 2-204: Formation in General

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

formity under the Code.[4] The court disposed of the case by engrafting upon section 2-204 the theory of a meeting of the minds[5] to find that there was no contract when all of the correspondence was construed together.

The necessity of finding a meeting of the minds or mutual assent as an indispensable element of a contract[6] is justified by the unfairness of holding one to an agreement to which he did not assent.[7] Therefore the attention of the court traditionally focused upon the nature of "assent" and induced analyses in terms of subjective and objective theories of contractual liability. The hypothetical basis of the subjective theory is that the measure of agreement depends upon actual mental assent, that is, whether both of the parties mentally determined and intended to enter into the same contract.[8] The obvious disadvantage of such an approach is that "the devil himself knoweth not the thought of man."[9] However, the parties should be able to rely on representation rather than speculation in transacting business. It is equally necessary for the court to be able to rely upon something less elusive than thoughts to render justice in a particular situation. Since the subjective mental state is determinable only by permitting one to say what it was, perjury and a large element of self interest are encouraged, further discrediting the subjective theory.[10] To minimize the foregoing difficulties[11] courts generally have adopted the objective theory that manifested intent is supreme,[12] not to be

[4] *See* Code Introductory Comment; Holahan, *Contract Formalities and the Uniform Commercial Code*, 3 VILL. L. REV. 1, 9 (1952).

[5] "The Uniform Commercial Code has not made any change in the basic law." 79 Ill. App. 2d at 152, 223 N.E.2d at 413.

[6] G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 11, § 49 (rev. ed. J. Murray 1965); RESTATEMENT OF CONTRACTS § 20 (1932); L. SIMPSON, LAW OF CONTRACTS § 9 (2d ed. 1965).

[7] *See* O'Neill v. Corporate Trustees, Inc., 376 F.2d 818 (5th Cir. 1967); Topeka Sav. Ass'n v. Beck, 199 Kan. 272, 428 P.2d 779 (1967); Peters v. Halligan, 182 Neb. 51, 152 N.W.2d 103 (1967); Richardson v. Greensboro Whse. & Storage Co., 223 N.C. 344, 26 S.E.2d 897 (1943); Dodds v. St. Louis Union Trust Co., 205 N.C. 153, 170 S.E. 652 (1933).

[8] *See* G. GRISMORE, *supra* note 6, § 12.

[9] Y.B. Pasch. 17 Edw. 4, 2 (1462).

[10] Phelps, *The Nature of Mutual Assent in Contracts*, 10 OKLA. L. REV. 410, 411 (1957).

[11] *Id.*

[12] RESTATEMENT OF CONTRACTS § 20 (1932): A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do these acts; but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

"frustrated or altered by the secrets and undisclosed intent of one of the parties to the contrary."[13] The subjective theory, however, is likely to remain an undercurrent in decisions[14] because not all problems will be solvable through the objective approach.[15]

In typical business transactions the buyer and seller enter into many sales based on their knowledge of good business practice, custom, usage and perhaps commercial law, but generally they do not contemplate the legal consequences of each action. Problems of contract formation arise, nevertheless, where human discord or, more frequently, changing market conditions effect a change in one's intention to have a contract.[16] Rather than adhering to the traditional analyses of contract formation in such a situation, the Code approach in section 2-204

> dispense[s] not only with formalities in contracting, but also with the necessity of finding an exact *time* when the contract for sale was made . . . and with exactness or definiteness of *"one or more terms"* of the contract . . . . In these respects its purpose is apparently to empower or require courts to give legal consequences to the rough-hewn deals of business men, even though they lack the precision which the judicial mind would find indispensable . . . .[17]

Section 2-204(1) provides for a contract involving the sale of goods to be made in any manner showing agreement, including conduct by the parties recognizing that a contract exists. Its purpose was to permit the court to treat "informal dealings as creating bind-

[13] Rodgers, McCabe, & Co. v. Bell, 156 N.C. 378, 382, 72 S.E. 817, 818 (1911); *see* White v. Corlies, 46 N.Y. 467 (Ct. App. 1871) ("unevinced mental determination" without legal effect).

[14] It has been said of the subjective theory that "it must necessarily be reckoned with even today, whatever the avowed theory may be. Moreover it is only by keeping constantly in mind the possibility of a conflict of theory . . . that one can hope to understand and to harmonize decisions . . . ." G. GRISMORE, *supra* note 6, § 12.

[15] In Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 325 F.2d 2, 18 (3d Cir. 1963) appellee's representative testified that he *thought* his automobile financing was being handled by a company other than appellant, although the *objective manifestations* of appellee indicated that the contract under examination was with appellant. Held, "[R]egardless of appellant's objective manifestations . . . [appellee] never intended to accept appellant's offer, if any, and that his conduct never reflected the recognition of a financing contract's existence . . . ."

[16] 46 CORNELL L.Q. 308, 310 (1961).

[17] REPORT OF THE NEW YORK LAW REV. COMM'N FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE, N.Y. Leg. Doc. No. 65 (I) at 268 (1955) [hereinafter cited as 1955 REPORT].

ing obligations."[18] No basic change was made in prior law[19] except to the extent that recognition of a contract by the parties creates a test, unknown at common law,[20] by which a contract may be found when there is a bargain in fact.[21] Subsection (1) is probably of little practical importance in view of the reliance by courts upon similar language in section 2-207(3).[22]

Section 2-204(2) initiates the principle that the precise moment when a contract is made may be unknown without vitiating liability. Its aim was to facilitate the formation of contracts by correspondence,[23] but the Code does not say that the court cannot find a calen-

[18] N.C. GEN. STAT. § 25-2-204, N.C. Comment (1965).

[19] Code § 2-204, Comment; N.C. GEN. STAT. § 25-2-204, N.C. Comment (1965); 1955 REPORT 269; *see* RESTATEMENT OF CONTRACTS § 21 (1932): "The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct."

[20] 1955 REPORT 271-273.

[21] In Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 F.2d 114 (3d Cir. 1965), the court relied upon the "liberal policy regarding formation of contracts of sale" of section 2-204(1) to find a contract in a course of dealing between the parties.

[22] *See* 1955 REPORT 271-273. *Compare* Code § 1-201(11):

> "Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement.")

*with* Code § 1-201(3):

> "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract.")

One reason that it has not been necessary for the court to use § 2-204(1) in a situation represented by Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (Ct. App. 1915) should be noted. There, following plaintiffs offer, defendant made a "counter-offer" by making acceptance of plaintiff's offer contingent on a prompt acknowledgment by plaintiff. Held, no contract because plaintiff never acknowledged receipt of the offer. Today the court seems to rely upon Code § 2-207 to find a contract in a *Poel* situation. *In re* Doughboy Industries, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962); *cf.* Valashinas v. Koniuto, 308 N.Y. 233, 124 N.E.2d 300 (Ct. App. 1954) (liberal decision, much criticized, antedating Code in New York). *But see* Roto-Lith, Ltd. v. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962). Arguably Code § 2-204(1) is an equally valid ground for finding the existence of a contract in a factual setting of the *Poel* type. However, section 2-207 has permitted courts to disregard material differences between offer and acceptance and to overlook or incorporate additional terms in acceptance in construing the terms of a contract. *See generally* 57 NW. U.L. REV. 477 (1962). But section 2-207 is of limited utility in determining *when* a contract exists.

[23] Code § 2-204, Comment.

dar date for the commencement of a contract where necessary because of a statute of limitations.[24]

Section 2-204(3) states that even if certain terms are left "open" a contract will not fail for indefiniteness if the parties intend to make a contract and a reasonably certain basis exists for a remedy. Contracts with open terms are intentionally approved,[25] reflecting their practical utility, but two pre-requisites must be met. The first—that the parties intended to make a contract—restricts the operation of the principle if it must be shown that the parties intended to assume a binding legal obligation in the course of informal agreements.[26] Proof requirements are less stringent, however, if an intent to enter into a "bargain in fact" is sufficient.[27] In determining whether parties have intended to make a contract the courts, as in *Euclid,* are likely to adhere to the salient policy of examining the whole correspondence between the parties to ascertain whether the latest expressed intent was to have a contract.[28] The second prerequisite to an open terms contract is the existence of a "reasonably certain basis for giving an appropriate remedy."[29] Neither certainty concerning the performance contemplated nor exactitude concerning the amount of damages is required.[30] Subsection (3) seems to change prior law to some extent[31] for reports are laden with cases stating that minds must meet as to all terms of a contract.[32] The ex-

[24] *See* 1955 REPORT 269-271.

[25] Code § 2-204, Comment.

[26] 1955 REPORT 279.

[27] This conflict between technical language ("contract") and a liberal policy may have been created deliberately to enable courts to "do justice" in each case. The difference in results will probably depend upon the extent to which the courts choose to overlook differences in terms of acceptance, Code § 2-207, or to disregard omissions. *See* Pennsylvania Co. v. Wilmington Trust Co., 39 Del. Ch. 453, 463, 166 A.2d 726, 732 (1960) where it was said that "those drafting the statute intended that the omission of even an important term does not prevent the finding under the statute that the parties intended to make a contract."

[28] Elks v. North State Life Ins. Co., 159 N.C. 619, 75 S.E. 808 (1912); Bristol, Cardiff, & Swansea Aërated Bread Co. v. Maggs, 44 Ch. Div. 616 (1890).

[29] Code § 2-204(3). It appears from the two reported cases concerning this subject that subsection (3) applies to a transfer of shares of stock, Wilmington Trust Co. v. Coulter, 41 Del. Ch. 458, 200 A.2d 441 (1964), and includes situations wherein a contract may not be "sufficiently definite to be specifically enforced yet which, upon breach, justifies the granting of damages," Pennsylvania Co. v. Wilmington Trust Co., 39 Del. Ch. 453, 465, 166 A.2d 726, 733 (1960).

[30] Code § 2-204, Comment.

[31] *See* N.C. GEN. STAT. § 25-2-204, N.C. Comment (1965), and cases

tent to which prior law is changed depends upon the number of exceptions which the particular jurisdiction has made to this stricter rule.[33] How indefinite a contract is permitted to be depends upon commercial standards, but the greater the number of "open" terms the less likely a contract will be found,[34] unless conduct is decisive under section 2-204(1) or section 2-207(3).

The general tenor of the Code is, in summary, that ordinary and technical contract rules should not govern sales contracts unless they can further principles "unique to the commercial world."[35] But the court in *Euclid* relied upon the older common law principles in approaching contract formation instead of finding clear and fixed authority within the Code itself.[36] The court seems to have violated Code policy by not finding contractual liability where conduct clearly indicated contractual intent in terms of Code law. The Code formulation of mutual assent has received scant attention. This may be because section 2-204 has not been thought needed when section 2-207[37] and basic contract principles[38] are available; it may also be because counsel have not recognized that section 2-204 makes subtle variations in common law concepts of mutual assent which may be used to advantage. Yet these concepts and their variations should be recognized and implemented within the Code structure to produce a more complete and reliable body of Code law, thereby facilitating business transactions.[39] Within the breadth of section 2-204 social justice in terms of business relationships is readily accessible with-

cited therein; 1955 REPORT 279. *Cf.* Weilersbacher v. Pittsburgh Brewing Co., 421 Pa. 118, 121, 218 A.2d 806, 808 (1966) where an oral agreement was held valid with reliance upon section 2-204(3).

[32] *See, e.g.*, O'Neill v. Corporate Trustees, Inc., 376 F.2d 818 (5th Cir. 1967).

[33] North Carolina, for example, has enforced "output" and "requirements" contracts and has supplied terms in contracts otherwise proper for a "place of delivery" and a "time for performance." *See* N.C. GEN. STAT. § 25-2-204, N.C. Comment (1965), and cases cited therein.

[34] Code § 2-204, Comment.

[35] Charney, *How to Make a Contract Under the U. C. C.*, 16 BROOKLYN BAR. 18, 27 (1964).

[36] *See* 13 U. PITT. L. REV. 750 (1952).

[37] Note 21 *supra.*

[38] Code § 1-103.

[39] *See* Code § 1-102(2): "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

out unreservedly engrafting upon the Code such concepts as will make of it a mutation and destroy its purpose.[40]

THOMAS W. TAYLOR

## Evidence—Privileged Communications Between Husband and Wife

The North Carolina Supreme Court recently reconsidered its position regarding privileged confidential communications between husband and wife.[1] In *Hicks v. Hicks*,[2] the wife had instituted a suit under the provisions of N.C. GEN. STAT. § 50-16 (Supp. 1967),[3] for the custody of their eight-year-old daughter, for maintenance and support for her and the child, and for counsel fees. The trial record reveals that the husband had installed a tape recorder in the basement of the home. There was no evidence that the wife knew of the tape recorder. On three different occasions, in the presence of their eight-year-old child, conversations between the husband and wife were recorded. The opinion does not disclose what was said on

[40] *See* Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 206 (1917):

> The legal relations consequent upon offer and acceptance are not wholly dependent, even upon the reasonable meaning of the words and acts of the parties. The law determines these relations in the light of subsequent circumstances, these often being totally unforeseen by the parties. In such cases it is sometimes said that the law will create that relation which the parties would have intended had they foreseen. The fact is, however, that the decision will depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions being inarticulate and subconscious.

[1] Common law developed four distinct rules regarding testimony between husband and wife. These rules have not always been kept separate in legal writings. These four categories are: (1) one spouse could not testify in the other's behalf (2) one spouse could not testify against the other (3) one spouse could not testify about confidential communications with the other (4) neither spouse could testify to nonaccess so as to basterdize a child conceived or born during the marriage. *See generally* J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 78-101 (1947); D. STANSBURY, NORTH CAROLINA EVIDENCE §§ 53-61 (2d ed. 1963) [hereinafter cited as STANSBURY]; 8 J. WIGMORE, EVIDENCE §§ 2285-87, 2332-41 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife*, 4 ARK. L. REV. 426 (1950).

[2] 271 N.C. 204, 155 S.E.2d 799 (1967).

[3] N.C. GEN. STAT. § 50-16 (Supp. 1967) provides for alimony without divorce and for custody of any children of the marriage. This section concerns support and not divorce. Shore v. Shore, 220 N.C. 802, 18 S.E.2d 353 (1942).

these occasions, but did indicate that the wife "used vile and profane language in respect to her husband."[4] The trial judge remarked to the jury " 'there was a pretty ugly conversation in the presence of that little girl.' "[5] On appeal the North Carolina Supreme Court was asked to determine whether the recordings were admissible in evidence. The court held the recordings inadmissible due to the privileged communications rule and ordered a new trial.

The court was faced initially with the admissibility of the sound recording itself.[6] The great weight of authority,[7] which the court followed,[8] holds that evidence offered in the form of a sound recording is not inadmissible because of that form, if properly authenticated[9] and if not excluded by some positive rule of law because of the subject matter. As early as 1936, a Pennsylvania court perceived that the phonograph, the dictaphone, the talking motion picture, and other recording devices were in such common use that the verity of their recording and reproduction of sounds was well established. Thus, the court could permit their use as a means of presenting evidentiary facts to the jury.[10]

---

[4] 271 N.C. 204, 206, 155 S.E.2d 799, 801 (1967).

[5] *Id.* at 207, 155 S.E.2d at 802.

[6] *See generally* Annot., 58 A.L.R.2d 1024 (1958).

[7] *Id.* at 1029-30.

[8] 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967).

[9] Sound recordings have almost universal approval as an acceptable form of evidence; this is premised upon a proper foundation initially established for their admission. Annot., 58 A.L.R.2d 1024, 1032-36 (1958). *See, e.g.*, Williams v. State, 226 P.2d 989 (Okla. Crim. App. 1951), which lays down seven requirements for a proper foundation.

[10] Commonwealth v. Clark. 123 Pa. Super. 277, 187 A. 237 (1936). As to the use of recordings containing privileged communications between spouses, *see* Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951) (in a divorce proceeding it was error to admit into evidence a wire recording of conversations between spouses since confidential communications between spouses cannot be divulged by either spouse without the consent of the other). *Accord,* People v. Buckowski, 37 Cal. 2d 629, 233 P.2d 912 (1951); Braun v. Braun, 31 Wash. 2d 468, 197 P.2d 442 (1948). *But see* State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950) (a criminal case where the admission in evidence of a wire recording of a confidential communication between spouses, simultaneously overheard by a third person, a police officer, was apparently upheld on the ground that an eavesdropper is unaffected by the rule of privilege. In earlier North Carolina cases tape recordings and television recordings were allowed in evidence). State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1959), *cert. denied,* 364 U.S. 832 (1960) (a criminal conspiracy case in which a tape recording was offered in evidence in corroboration of the witness who had testified regarding those matters on the tape); State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964) (recognizing admissibility of a television recording for impeachment purposes). For information on the

The court then concerned itself with N.C. GEN. STAT. § 8-56 (Supp. 1967), which expressly provides: "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."[11] This statute presents various problems when it is applied to the present fact situation. Essentially the court must decide three issues: (1) who has the privilege and who may waive it; (2) whether the presence of a third person destroys the privilege even though the third person is a child and member of the family; and (3) whether the presence of the third person destroys the privilege in toto so that either spouse may testify or destroys it only to the extent that the third person alone may testify.

The marital privilege of confidential communications is to be distinguished from rules disqualifying witnesses as unreliable and from rules, *e.g.*, the hearsay rule, excluding evidence because of lack of trustworthiness or because of its prejudicial effect. The rule of privilege shuts out probative evidence as a matter of policy in recognition of the desirability of protecting certain human relationships, even at the expense of the judicial investigation of truth.[12] The social gain to be fostered is absolute confidence between spouses.

use of motion pictures, *see* Annot., 129 A.L.R. 361 (1940); Annot., 83 A.L.R. 1351 (1933).

[11] A partial bibliography of materials treating privileged communications between husband and wife follows: STANSBURY § 60; R. WEINBERG, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATIONS 26-30 (1967); WIGMORE §§ 2332-41; Hurley, *Privileged Communications in Oregon*, 36 ORE. L. REV. 132 (1957); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); Platz, *A Code of Evidence for Wisconsin? Various Privileges*, 1945 WIS. L. REV. 239; Quick, *Privileges Under the Uniform Rules of Evidence*, 26 U. CIN. L. REV. 537, 550 (1957); *Symposium on the Oklahoma Law of Evidence—Confidential Communications Between Spouses*, 5 OKLA. L. REV. 291, 311 (1952); Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife*, 4 ARK. L. REV. 426, 429-32 (1950); Note, *Spousal Testimony*, 28 BROOKLYN L. REV. 259, 279-84 (1962); Note, *Privileged Communications Between Husband and Wife in the District of Columbia*, 1 CATH. U.L. REV. 9 (1950); Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256 (1952); Note, *Marital Evidentiary Privilege in Minnesota*, 36 MINN. L. REV. 251 (1952); Note, *Evidence—Privileged Communications Between Husband and Wife*, 15 N.C.L. REV. 282 (1937); Note, *Privileged Communications—Some Recent Developments*, 5 VAND. L. REV. 590, 593 (1952); Annot., 63 A.L.R. 107 (1929). This most modern and widely recognized marital privilege has the sanction of statute in more than forty jurisdictions. The statutes have been collected in 2 J. WIGMORE, EVIDENCE § 488 (3d ed. 1940).

[12] WIGMORE § 2285.

The policy of the privilege[13] was expressed in *State v. Brittain*[14] thusly:

> The relation of husband and wife is confidential, from unity of interest and sometimes unity of person, as in a case of joint estate to them. The law requires and exhorts this confidence, and it will protect it. Communications between them cannot be exposed to public view. The interest of the home, the parties, the children and especially the peace and order of society forbid it.[15]

The privilege embraces oral and written communications[16] but not ordinarily acts.[17] It is applicable to a marital status only, i.e., communications "during marriage."[18] Therefore, the privilege does not apply to a communication between spouses living in separation,[19] or between persons living in unlawful cohabitation,[20] since the relation is not one in which the law wishes to foster confidence. The privilege does not protect communications between man and woman before their marriage,[21] but once the privilege has arisen, it remains after termination of the marital relation by death[22] or divorce[23] as to communications during marriage.

There is a split of authority among the states regarding which spouse has the privilege and who may waive it.[24] Some courts feel

---

[13] WIGMORE § 2332; Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 680-82 (1929).

[14] 117 N.C. 783, 23 S.E. 433 (1895).

[15] *Id.* at 795, 23 S.E. at 433.

[16] Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); Mitchell v. Mitchell, 80 Tex. 101, 15 S.W. 705 (1891).

[17] WIGMORE § 2337 (acts may be communicative in nature so some acts may be covered by the privilege).

[18] Whitford v. North State Life Ins. Co., 163 N.C. 233, 79 S.E. 501 (1913) held that a letter written by husband and received by wife after his death not privileged, since communication was not made during marriage.

[19] Holyoke v. Holyoke's Estate, 110 Me. 469, 87 A. 40 (1913); *Contra*, People v. Oyola, 6 N.Y.2d 259, 160 N.E.2d 494, 189 N.Y.S.2d 203 (1959). *Oyola* held privilege applicable where separation was short and communication was in nature of an attempted reconciliation.

[20] People v. Keller, 165 Cal. App. 2d 419, 332 P.2d 174 (1958) (privilege does not apply where marriage is bigamous).

[21] United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Halbock v. Hill, 261 F. 1007 (D.C. Cir. 1919); Forshay v. Johnston, 144 Neb. 525, 13 N.W.2d 873 (1944); Harp v. State, 158 Tenn. 510, 14 S.W.2d 720 (1929).

[22] *See* WIGMORE § 2341 n.1 for numerous cases on this point.

[23] Cooper v. United States, 282 F.2d 527 (9th Cir. 1960); Pereira v. U.S., 202 F.2d 830, 834 (5th Cir. 1953); Annot., 38 A.L.R.2d 570, 579 (1954); *But see*, Coles v. Harsch, 129 Ore. 11, 276 P. 248 (1929).

[24] WIGMORE § 2340.

that since the privilege is intended to secure freedom from apprehension in the mind of the communicator, he has the privilege, and the addressee cannot object, unless the latter's silence is viewed as an assent and adoption of the statement as his own.[25] Under this reasoning the communicating spouse alone has the privilege and he alone may waive it.[26] However, the general rule which existed at common law is that communications made by one spouse to the other in confidence of the marital relation are so protected that neither spouse can disclose or can be required to disclose unless the other spouse consents thereto and waives the privilege.[27] Thus *both* spouses have the privilege but *neither* can waive it without the consent of the other.

The court in *Hicks* in considering the scope and meaning of this privilege discovered what must be viewed as an aberration in North Carolina law regarding who may claim the privilege and who may waive it. In *Hagedorn v. Hagedorn*,[28] the court permitted the wife to testify to confidential conversations with her husband, over the husband's objection.[29] "Thus," one commentator has summarized, "under this decision [the *Hagedorn* case] where one spouse confides in the other, apparently *both* spouses are given a privilege not to disclose the confidence, but *either* can waive it for both."[30] Until the present case the North Carolina Supreme Court had no opportunity to reconsider this position, with the exception of an *obiter dictum* in accord with the decision of the *Hagedorn* case.[31] The common law rule, i.e., that both spouses have the privilege and neither can waive it without the consent of the other, is a direct contradiction of the rule in *Hagedorn*. North Carolina recognized the common law formulation of the privilege before it was written into

[25] WIGMORE §§ 2338 par. (4), 2340. *E.g.*, Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937); *Contra*, Hunter v. Hunter, 169 Pa. Super. 498, 503, 83 A.2d 401, 403 (1951), note 10 *supra*.

[26] State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927).

[27] Note 24 *supra*; State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918); State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915); State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913); Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891).

[28] 211 N.C. 175, 189 S.E. 507 (1937).

[29] STANSBURY § 60.

[30] 15 N.C.L. REV. 382, 285 (1937). This excellent note criticizes the *Hagedorn* case stating that "In arriving at this result, the Court relied solely upon one North Carolina case, [Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929)] which is not in point, and a dictum of the Supreme Court of the United States [Stickney v. Stickney, 131 U.S. 227, 236 (1899)]."

[31] Biggs v. Biggs, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960).

the present statute.[32] In *McCoy v. Justice*,[33] for example, a letter written by the husband to the wife was held inadmissible without the husband's consent even though the wife betrayed the confidence by giving the letter to a third person. Note that the privilege did not terminate when the third person received the letter.

If the court in *Hicks* had followed the *Hagedorn* decision, the husband could have waived the privilege. The court did not expressly overrule *Hagedorn* or the *obiter dictum* in accord, but simply held if they were applicable to the facts then the court was inclined not to follow them.[34] The court apparently adopted the common law rule in interpreting the statute but it is distressing that the court did not expressly overrule the *Hagedorn* case which is a clear departure from the statute.

The final issue in the case, i.e., whether the presence of a third person, a child, during the conversations removed the veil of confidence, had to be determined by the court. The essence of the privilege is to protect confidential communications only.[35] The better view appears to be that all marital communications are presumed confidential, but it is a rebuttable presumption.[36] According to the reasoning of most courts, this confidentiality is destroyed when the communication is made in the known presence of a third person.[37] Also, since the privilege insures the communicating spouse only that his confidences will not be disclosed without his consent in court by

[32] In State v. Jolly, 20 N.C. 108 (1838) the court said: "whatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and that neither [husband nor wife] should be allowed to divulge it to the danger and disgrace of the other." *Id.* at 112.

[33] 199 N.C. 602, 155 S.E. 452 (1930). *See also*, State v. Banks, 204 N.C. 233, 167 S.E. 851 (1933) where the court refused to allow cross-examination of witness as to contents of letter written by him to his wife and delivered by her to counsel to show bias. The contrary implication in State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927) would appear to be an inadvertance.

[34] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

[35] Wigmore suggests that all marital communications should be presumed confidential until the contrary is shown. WIGMORE § 2336. *See also*, Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905); Comment, 4 ARK. L. REV. 426, 430 (1950).

[36] *Id. Accord*, R. WEINBERG, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATIONS 28 (1967).

[37] WIGMORE § 2339. *See also*, Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891). Some cases have held that communications between spouses, although made in the presence of a third person, are privileged. *E.g.*, Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N.E. 795 (1915). Some states follow this rule on the ground that the disqualifying statute makes no exception with respect to the presence of a third person. *See* Annot., 63 A.L.R. 107, 118 (1929).

the addressee,[38] an eavesdropper, unknown to the spouses, who overhears them, is not prohibited from making a disclosure.[39] Consequently, according to the great weight of authority, a communication, conversation, or transaction between husband and wife in the *presence of* or *overheard by* a third person is not within the protection of the privileged communications rule.[40] The majority of courts allow the third person to testify, but courts disagree whether the addressee may also testify. The logical rule would appear to be that a communication made by one spouse to the other in the known presence of a third person would not be considered confidential and could be the subject of testimony by the spouse to whom the communication is made; but that a communication made by one spouse to the other in supposed privacy, which is overheard by an eavesdropper would still be a confidential communication and the addresse could not testify as to the communication. Yet the majority of jurisdictions do not seem to require that the presence of a third person be known to the communicator in order to render the testimony of a spouse regarding the communication admissible.[41] "But," it has been noted, "the facts of the majority of

[38] Dalton v. People, 68 Colo. 44, 189 P. 37 (1920); Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918).

[39] State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950), *supra* note 10; Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918) (homicide; conversation between husband and wife in jail, overheard by dictograph, admitted); Commonwealth v. Everson, 123 Ky. 330, 96 S.W. 460 (1906); State v. Center, 35 Vt. 378 (1862) (conversation overheard by witness who was in the next room).

[40] WIGMORE § 2339. *E.g.*, Wolfe v. United States, 291 U.S. 7 (1934); Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913); Cowser v. State, 157 S.W. 758 (Tex. 1913). North Carolina has several cases speaking to this point. State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929) is an arson prosecution in which a third person was permitted to testify what he heard husband tell wife at time of arrest. In State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918) a constable was allowed to testify that at the time of arrest the wife told the defendant husband she had warned him against selling whiskey and that he would get caught. State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915) was a liquor offense in which conversations overheard by a police officer were admitted. In State v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913) eavesdropper unknown to spouses was allowed to testify to the conversation. In Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891) a third person was allowed to testify about what the husband said to the wife to show adulterous intercourse as well as contradicting a previous witness. *C.f.* State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895) where the wife was forced by her husband to confess to him about incest, then forced by him to confess to her mother; since the first confession was inadmissible, the second confession was also excluded as stemming or proceeding from the first.

[41] Annot., 63 A.L.R. 107, 116 (1929).

these cases show that the reasonable conclusion to be drawn from them is that the presence of a third person was known to the husband and wife."[42]

Members of one's family occupy the same position as strangers in that their knowledge of a communication between spouses affects the privilege of that communication.[43] Thus, if a communication is made in the known presence of a member of the family,[44] or is overheard by a member of the family,[45] the veil of confidence has been removed and the communication is not privileged.

In *Hicks,* a third person was present during the conversations, but that person was a child. Does the presence of a child remove the veil of confidence so that the husband could submit the recordings in evidence? The answer to this question logically should involve two additional problems: (1) evaluation of the competency of the child to determine whether she may or may not be considered a third person within the rule, and (2) if the child is determined competent, whether the privilege is completely destroyed so that one of the spouses may submit evidence concerning the conversations or is destroyed only to the extent that the child could testify. Unfortunately the court did not face either of these problems; it simply gave its conclusions without any reasons. The court stated that it construed the statute broadly and held that the husband and wife *intended* their utterances to be privileged and that the "presence of the eight-year-old daughter did not destroy the veil of confidence thrown over these confidential conversations. . . ."[46] Thus the court held the tape recordings inadmissible and ordered a new trial.

Three problems faced the court and no satisfactory answer was given to any of them. First, the court should have made its position regarding the *Hagedorn* case explicit rather than saying it does not apply to these facts. But the court did indicate that the other de-

[42] *Id.*

[43] *Id.* at 118.

[44] In Taylor v. Winsted, 74 Ind. App. 511, 129 N.E. 259 (1920) a wife was held competent to testify to statements made by her to her husband in the presence of their sixteen-year-old daughter. Cowser v. State, 157 S.W. 758 (Tex. 1913) held that a wife may testify as to a conversation between herself and her husband in the presence of her daughter.

[45] Linnell v. Linnell, 249 Mass. 51, 143 N.E. 813 (1924) held that when a daughter was in a room 10 or 12 feet from room where wife made angry statements to husband, the husband should be allowed to testify.

[46] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

cisions since 1838[47] are uniform and that it would follow them. The logical conclusion is that the rule in North Carolina is that both spouses have the privilege but neither can waive it without the consent of the other. Secondly, the court should have concerned itself with the competency of the child. In North Carolina there is no fixed limit below which a witness is incompetent to testify, but the witness must understand the obligation of the oath and have sufficient intelligence to give evidence.[48] North Carolina is liberal in allowing children to testify; several cases have found children under seven years old competent to testify.[49] Previously courts have made the following inquiries: Was the child of sufficient intelligence to pay attention to, and to understand, what was being said?[50] Was the child interested in what was being said?[51] Did the child pay attention to or take any part in the conversation?[52] In the principal case the court failed to make any such inquiries; however, the court stated at one point in its discussion that the child was " 'singing or playing in the area' "[53] during one of the conversations, thus possibly implying that the child was not paying attention to or was not interested in what was being said. The court made no further observations about the child in respect to the other two conversations and nowhere referred to the child's competancy. If the child was determined competent as a third person, how could the spouses *intend* their conversations to be confidential when making vile and profane statements in

[47] State v. Jolly, 20 N.C. 108 (1838).

[48] STANSBURY § 55.

[49] McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963) (six-year-old boy allowed to testify to events occurring nearly two years earlier); State v. Gibson, 221 N.C. 252, 20 S.E. 51 (1942) (admitting testimony of five-year-old, rejecting that of six-year-old, not abuse of discretion); *See also,* State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); Artesani v. Gritton, 252 N.C. 463, 113 S.E.2d 895 (1960); State v. Edwards, 79 N.C. 648 (1878).

[50] Fuller v. Fuller, 100 W. Va. 309, 130 S.E. 270 (1925) (thirteen-year-old daughter held capable of comprehending what was said); Freeman v. Freeman, 238 Mass. 150, 130 N.E. 220 (1921) (nine-year-old child held not of sufficient intelligence to comprehend conversation); Schierstein v. Schierstein, 68 Mo. App. 205 (1896) (infant child held incapable of comprehending).

[51] Lyon v. Prouty, 154 Mass. 488, 28 N.E. 908 (1891) held that a fourteen-year-old daughter would be interested when conversations concerned seduction.

[52] Hopkins v. Grimshaw, 165 U.S. 342 (1897) held that the wife could not testify as to a private conversation where the thirteen-year-old-daughter took no part in the conversation.

[53] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

the presence of the third person? Thirdly, if the court had determined the child competent as a third person, the problem of whether both the child and husband could testify would arise. The better view appears to be that the privilege is completely destroyed as to a conversation made in the known presence of a third person and therefore the husband should be allowed to testify via the tape recordings. North Carolina follows the rule that the third person either known or unknown to the spouses may testify, but whether the spouse may in turn testify once the actual presence of a third person has been established has not been decided.[54]

A court should be zealous in protecting the privilege of confidential communications which is intended to secure the perfect confidence and trust which should characterize the relation of husband and wife. However, the privilege protects *only* the institution of marriage. It seems that the court in *Hicks* viewed the privilege as covering the familial unit. The fact that the spouses intend their conversations to be private and confidential seems immaterial when spoken in the known presence of a third person, even if that third person is a child. The court possibly considered the child such an integral part of the marriage that she should not be considered a third person. The real problem with the case is the failure of the court to articulate the reasons for its decision, resulting in considerable ambiguity as to its actual holding.

ERIC MILLS HOLMES

## Federal Jurisdiction—Realignment—Antagonism Test Extended

Multiple-party actions in the federal courts are susceptible to dismissal for want of jurisdiction because of the rule of complete diversity requiring that no plaintiff be a citizen of a state of which a defendant is a citizen.[1] The jurisdiction of the federal courts over suits "between citizens of different states"[2] seemingly contradicts the basic tenets of federalism, for these suits involve rights grounded

[54] Note 40 *supra.*

[1] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
[2] 28 U.S.C. § 1332(a)(1) (1964).

in state law cognizable in state courts.[3] The federal courts have been sensitive to this contradiction and have sought to "scrupulously confine their own jurisdiction to the precise limits which the [Judiciary Acts have] defined."[4] In multiple-party actions, therefore, the courts have been obliged to ignore the arrangement of the parties on the pleadings and to take upon themselves the duty of realigning the parties "according to their sides in the dispute."[5] The commonly accepted test for realignment is the "real" or "ultimate" interests of the parties.[6] This refers to the parties' interests *at law* which may or may not coincide with their interests *in fact*. In the case of corporations and their shareholders, however, the courts have recognized that common interests and a common stance on the litigation do not always follow from common interests at law. In a stockholder's derivative action the corporation will not be realigned as a party plaintiff if the court finds that it is under control "antagonistic" to enforcement of the claim.[7] In this class of actions the federal courts have substituted antagonism between the parties for the pattern of legal interest as a basis for alignment and have thereby created an exception to the ultimate interest test.[8]

This exception was expanded to non-stockholder actions in the

[3] [Diversity jurisdiction] poses the deepest issue of the uses of the federal courts. In these instances the jurisdiction is employed not to vindicate rights grounded in the national authority but solely to administer state law. . . . The problem is, therefore, whether this exceptional judicial undertaking rests on some present, valid, federal purpose. If not, it is a function that should plainly be surrendered. . . .
Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235 (1948). Exercise of diversity jurisdiction has occasioned considerable soul-searching among legal scholars. A furious debate has raged over the question of whether the federal courts should continue to exercise jurisdiction over cases grounded in diversity. *see* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 892-97 (1953); C. WRIGHT, FEDERAL COURTS § 23 (1963) [hereinafter cited as WRIGHT]; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 873-76 (1931).

[4] Healy v. Ratta, 292 U.S. 263, 270 (1934); *accord*, Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 77 (1941).

[5] Dawson v. Columbia Ave. Trust Co., 197 U.S. 178, 180 (1905).

[6] 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 26 at 145-46 (Wright rev. 1960); WRIGHT § 30 at 83 (1963).

[7] Smith v. Sperling, 354 U.S. 91 (1957); Venner v. Great Northern Ry. Co., 209 U.S. 24 (1908); Doctor v. Harrington, 196 U.S. 579 (1905); De Pinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 831 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964).

[8] WRIGHT § 30 at 83.

recent case of *Reed v. Robilio*.[9] The Sixth Circuit Court of Appeals refused to accept the identity of interest at law between an executor and the sole heir as conclusive of alignment in an action brought on behalf of the estate. The court held that the antagonism of the executor to the heir's claim precluded realignment of the executor as a party plaintiff.[10] The plaintiff in *Robilio* was a citizen of New York. Contending that the sum paid for her deceased father's interest in a foods-processing partnership was grossly inadequate,[11] the plaintiff demanded that the executors of her parents' estates bring suit against the purchasers, her father's former partners and their relatives. The executors refused to sue whereupon she brought this action alleging breach of a partner's fiduciary duty. The executors, citizens of Tennessee, were joined with the individual defendants, also citizens of Tennessee. Although the complaint alleged no wrongdoing on the part of the executors and sought no relief against them, both filed answers which denied the allegations of the complaint and asserted fairness of the transaction as an affirmative defense.[12] During the trial, the executors acted as parties adversary to the plaintiff.[13]

The jurisdictional issue was not raised until the fifth week of the trial on the trial judge's own motion.[14] The district court concluded that the conduct of the executors was "inexplicable"[15] but that it

[9] 376 F.2d 392 (6th Cir. 1967), *rev'g* 248 F. Supp. 602 (W.D. Tenn. 1965).

[10] In the district court, the plaintiff joined the executor of her father's estate, Planters National Bank of Memphis, and the executor of her mother's estate, an attorney; but the executor of the mother's estate was discharged prior to the appellate argument, and the court of appeals ordered dismissal of the action as to him. 376 F.2d at 394. Thus only the bank's position in the litigation was at issue before the court of appeals.

[11] Pursuant to the father's will the bank as his executor undertook to sell his interest in the partnership. Its trust officer negotiated the price and the terms of the sale to the real defendants; the sale, and certain new partnership terms, were approved by the plaintiff's mother, acting upon the advice of the attorney who ultimately became her executor. 248 F. Supp. at 604.

[12] 376 F.2d at 393.

[13] *Id.* The executors submitted interrogatories to the plaintiff, objected to the testimony of her witnesses and argued against her on points of law. The bank went so far as to put its trust officer on the stand to testify in support of the real defendants' position. 248 F. Supp. at 616.

[14] 248 F. Supp. at 605.

[15] No reason is assigned in either decision for the hostility of the executors to plaintiff's claim on behalf of the estates. While the cause of the antagonism is unknown, it is possible that the bank and the attorney were motivated at least in part by a desire to protect their professional reputations. The bank's trust officer actually negotiated the sale and obtained the price which plaintiff attacked as "grossly inadequate." The other executor

was "not determinative of the jurisdictional issue."[16] The court then realigned the executors as parties plaintiff according to the ultimate interest test and dismissed the action.[17]

In reversing and remanding the case the court of appeals acknowledged the prevalence of the ultimate interest test but refused to deem it controlling.[18] The court relied on the decision of the Supreme Court in *Smith v. Sperling*[19] and drew an analogy between the heir-executor situation in *Robilio* and the stockholder-corporation situation in *Sperling*.[20] According to the court of appeals, *Sperling* stands for two propositions: first, that the relevant test in the stockholder situation is whether the corporation is antagonistic to the enforcement of the claim and second, that the refusal of the corporation to sue is evidence of that antagonism.[21] Both criteria were found to be present in *Robilio*. The court noted that the rule obtaining in stockholders' suits "is not far removed" from the rule applicable in other derivative actions.[22] Finding that the rule of *Sperling* could be applied to the situation in *Robilio*, the court of appeals declined to limit *Sperling* to stockholders' derivative suits until the Supreme Court had done so.[23]

The court's extension of *Sperling* to a non-stockholder situation is not necessarily precluded by other Supreme Court decisions on realignment which have utilized the ultimate interest test. A trustee and his beneficiary,[24] a lessor and his co-lessor,[25] a mortgagee and its mortgagor,[26] and a parent corporation and its subsidiary,[27] all

advised (or at least permitted) plaintiff's mother to accept the price. Possibly they interpreted the attack on the transaction as an attack on their professional competency and reacted accordingly. *See* note 11 *supra*.

[16] 248 F. Supp at 616.

[17] Especially when the nominal defendants, as here, are fiduciaries, will the Court presume that their interests coincide with the interests of the decedents' estates. It will take more than a showing of personal, hostile attitudes to displace this presumption.

*Id.*

[18] *Id.* 376 F.2d at 394.

[19] 354 U.S. 91 (1957).

[20] 376 F.2d at 395.

[21] *Id.*; *see* Smith v. Sperling, 354 U.S. 91, 97 (1957). Justice Frankfurter's dissent in *Sperling* was directed against the second proposition, 354 U.S. at 105.

[22] 376 F.2d at 395.

[23] *Id.* at 395-96.

[24] Hamer v. New York Rys. Co., 244 U.S. 266 (1917).

[25] Lee v. Lehigh Valley Coal Co., 267 U.S. 542 (1925).

[26] Dawson v. Columbia Ave Trust Co., 197 U.S. 178 (1905).

[27] Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920).

of whom had the same legal interests as against the real defendants, have been realigned so as to oust jurisdiction. In none of these cases, however, were the parties actually antagonistic to each other. The possibility of antagonism was negated by findings of collusion to create jurisdiction where it otherwise would not exist.[28] The assertion by the plaintiff of a claim which is properly the claim of the nominal defendant has supported a finding of collusion,[29] as has a request by the nominal defendant in his answer that the prayer for relief be granted.[30] Admission in the complaint that a party has been joined as a defendant because joinder as a plaintiff would defeat diversity has been taken as an admission of collusion.[31] These cases suggest that the Supreme Court has consistently applied the ultimate interest test where the facts of the case create a suspicion that the parties have collusively arranged alignment so as to confer jurisdiction on the federal courts. It may be said that the ultimate interest test, as applied, is a defensive device to defeat collusive expansion of diversity jurisdiction.[32]

The antagonism test developed in the stockholders' cases takes a functional approach to the problem of alignment. Antagonism, for the purposes of alignment, is not the subjective state of hostility or

[28] In Dawson v. Columbia Ave. Trust Co., 197 U.S. 178, 180 (1905), the Court found that a suit brought by a mortgagee to compel a Georgia city to perform its contract with the Georgia mortgagor was brought "solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State," and ordered dismissal.

[29] *See* Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) (mortgagee sought to establish that a lease given by the mortgagor was binding upon the assignee of the lessee); Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920) (parent corporation sued to enjoin the union from employing violence and intimidation in a strike at a subsidiary's plant); Hamer v. New York Rys. Co., 244 U.S. 266 (1917) (bondholders sued to enforce a judgment which the trustee had secured against the defaulting issuer).

[30] Hamer v. New York Rys. Co., 244 U.S. 266, 274 (1917).

[31] Lee v. Lehigh Valley Coal Co., 267 U.S. 542, 543 (1925).

[32] In two cases involving similar fact situations, the Supreme Court invoked the ultimate interest test to *preserve* federal jurisdiction where it would not exist if the antagonism test were applied. Sharpe v. Bonham, 224 U.S. 241 (1912) and Helm v. Zarecor, 222 U.S. 32 (1911) involved a dispute over church properties between the national Presbyterian Church in the United States and a dissident group of Tennessee Presbyterians. The parties whose alignment was at issue were the holders of legal title to the properties. In both cases, they were members of the "national" faction. Notwithstanding their personal antagonism to the dissidents, the title holders were aligned with them in actions brought by out-of-state members of the national faction. The Supreme Court refused to permit alignment, holding that the title-holders were at law neutral stakeholders in the dispute and should not be realigned as parties plaintiff so as to destroy diversity.

personal animosity but the objective fact of "real collision" between the parties[33] as revealed "by the pleadings and the nature of the dispute."[34] The Supreme Court has attempted neither to delve into the motives of corporate directors nor to determine whether they harbor personal animosity toward the complaining stockholder.[35] Instead the Court has looked to the conduct of the management and to the position they have taken on behalf of the corporation in the pleadings. The refusal of directors to sue[36] and the denial of an opportunity for the complaining stockholder to present his charges to the directors have been held to constitute sufficient antagonism to defeat realignment.[37] Antagonism may also be established if the corporation unites with the real defendants in filing pleadings which deny the plaintiff's charges of wrongdoing.[38] In short, "There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks."[39]

Judicial acceptance of *Robilio* need not abrogate ultimate interest as the general test for realignment. The ultimate interests of the parties will continue to be the basis for realignment but with an exception recognized where antagonism is actually present. In *Robilio* the sterile application of the ultimate interest test would have created a danger of substantial injustice to the plaintiff. The effect of the district court's decision would have been to compel the New York plaintiff to bring her action in the courts of Tennessee. With the Tennessee executors and defendants vigorously denying the unfairness of the transaction, the possibility of prejudice to plaintiff's claim cannot be overlooked. There can be little doubt that the "matter in controversy" was in reality "between citizens of different states."[40] Application of the antagonism test merely recognized the existence of that controversy and preserved federal jurisdiction in an appropriate situation.

WILLIAM V. MCPHERSON, JR.

[33] Smith v. Sperling, 354 U.S. 91, 97-98 (1957).
[34] *Id.* at 97.
[35] The Court noted in *Sperling* that the refusal to take action which constituted antagonism might have been made "for any number of reasons." 354 U.S. at 96.
[36] 354 U.S. at 95.
[37] Doctor v. Harrington, 196 U.S. 579, 588 (1905).
[38] Venner v. Great Northern Ry., 209 U.S. 24, 32 (1908).
[39] Smith v. Sperling, 354 U.S. 91, 95 (1957).
[40] 28 U.S.C. § 1332 (1964).

## International Law—Conflicting Jurisdictions

The recent case involving Mehdi Eatessami,[1] an Iranian-born Israeli citizen extradited from New York to Switzerland, points out again, this time in the context of international extradition, the warning of the New York Court of Appeals[2] that the "center of gravity"[3] concept so important in choice of laws is not fungible with the concept of "minimal contacts" for jurisdictional purposes.

Eatessami was accused by the Swiss of having masterminded a loan swindle against the Swiss Bank Corporation. Accounts opened with the main office of the Swiss Bank, in Geneva, were filled with counterfeit stock certificates prepared and mailed from New York. Subsequent loans totalling 300,000 dollars were secured and the proceeds paid to Eatessami and his confederates through New York banks.

In an earlier tort action brought in the New York state courts for fraud,[4] the question of jurisdiction under section 302(a)(2) of the New York procedure act had been determined. That section provides that New York courts may assert personal jurisdiction over a nondomiciliary who "commits a tortious act within the state. . . ,"[5] and coincides with similar "long-arm" statutes enacted in other states.[6] In this pre-trial determination of jurisdiction, a finding that the various fraudulent communications between Eatessami and the Swiss Bank had been prepared and mailed in New York supplied the necessary acts to support jurisdiction without violation of due process. The court did not determine which law, Swiss or New York, would apply in a trial on the issues. Generally, choice of laws

[1] United States *ex rel.* Eatessami v. Morasco, 275 F. Supp. 492 (S.D.N.Y. 1967).

[2] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 463, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 23 (1965).

[3] That jurisdiction would be the "center of gravity" whose law and public policy is most concerned with the issues raised by the litigation. *See* Hanson v. Denckla, 357 U.S. 235, 254 (1958); Babcock v. Jackson, 12 N.Y.2d 473, 481-82, 191 N.E.2d 279, 283-84 (1963).

[4] Swiss Bank Corp. v. Eatessami, 26 App. Div. 2d 287, 273 N.Y.S.2d 955 (1966).

[5] N.Y.R. CIV. PRAC. 302(a)(2) (McKinney 1967).

[6] *See, e.g.*, N.C. GEN. STAT. § 55-145 (1966). *Compare* Totero v. World Telegram Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. 1963) *with* Painter v. Home Fin. Co., 245 N.C. 576, 96 S.E.2d 731 (1957).

teaches that the law of the place of the last occurrence necessary to make the actor liable governs.[7] However, determining whether that last event is the receipt of the fraudulently obtained funds (New York), or the making of the fraudulent representation (Geneva), is unconnected with the question of jurisdiction. Under certain situations, New York may assert personal jurisdiction, yet be required to apply the law of a sister state, or of a foreign nation.[8]

Yet little more than a year later, the Swiss government filed a formal request[9] for the extradition of Eatessami. Extradition, the established method of recovery of the international fugitive,[10] is governed in the United States by treaty[11] and federal statute,[12] and

---

[7] H. GOODRICH, CONFLICT OF LAWS 168 (1964).

[8] *Cf.* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Walton v. Arabian American Oil Co., 233 F.2d Cir. 1956, *cert. denied,* 352 U.S. 872 (1956).

[9] A formal request for extradition requires authenticated documents supporting the requesting state's contention that the surrender of the accused is justified, including identification of the accused, a statement of the charges with texts of the relevant laws, a warrant for arrest, depositions and related evidence. Memorandum in opposition to writ of habeas corpus filed on behalf of the Swiss government, Dkt. No. 67 Civil 3983 (S.D.N.Y. 1967).

[10] *See, e.g.,* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936). The actual proceedings differ, however, from normal probable cause cause hearings. For example, 18 U.S.C. § 3190 (1964) permits the demanding country to introduce ex parte depositions gathered at home, but the defendant may not do likewise. *In re* Oteiza y Cortes, 136 U.S. 330 (1890). Nor can the accused introduce evidence which contradicts the demanding country's proof, Collins v. Loisel, 259 U.S. 309 (1922); nor evidence to establish an alibi, Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927); nor evidence of insanity, Charlton v. Kelly, 229 U.S. 447 (1913); nor evidence that the statute of limitations has run, unless the treaty otherwise provides, Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963). Furthermore, an American citizen may be held for extradition on deposition evidence which would not be admissible at a preliminary hearing on a domestic crime. Bingham v. Bradley, 241 U.S. 511, 517 (1916); Glucksman v. Henkel, 221 U.S. 508, 512 (1911); Wacker v. Bisson, 348 F.2d 602, 605 (5th Cir. 1965). Indeed, "all the fictitious niceties of a criminal trial at common law" are absent. Gluckman v. Henkel, 221 U.S. 508, 512 (1911). *See,* Note 61 COL L. REV. 105 (1961); *cf.* Evans, *Acquisition of Custody Over the International Offender—Alternatives to Extradition: A Survey of United States Practice,* [1964] BRIT. Y.B. INT'L L. 77.

[11] 18 U.S.C. §§ 3181, 3184 (1964). Extradition can take place only in pursuance to a treaty. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

[12] *See* 18 U.S.C. §§ 3181-95 (1964). Interstate rendition is generally controlled by the Uniform Extradition Act, now adopted by all states except Alaska, Louisiana, Mississippi, Nevada, North Dakota, South Carolina, and Washington. New York and Rhode Island adopted the Act, amending section 6, so as to provide for "double-criminality," i.e., the offense must be criminal in both states. N.Y. CODE CRIM. PROC. § 834 (McKinney 1967); R.I. GEN. LAWS ANN. § 12-9-8 (1956). *See, e.g.,* People *ex rel.* Burtman

committed solely to the federal government as an adjunct of the treaty power.[13] Usually, the jurisdiction of the requesting state and that of the requested or asylum state over the accused is based upon the principle of territoriality.[14] That is, the particular treaty offense[15] must have been committed within the territorial jurisdiction of the requesting state, and the fugitive found within the territory of the asylum state.[16] Arguably, upon reviewing the finding of the United States Commissioner that Switzerland had sufficient basis for a claim to criminal jurisdiction over Eatessami, the federal district court was obligated to take notice of the similar proceedings of its New York counterpart. While full faith and credit does not generally apply between federal and state courts beyond enforce-

v. Silberglitt, 15 Misc. 2d 847, 187 N.Y.S.2d 536 (Sup. Ct. 1956) (books obscene in Pennsylvania not in New York); People *ex rel.* Albert v. Commissioner of Correction, 111 N.Y.S.2d 307 (Sup. Ct. 1952) (gaming tables illegal in Maryland are "games of skill" in New York).

[13] U.S. CONST. art. II, § 2. While the executive has no inherent power to extradite on its own initiative, Valentine v. United States *ex rel.* Niedecker, 299 U.S. 5 (1936), Congress does enjoy plenary power over aliens, Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952), and the immigration law "bristles with severities," Scales v. United States, 367 U.S. 203, 222 (1961). *See also* United States *ex rel.* Feretic v. Shaughnessy, 211 F.2d 262, 264 (2d Cir. 1955); *In re* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963); United States *ex rel.* Paschalides v. District Comm'r, 143 F. Supp. 310, 312 (S.D.N.Y. 1956).

[14] *See* Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931). But see the criticism of the territorial principle by Judge Frank in Walton v. Arabian American Oil Co., 233 F.2d 541, 543 & n.5 (2d Cir. 1956).

[15] Local law is used in defining the particular "treaty offense." *See* Petitt v. Walshe, 194 U.S. 205, 207, 218 (1904); United States *ex rel.* Rauch v. Stockinger, 269 F.2d 681 (2d Cir. 1959); *In re* Gonzales, 217 F. Supp. 717 (S.D.N.Y. 1963).

[16] The fugitive may have been in the asylum state when the crime was committed. United States v. Steinberg, 67 F.2d 77 (2d Cir. 1932), *cert. denied*, 287 U.S. 640 (1932); Wacker v. Beeson [*sic*], 256 F. Supp. 542 (E.D. La. 1966), *aff'd*, Wacker v. Bisson, 370 F.2d 552 (5th Cir.), *cert. denied*, 387 U.S. 936 (1967). *See also In re* Harris, 170 Ohio St. 151, 163 N.E.2d 762, 10 Ohio Op. 2d 99 (1959) (non-support constitutes an "act" within the jurisdiction of the requesting state, for extradition purposes).

[17] Here review of the commissioner's decision was through habeas corpus, an alternative is an action for a declaratory judgment. Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965). The scope of review, in any case, is the same. Brownell v. Tom We Shung, 352 U.S. 180 (1956). The reviewing court determines only whether the magistrate had jurisdiction, whether the offense was within the treaty, and whether there is probable cause to believe the accused guilty. Collins v. Loisel, 259 U.S. 309 (1922). The courts test only the legality of the extradition proceedings; the wisdom of extradition remains for the executive to decide. 18 U.S.C. § 3184 (1964). *See* Note, 62 COL. L. REV. 1313, 1315 (1962); Note, 61 MICH. L. REV. 383, 387 (1962).

ment of judgments,[18] except in the taxation field,[19] the Supreme Court has been reluctant[20] to upset state court findings of jurisdiction. Moreover, federal courts have followed state jurisdictional laws in cases involving nondomiciliaries.[21] Furthermore, the determination of the state court that it had civil jurisdiction over Eatessami because of certain tortious acts done in New York, would imply that it also had criminal jurisdiction,[22] as those same acts were criminal under New York statute.[23] Ordinarily, the territorial sovereign, being competent to prosecute for offenses committed within its territory, would not extradite for such an offense.[24] However, without reference or mention of the New York court's findings, the federal court found the extradition proceedings legal, and following the approval of the Secretary of State, Eatessami was extradited to Switzerland.[25]

Was the federal district court correct? First, it is important to realize that it was concerned with treaty law.[26] Familiar learning teaches that treaties override state laws when a conflict arises. Be-

[18] Milwaukee County v. M.E. White Co., 296 U.S. 268, 275 (1935). *See also* 28 U.S.C. § 1738 (1964).

[19] Curry v. McCanless, 307 U.S. 357 (1939); Worcester County Co. v. Riley, 302 U.S. 292, 299 (1937).

[20] Except in extraordinary circumstances. *Cf.* Texas v. Florida, 306 U.S. 398, 342 (1939) (dissenting opinion of Frankfurter, J.).

[21] United States v. Montreal Trust Co., 358 F.2d 239, 249 (2d Cir. 1966) (concurring opinion); Arrowsmith v. United Press Int'l, 320 F.2d 219, 221 (2d Cir. 1963) (en banc).

[22] N.Y. PENAL LAW § 1930(1) (McKinney 1967).

[23] N.Y. PENAL LAW §§ 881(3), 884(5) (McKinney 1967).

[24] Evans, *The New Extradition Treaties of the United States,* 59 AM. J. INT'L L. 351, 354 (1965).

[25] Extradition was approved by the Secretary of State on the charges of obtaining money by false pretenses and the fraudulent use of counterfeited or forged private instruments. However, the Secretary determined that the record did not contain evidence that such instruments were counterfeited or forged in Switzerland, and so refused extradition for the forgery charge. Letter from the Secretary of State to the Swiss Ambassador, January 12, 1968. Eatessami was extradited on January 13, 1968 and will be tried under Articles 148 and 251 of the Swiss Criminal Code, relating to embezzlement and use of counterfeit securities. The Swiss statute provides for a maximum sentence of five years imprisonment. Letter from Bernard J. Reverdin to the writer February 23, 1968.

[26] Art. II § 4 of the Extradition Treaty Between the United States and Switzerland of May 14, 1900, 31 Stat. 1928, 1929 (1900), T.S. No. 354 (effective February 28, 1901), provides:

> Extradition shall be granted for . . . (4) The counterfeiting or forgery of public or private instruments; the fraudulent use of counterfeited or forged instruments.

*Cf.* Hauenstein v. Lynham, 100 U.S. 483 (1879), *rev'g,* 69 Va. 62 (1877).

yond reference to the applicable New York law for definition of the elements of the relevant treaty offense, the state jurisdictional law was not considered. Secondly, reference to New York state court decisions would support the conclusion of the federal court that indeed a crime, or at least punishable elements of a crime, had been committed within the territory of the requesting state, in this case Switzerland. In *People v. Adams*,[27] New York courts convicted an Ohio resident of the offense of obtaining money by false pretenses, though the defendant was, at the time of the crime and for a while thereafter, in Ohio, and did not come to New York until later. Similarly, in *People v. Zayas*,[28] the New York court held that it had jurisdiction to try the defendant for a crime committed partially in New York, where the false pretenses were made, and partially in Pennsylvania, where the money was received. Thus, by New York standards, culpable elements of the alleged crime had been committed in Switzerland, though Eatessami had remained all the while in New York.

Thirdly, the federal court apparently realized that the New York court was not attempting to assert a preëmptive jurisdiction. Had the New York court asserted exclusive jurisdiction based upon the "center of gravity" concepts familiar to choice of laws, the question might have been different. However, by merely determining that it had jurisdiction because of certain "minimal contacts" with the state, the New York court did not foreclose the assertion of a supplemental jurisdiction by another state,[29] such as Switzerland. And, as the federal court emphasized, any excessively complicated and technical application of traditional jurisdictional concepts is ill-suited to deal with the problems of multinational crime.[30] Thus the federal court was probably correct, and was able to insure the fulfillment of national treaty obligations without offending federalistic guidelines.

K. G. ROBINSON, JR.

[27] 3 Denio (N.Y.) 190, *aff'd* 1 N.Y. 173 (1848).
[28] 217 N.Y. 78, 111 N.E. 465 (1916).
[29] *Cf.* United States v. Arnhold & S. Bleichroeder, Inc., 96 F. Supp. 240 (S.D.N.Y. 1951); Eisler v. Soskin, 272 App. Div. 894, 71 N.Y.S.2d 682, *aff'd*, 297 N.Y. 841, 78 N.E.2d 862 (1948).
[30] *See Re* Vignoni, 17 Int'l L. Rep. 263, 264 (Chile, Sup. Ct. 1950).

**Real Property—Eminent Domain—The Public Use Requirement**

It is axiomatic that a governmental taking of private property must be for a public use.[1] However, when "we come to seek for the principles upon which the question of public use is to be determined, or to define the words, 'public use,' in the light of judicial decisions, we find ourselves utterly at sea."[2] Recently the North Carolina Supreme Court encountered this difficulty in dealing with an exercise of the power of eminent domain to induce industry to settle in a certain locale. In *Highway Commission v. Thorton*[3] the court stated that

> [t]he home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids.[4]

Despite other like assurances to North Carolina landowners, however, the court upheld a condemnation of private property for the purpose of constructing a road running from a public highway across the condemned property to a private trucking terminal. In so holding the court has apparently adopted a more liberal and, from the condemnee's point of view, less protective theory of public use. Indeed, the decision may well have sounded the death knell for a meaningful public use limitation on the power of eminent domain in North Carolina.

The history of the public use requirement is largely one of judicial struggling to define the concept in light of earlier ideas and needs of society that may not have validity today.[5] Two conflicting views have emerged.[6] Prior to the mid-nineteenth century

[1] 2 P. NICHOLS, EMINENT DOMAIN § 7.1 (3d rev. ed. 1963) [hereinafter cited as NICHOLS]; 26 AM. JUR. *Eminent Domain* § 25 (1966). For a North Carolina case see, City of Charlotte v. Heath, 226 N.C. 750, 40 S.E.2d 600 (1946).

[2] 1 J. LEWIS, EMINENT DOMAIN 410 (2d ed. 1900).

[3] 271 N.C. 227, 156 S.E.2d 248 (1967).

[4] *Id.* at 243, 156 S.E.2d at 260.

[5] *See* 2 NICHOLS § 7.21; Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966); Note, 13 DRAKE L. REV. 95 (1963); Note, 50 IOWA L. REV. 799 (1965).

[6] *See* 2 NICHOLS § 7.2.

there was little need for stringent limitations on the power of eminent domain. With the advent of huge corporations and the growing scarcity of land, however, the necessity of insuring against an arbitrary exercise of the power became manifest. The "use by the public" test was developed to fill this gap in property protection. Under this theory "use" is defined as employment by the public.[7] Thus the public must use or employ the facility for which the taking was made. In addition, the private benefits which usually attend the construction of a road or other project must be incidental to the benefit intended for and received by the public.[8] A determination that the taking is primarily for the advantage of a private individual or that the public has no right of user in the facility will invalidate the taking.

When new ideas developed that involved government as a positive instrument of social and economic reform, the courts were confronted with the narrowness of the public use test. The response was a determination that "use" could mean not only employment, but also benefit or advantage. In jurisdictions accepting this definition, a taking which tends to promote the welfare or productivity of the community is deemed to be for a public use.[9] It is immaterial that the benefit results directly to a private individual or corporation or that the public has no right to use the facility.

While various statements of the supreme court would seem to indicate that the benefit theory is familiar to North Carolina law,[10] a review of several cases shows the contrary to be true. *Stratford v. City of Greensboro*[11] involved a proposed condemnation to link

[7] *See, e.g.*, Cozard v. Hardware Co., 139 N.C. 283, 51 S.E. 932 (1905).

[8] *See, e.g.*, Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394 (1899). *See also* Annot., 53 A.L.R. 9, 24 (1928).

[9] For a collection of authorities which support this doctrine *see* 2 NICHOLS § 7.2(2) n.9.

[10] An example is found in Reed v. Highway Comm'n, 209 N.C. 648, 184 S.E. 513 (1936), wherein the court stated

> [i]t is a matter of common knowledge, shall we term it, "the tourist industry" is now in the mountain sections of this State one of its most valuable assets to the people of that section. These scenic roads do much to encourage tourists to come into this "land of the sky," locate and spend the summer, and put into circulation money which is of great benefit to the people. In taking over a road to be part of the highway system, this purpose can be considered on the aspect of the road being taken over for a public and not a private purpose. These beautiful mountains ought not to be shut off from the public by selfish persons or interests.

*Id.* at 654, 184 S.E. at 516-17. It might be noted that the road in *Thorton* had no scenic appeal.

[11] 124 N.C. 127, 32 S.E. 394 (1899).

two major streets by a third. There was evidence showing a contract between the condemnor-municipality and a landowner who stood to gain from the new street whereby the latter agreed to pay for the rights-of-way and to move certain businesses to the city.[12] The court stated that "[i]f the substantial benefit was for the defendant . . . as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void."[13] In holding unconstitutional a statute which authorized owners of timber lands to condemn private rights-of-way, the court in *Cozard v. Hardware Company*[14] expressly rejected the public benefit theory. The court noted "[t]hat great and dangerous monopolies have been fostered by the liberal construction put upon the term 'public use' "[15] and questioned whether meaningful limits could be devised under such a definition. In *Highway Commission v. Batts*[16] the court reversed a lower court determination that a public use existed in relation to a proposal to widen and pave an existing dirt road which served several rural landowners. Although the court conceded that there would be a right of user on the part of the public, the main benefit was found to be in the landowners who desired the new road. As in *Stratford* the court seemed to rely on elements indicating something less than a good faith concern with the public interest. In *Stratford* it was the contract,[17] while here a shell house had been erected to meet a Commission requirement that four houses front a rural road and certain misrepresentations had been made to the County Board of Commissioners.

In *Thorton* the property purchased by Associated Transport for its terminal was landlocked at the time of purchase. It appears that Associated was persuaded to select this particular site through the assurances of the Burlington-Alamance County Chamber of Commerce that the Highway Commission would secure a right-of-way across defendant's land and construct an access road thereon. The Chamber of Commerce was apparently able to guarantee the High-

[12] The fact that in their respective answers the city denied while the private citizen admitted the contract was noted by the court. *Id.* at 131, 32 S.E. at 395-96.

[13] *Id.* at 134-35, 32 S.E. at 397.

[14] 139 N.C. 283, 51 S.E. 932 (1905).

[15] *Id.* at 291, 51 S.E. at 935.

[16] 265 N.C. 346, 144 S.E.2d 126 (1965).

[17] That the contract indicated a promotion of a private interest was recognized in Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

way Commission's action,[18] for construction was begun shortly thereafter. The road was to be constructed upon an existing private graveled road built by the defendant to provide a means of ingress and egress to his own home and to two rented dwellings.[19] Ten months later and after completion of ninety-six per cent of the work the defendant filed his answer denying that the taking was for a public use.[20] The evidence presented by the plaintiff showed Associated to be a large trucking concern with a substantial local employment. The road would serve these employees, suppliers, customers and visitors. The lower court, relying on *Batts,* found that any benefit to the public was incidental to that received by Associated and enjoined completion of the road.

The supreme court reversed. Denying adoption of the public benefit test of a public use, the court found the facts sufficient to bring the case within the "use by the public" test because of the large number of users disclosed by the evidence. The dissenters, however, strongly protested the decision and analyzed its implications by stating that

> [t]his decision . . . establishes the power of the State Highway Commission to condemn a right-of-way for a road to the plant of any private industry with a payroll which the Chamber of Commerce, or some other group able to influence the Highway Commission, decides is large enough to benefit the economy of the community. It is a decision which will rise to haunt not only this Court but the Highway Commission, for any private corporation can now say to it, "Condemn us a road and we will employ enough people so that you can justify it as a public road." But how many employees are enough to make "a public?" And surely the applicant for a "public road" must be a business big enough and so well established as to justify confidence in its continuing payroll. But what of the rights of the entrepreneur in this land of

[18] It is puzzling how a Chamber of Commerce was able to guarantee the Commission's action with such assurance and certainty. The court does not give this fact any attention, and a further discussion would be beyond the purposes of this note.

[19] The Highway Commission's argument that its action was an acceptance of defendant's dedication of this road to the public use was rejected.

[20] On the basis of this fact the Highway Commission contended that the defendant was guilty of laches. The court pointed out, however, that N.C. GEN. STAT. § 136-107 (1964) gives the condemnee twelve months within which to answer the Commission's complaint. For a discussion of North Carolina's complex statutory scheme of eminent domain see Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action,* 45 N.C.L. REV. 587 (1967).

> equal opportunity? Is only Big Business to be thus "encouraged to locate" here?[21]

Notwithstanding the majority's declaration to the contrary, the dissenters saw an unqualified adoption of the public benefit test.

On the basis of *Stratford* and *Batts* it is difficult to find fault with the dissenters' conclusion. *Stratford* presented a much clearer public use as the proposed street would link two major arteries in a large city, whereas in *Thorton* the road ended in a *cul de sac* at a private business enterprise.[22] The *Batts* case, it is submitted, cannot be reconciled with *Thorton* on the basis of the public use test. There are three main grounds upon which it could be contended that the cases are distinguishable, but none suffice to explain the different results under the public use test. The first difference is that in *Thorton* Associated was landlocked. The court pays little attention to this fact, however, for the situation was the fault not of Mr. Thorton but of Associated and the Chamber of Commerce.[23] Secondly, in *Batts* only several citizens stood to gain while a large corporation was the beneficiary of the new road in *Thorton.* If this distinction accounts for the difference in results, then clearly the benefit test is being applied; for, as noted above, the narrow doctrine was developed to prevent takings for the benefit of industrial giants at the expense of the small landholders. The number of persons who would use the road in each case suggests the third major difference. In *Batts* only the owners of the abutting land and a few of their friends would have occasion to use the road, while in *Thorton* a number of employees and others having business with Associated would traverse the road. If numbers are so important to the court, then the decision may well stand for its definition of "public." The dissent counters the majority's reliance on the difference in numbers by pointing out that the road was not con-

[21] Highway Comm'n v. Thorton, 271 N.C. 227, 245, 156 S.E.2d 248, 262 (1967).

[22] The mere fact that a road ends in a *cul de sac* does not, however, make it a private road. Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

[23] It could be contended that the assurances by the Chamber of Commerce and the diligent efforts by that body in Associated Transport's behalf could serve to indicate a motive unacceptable under the public use test as did the contract in *Stratford* and sham dwelling and false representations in *Batts.* It is also interesting to speculate whether an action would lie against the Chamber of Commerce if the Highway Commission failed to act as guaranteed.

structed for the public as that term is generally understood."[24] Even if it were conceded that only persons having business with Associated can constitute "a public," it is almost impossible to find the benefit to Associated purely incidental to the use by such a public as is required under the public use test.[25]

If North Carolina has now adopted the public benefit theory, it is not alone in its choice.[26] In fact, many writers applaud such a move as the shedding of the shackles of a past age.[27] These commentators see in the public use test a potential for judicial stifling of needed social and economic reform. It must be pointed out, however, that sweeping aside such impediments to reform as the right of private property may present a case where the cure is worse than the disease. Neither the state's need for new industry nor the rights to private property should be so exalted as to preclude recognition of the other. A fair balance must be struck and from this it follows that neither test alone is sufficient in all cases. Carried to their logical extremes either test would validate takings clearly beyond constitutional permissibility.[28]

On final analysis *Thorton* discloses an attempt by the supreme court to strike this balance within the framework of the older public use theory. But in allowing the Highway Commission to condemn private property as an inducement to new industry the court has, at the least, tacitly relied on the benefit line of reasoning while paying lip service to the public use test. Although this is not *malum in se*,[29] it is not clear why the court chose to do so in a case in which the equities were so heavily in favor of the condemnee.[30]

[24] Highway Comm'n v. Thorton, 271 N.C. 227, 246, 156 S.E.2d 248, 262 (1967).

[25] See note 8 *supra*.

[26] See note 9 *supra*.

[27] Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

[28] For example the public use test would not be violated by a taking for the purpose of constructing theaters or hotels, while the public benefit theory would allow the government to redistribute property to those who could employ it best. 2 NICHOLS § 7.2[3].

[29] One writer suggests that retention of the public use test in name only may have some deterrent effect on the over zealous use of the power of eminent domain. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

[30] This statement represents the view of the writer. It is not based on any

If industry is to be given so unbridled a hand in locating, the fears expressed by the dissenters may well be realized. The ultimate implications which the decision may have on the power of eminent domain and the existing theories of land ownership cannot be adequately assessed until the court provides clarification in future cases. Such a clarification of the court's position is in order not only for the benefit of the Bar and the Highway Commission, but more importantly for the North Carolina landowner.

LAURENCE V. SENN, JR.

## Survivorship—Joint Bank Accounts with the Right of Survivorship in North Carolina

In 1784, North Carolina abolished the right of survivorship as an incident of joint tenancy,[1] but the state supreme court held that oral and written contracts making the rights of the parties dependent on survivorship remained valid.[2] Thereafter, it was generally accepted that joint bank accounts with the right of survivorship could

one fact but on the seeming unfairness of the decision. The Record reveals numerous efforts by individual members of the Burlington-Alamance County Chamber of Commerce to persuade Mr. Thorton to donate or sell his land so that Associated Transport would not move from the area. Mild hints of possible litigation were resorted to when Mr. Thorton indicated that he was not "community-minded" enough to allow large, noisy tractor-trailer trucks to cross his land "24 hours a day." Highway Comm'n v. Thorton, 271 N.C. 227, 233, 156 S.E.2d 248, 253 (1967). At no time did Associated or the Highway Commission approach Mr. Thorton. Here then a small landowner of limited means runs afoul of the desire of a body of non-elective business leaders to keep business within the area. While their purpose is commendable, the methods employed are not.

[1] N.C. GEN. STAT. § 41-2 (1966).

[2] Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895).

The contract theory has been used by a growing number of courts in other states to uphold the joint bank account with the right of survivorship. Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Malone v. Sullivan, 136 Kan. 193, 14 P.2d 647 (1932); Bishop v. Bishop's Ex'rs, 293 Ky. 652, 170 S.W.2d 1 (1943); Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1915); Holt v. Bayles, 85 Utah 364, 39 P.2d 715 (1934); Deal's Adm'r v. Merchants and Mechanics Bank, 120 Va. 297, 91 S.E. 135 (1917).

For a discussion of the contract theory and other legal theories by which the courts have tried to test the validity of the joint bank account with the right of survivorship, see Kepner, *The Joint and Survivorship Bank Account—a Concept Without a Name,* 41 CALIF. L. REV. 596 (1953); Kepner, *Five More Years of the Joint Bank Account Muddle,* 26 U. CHI. L. REV. 376 (1959); and Note, 31 N.C.L. REV. 95 (1952).

be created, and the principal issue litigated was whether the parties had effectively established such an account. The accounts were basically of two types—joint accounts where a written agreement provided for the right of survivorship and ones where there was not such an agreement. In the former the court upheld the claim of survivorship,[3] but in the latter its decision hinged on whether there were circumstances indicating the parties' intent to create the right of survivorship. With sufficient evidence of such intent the court reasoned there was a right of survivorship;[4] without such evidence the court held that the party not depositing the funds was merely an agent for the depositor.[5]

In 1959 the legislature, in an attempt to clarify the law, passed a statute[6] that required the parties to sign a written agreement[7] expressly providing for the right of survivorship.[8] While this statute applied only to husband and wife deposit accounts,[9] an amendment passed in 1963[10] eliminated this restriction and brought accounts opened by any two or more persons with a banking institution[11]

[3] *E.g.*, Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

[4] *See, e.g.*, Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940), where the husband assigned building and loan association stock in his name alone to himself or his wife "either or the survivor." Then he had the stock transferred and reissued stating that he wanted the survivor to be able to cash in the stock "without the usual red tape." These facts combined with the wife's possession of the stock resulted in a finding that a common ownership with the right of survivorship had been created, although there was no formal contract. The North Carolina Supreme Court, however, allowed a partial new trial because of erroneous instructions to the jury.

[5] *E.g.*, Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933).

[6] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[7] The written agreement could be either on a signature card or by separate instrument. However, the requirement that the agreement be written was the only element of the statutory account contrary to the common law accounts.

[8] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[9] *Id.*

(e) As used in this section:

(2) "Deposit account" includes both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

[10] N.C. GEN. STAT. § 41-2.1 (1966).

[11] *Id.*

(e) As used in this section:

(1) "Banking institution" includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.

within its purview.[12] This amendment did not alter the basic prerequisite of an express written agreement.

Assuming a joint bank account has been established, however, certain questions still remain. What are the legal incidents which follow from its creation? This question can best be answered by considering the accounts at two points in time—while the parties are living and when one party dies.

The common law and statutory law attached certain incidents to joint accounts while the parties were still living. At common law,[13] in the absence of evidence to the contrary, the parties were deemed to own the account equally.[14] Furthermore, creditors of each could attach the account to the extent of the interest of the particular debtor.[15] It should be noted here that the common law was supplemented in 1919 by N.C. GEN. STAT § 53-146 (1965), which provided that when an account was opened in the names of two persons payable to either, withdrawal by one party discharged the banking institution from liability to the other party.[16]

Under subsequent statutes the law remained much the same. With respect to the incidents which attach during the lifetime of the parties to a husband and wife account, the 1959 statute[17] with a few minor exceptions was essentially a comprehensive codification

[12] *Id.*: (a) "A dposit account may be established with a banking institution in the names of two or more persons. . . ."

[13] For the purposes of this comment the common law of joint bank accounts is defined in the following manner: with respect to husband and wife accounts the North Carolina case law prior to 1959 is referred to; and with respect to accounts established by parties not husband and wife, the case law prior to 1963 is referred to.

[14] Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961). A joint bank account with the right of survivorship was involved but the account also provided that the deposit "shall be for the use and benefit of both of us." *Id.* at 153, 120 S.E.2d at 577.

[15] Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

[16] This statute did not affect the interests of the parties in the funds but only afforded protection for the banking institutions. The bank could pay out the balance to the survivor if the account was established in two names, payable to either or the survivor, but the surviving party could not prevail in an action by the decedent's estate for the decedent's portion of the funds unless the account had been created by a contract providing for the right of survivorship. Also, a question arose as to whether the bank was protected when the account was in the names of more than two persons.

Similar statutes have been passed in many states, *e.g.*, GA. CODE ANN. § 13-2039 (1967), which was enacted in 1919 and is almost an exact replica of N.C. GEN. STAT. § 53-146 (1965).

[17] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

of the common law and the 1917 statute.[18] It specifically stated that either party could withdraw,[19] and such a withdrawal was a complete discharge of the banking institution.[20] Although the statute included no provision relating to the inter vivos ownership of the funds,[21] it provided that during the lifetime of the parties the account was subject to their respective debts to the extent that each had contributed. If their respective contributions could not be determined, it stated that the funds would be deemed to be owned equally for this purpose.[22] With respect to the legal incidents while the parties are living, the 1963 amendment makes no changes.

When one party to an account died, the common law,[23] the 1959 statute[24] and 1963 amended version of that statute[25] all pro-

[18] N.C. GEN. STAT. § 53-146 (1965).

[19] Such a provision was one of the more important terms of the common law account and, although this is an incident of the creation of the statutory account, the sample agreement set out in the 1959 statute and the 1963 amended version of the statute included such as a provision.

[20] The 1917 statute was not superseded by the 1963 amended version of the joint bank account statute with respect to the bank's liability when the owners of accounts in two names are still living. However, the scope of the protection was changed. In one sense the 1917 statute afforded more limited protection; in another it gave a broader protection. Literally, at least, it only applied to accounts in two names, whereas the more recent statute applies to accounts in the names of two or more persons. But for the bank to be protected no particular agreement between the parties was necessary, whereas the recent legislation requires a written agreement signed by the parties expressly providing for survivorship.

As to bank protection when one of the parties dies, the 1917 statute allowed the bank to pay out funds to the other party. However, it appears to have been superseded to the extent that, if an account comes within the terms of N.C. GEN. STAT. § 41-2.1 (1966), the bank must pay the decedent's equal share to the legal representative of the estate. But it would appear that if an account in two names was not within the scope of the latter statute, the bank could still pay out the funds to the survivor.

[21] In Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961), the court stated that unless it could be shown otherwise the parties would be deemed to own the account equally. The agreement stated the deposit was "for the use and benefit of . . . both." *Id.* at 153, 120 S.E.2d at 577. However, many of the agreements establishing survivorship accounts now state that the parties are co-owners of the funds regardless of whose are deposited. Such a provision is included in the sample agreement in both the 1959 statute and the 1963 amended version of the statute. This might lead the court conclusively to presume equal ownership while the parties are living.

For a discussion of inter vivos rights in joint bank accounts in general and a survey of case law on the topic, see Comment, *The Donee's Inter Vivos Interests,* 60 MICH. L. REV. 972 (1962).

[22] Also accounts opened under the statute were subject to the provisions of law applicable to transfers in fraud of creditors.

[23] Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

[24] Ch. 404 [1959] N.C. Sess L. (amended 1963).

[25] N.C. GEN. STAT. § 41-2.1 (1966).

vided that the survivor became the sole owner of the unwithdrawn deposit, but the more important question was, what were the rights of creditors? At common law the survivor was entitled to the funds free from the claims of creditors.[26] However, the 1959 statute,[27] which was only applicable to husband and wife accounts, modified the common law and provided that the entire account was subject to the claims of creditors. Accounts owned by parties not husband and wife remained exempt from the debts of the deceased. This inconsistency led to the amendment of the statute in 1963,[28] which brings all deposit accounts within its purview[29] and makes such accounts subject to the claims of creditors only to the extent of the decedent's equal share.[30] To make certain that the funds will be available for payment of creditors, the 1963 amendment provides for the banking institution to pay the decedent's equal share to the legal representative of the deceased and the remainder to the surviving joint tenant.[31] The legal representative is not to pay the claims of creditors from the decedent's share until all other personal assets of the estate are exhausted.[32]

Although the 1963 amended version of the statute is generally clear, with respect to the rights of creditors and whom may open accounts, two important questions remain unanswered. First, does the statute apply retrospectively? Second, if the statute is to apply prospectively, does the date of the contract determine the law applicable, or does the deposit of the particular funds control?

The author of the bill assumed it was to operate retroactively,[33] but the North Carolina Attorney General ruled that the 1963

[26] Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

[27] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[28] One authority recommended that the 1959 statute be amended to conform with the original drafting; i.e., exempt accounts from the claims of creditors, or be entirely repealed. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 126 n.72 (3d ed. 1963).

The 1963 amendment improved the status of the husband and wife account, in that no more than one-half is subject to the debts of the deceased. However, the statute was detrimental to the interests of parties not husband and wife since it superseded the common law as set out in Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960), and made the decedent's proportionate share subject to the claims of creditors.

[29] N.C. GEN. STAT. § 41-2.1(a) (1966).

[30] N.C. GEN. STAT. § 41-2.1(b)(3) (1966).

[31] N.C. GEN. STAT. § 41-2.1(b)(4) (1966).

[32] *Id.*

[33] Interview with B. T. Jones, in Forest City, North Carolina, September 7, 1967.

amended version of the statute applies only prospectively.[34] As a result of this ruling, the question of whether the contract or deposit date is controlling takes on greater significance when one party dies. If the contract date is controlling, husband and wife accounts established prior to 1959 and accounts established by parties not husband and wife prior to 1963 are subject to the common law and therefore exempt from the claims of creditors of a deceased party. Husband and wife accounts established between 1959 and 1963 do not enjoy this favored position since they remain subject to the claims of creditors in their entirety. It would be advisable for the owners of these latter accounts to withdraw their funds and establish new accounts so that only one-half the account will be subject to the claims of creditors, since the present statute would govern their accounts. Of course, all joint accounts established after 1963, whether or not they are husband and wife accounts are subject to the claims of creditors to the extent of the decedent's proportionate share.

If the date of each deposit is considered determinative of applicable law, the results upon the death of one party will be interesting. A husband and wife account established prior to 1959 will be treated as follows: funds deposited prior to 1959 will be exempt from the claims of creditors; funds deposited between 1959 and 1963 will be subject in their entirety to such claims; and one-half the funds deposited after 1963 will be subject to the debts of the deceased. As to accounts opened by parties not husband and wife anytime prior to 1963, the funds deposited before 1963 will be exempt from the claims of creditors, but those funds deposited after that

[34] Opinion of Attorney General of North Carolina to Hon. E .W. Tanner, Clerk of Rutherford Superior Court, dated 18 February 1964. This interpretation was based on two subsections of N.C. GEN. STAT. § 41-2.1 (1966). Subsection (a) provides that "a deposit account may be established," and subsection (d) states that the statute is not to be deemed exclusive with deposit accounts not conforming to the statute being governed by other applicable provisions of the law.

A retroactive application of the statute would raise the constitutional problems of impairment of the obligation of contract and of taking of property without due process of law. The court would probably hold the statute to be prospective, relying on the canon of construction to avoid the constitutional issue. *See, e.g.,* United States v. Rumely, 345 U.S. 41 (1953).

If the statute were construed to be prospective only in application, another question raised is whether a joint account with the right of survivorship could still be established under the common law, i.e., providing for the account to be exempt from the claims of creditors. Through use of the two provisions of the statute mentioned above, it appears a plausible argument exists in favor of this interpretation.

time will be subject to the decedent's debts to the extent of his proportionate share. Determining the total amount subject to the claims of creditors would not be difficult if the depositors made no withdrawals prior to death. But if withdrawals were made, the character of the remaining funds would have to be determined. Such funds may be exempt, partially subject or fully subject to the claims of creditors.[35]

In conclusion, the 1963 amended version of the statute is basically a comprehensive codification of the common law of joint bank accounts with the right of survivorship in North Carolina. Subjecting accounts to the claims of creditors to the extent of the decedent's proportionate share is the only provision affecting the rights of the parties which is inconsistent with the case law. To assist in the administration of this fund and to protect the creditor's rights upon the death of one of the parties, the statute includes a method of disbursement. Although generally explicit in its terms, the statute should be clarified as to whether it is to be applicable retroactively or prospectively, and also as to whether the contract date of the account or the deposit date of the particular funds determines the rights of creditors upon the death of one of the parties.

WILLIAM H. LEWIS, JR.

## Taxation—Deduction of Meals as a Business Travel Expense

The United States Supreme Court recently held in *United States v. Correll*[1] that a wholesale grocery salesman could not deduct the costs of breakfasts and lunches he ate while traveling in his territory because he was not required to stop for sleep or rest. Mr. Correll lived outside his territory but was required by his employer to be in the district at the start of the working day and to eat breakfast and lunch at the restaurants of his customers.[2] The Corrells filed a joint income tax return[3] and claimed the expense of these meals as a business deduction under section 162(a)(2) of the Internal

[35] The court would have to adopt a formula to determine this: *e.g.*, the first funds in were the first funds out or the last funds in were the first funds out.

[1] 36 U.S.L.W. 4055 (U.S. Dec. 11, 1967).
[2] Correll v. United States, 369 F.2d 87 (6th Cir. 1966).
[3] INT. REV. CODE OF 1954, § 6013.

Revenue Code.[4] They paid the deficiency asserted by the Commissioner of Internal Revenue and sued in the district court for a refund. The jury returned a verdict for the taxpayer and the Sixth Circuit affirmed.[5]

The Commissioner contended that the cost of such meals was a personal living expense and not deductible.[6] He took the position that for a business trip to be "away from home" so as to qualify for a deduction for the cost of meals, the trip must be of such a duration as to require "sleep or rest" before returning home.[7] The Supreme Court accepted his interpretation.[8]

The Commissioner at one time insisted that the cost of transportation on business trips was not deductible unless the trip was overnight, but he found little support in the courts for this position.[9] In the 1954 Code[10] Congress specifically rejected this idea and made these expenses deductible though the trip was not overnight.[11] In

[4] It appears that the instant case arose under § 162(a)(2) of the 1954 Code before it was amended in 1962. At that time the statute read as follows:

> (a) IN GENERAL—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business, including—
>
> . . . .
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business. . . .

INT. REV. CODE OF 1954, ch. 1, § 162(a)(2), 68A Stat. 46. The amendment, Revenue Act of 1962, Pub. L. No. 87-834, § 4(b), 76 Stat. 976, has no effect on the issue before the court.

[5] Correll v. United States, 369 F.2d 87 (6th Cir. 1966).

[6] "[N]o deduction shall be allowed for personal, living, or family expenses." INT. REV. CODE OF 1954, § 262.

[7] This has often been referred to as the "overnight" rule, but it is more accurately called the "substantial sleep or rest" rule. William A. Bagley, 46 T.C. 176, 182 (1966). While Rev. Rul. 63-239, 1963-2 CUM. BULL. 87 supposedly disallows any deduction unless the taxpayer is "away from home overnight" it does not claim to supersede Rev. Rul. 54-497, 1954-2 CUM. BULL. 75, which defines overnight as "a trip on which the taxpayer's duties require him to obtain necessary sleep away from his home. . . . [T]he employee need not be away from his home terminal for entire 24 hour day or throughout the hours from dusk until dawn." Despite the existence of this ruling the Commissioner in Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961), contended that a taxpayer who was away for 16-18 hours each trip and rented a room for rest during his layover could not deduct the costs of meals and lodging. See also Rev. Rul. 61-221, 1961-2 CUM. BULL. 34; I.T. 3395, 1940-2 CUM. BULL. 64.

[8] United States v. Correll, 36 U.S.L.W. 4055 (U.S. Dec. 11, 1967).

[9] *E.g.*, Chandler v. Commissioner, 226 F.2d 467 (1st Cir. 1955); Joseph M. Winn, 32 T.C. 220 (1959); Kenneth Waters, 12 T.C. 414 (1949).

[10] INT. REV. CODE OF 1954, § 62(2)(C).

[11] At present, business transportation expenses can be deducted by an

1960 the Treasury declared it would not litigate any pending disputes of this nature under the 1939 Code.[12] The "overnight" rule found more support from the judiciary when it was applied to the deductibility of meals. The acceptance of the rule in the courts of appeal was limited,[13] but the Tax Court followed it until 1966[14] when it abandoned the rule.[15] On appeal, however, the First Circuit reversed and remanded the case.[16] This decision created a conflict between the circuits and the Supreme Court granted certiorari[17] in order to resolve the conflict.[18]

It appears that the primary reason the Supreme Court accepted the "substantial sleep or rest" rule was to avoid the costly and indefinite case-by-case determination of what business travel is sufficient to be classified as "away from home" and therefore deductible.[19] The simplicity and certainty of this approach is its most appealing aspect.[20] Those courts which have rejected the rule have not been able to offer any substitute which has this quality of clarity; what

employee in arriving at adjusted gross income only if they are reimbursed by the employer or if they are incurred while he was away from home overnight. . . .

For this reason . . . [the] bill permit[s] employees to deduct business transportation expenses in arriving at adjusted gross income. . . . The business transportation expenses which are deductible . . . include only expenses for actual travel. . . .

H.R. REP. No. 1337, 83d Cong., 2d Sess. 9 (1954). See also S. REP. No. 1622, 83d Cong., 2d Sess. 9 (1954).

[12] Rev. Rul. 60-147, 1960-1 CUM. BULL. 682 (it was specified that the acceptance of the *Winn* decision, note 9 *supra,* did not affect the position of the Commissioner that meals and lodging were not deductible unless the trip was overnight).

[13] United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); Hanson v. Commissioner, 298 F.2d 391 (8th Cir. 1962); Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961); Ahrens v. United States, 264 F. Supp. 518 (S.D. Ill. 1967). In Rev. Rul. 61-221, 1961-2 CUM. BULL., 34, the Internal Revenue Service stated it would follow the decision in the *Williams* case, *supra.,* and modified the "overnight" rule to the "substantial sleep or rest" rule.

[14] *See, e.g.,* Jerome Mortrud, 44 T.C. 208 (1965); Al J. Smith, 33 T.C. 861 (1960); Sam J. Herrin, 28 T.C. 1303 (1957).

[15] William A. Bagley, 46 T.C. 176 (1966).

[16] Commisioner v. Bagley, 374 F.2d 204 (1st Cir. 1967).

[17] United States v. Correll, 388 U.S. 905 (1967).

[18] United States v. Correll, 36 U.S.L.W. 4055 (U.S. Dec. 11, 1967).

[19] *Id.* at 4056.

[20] In William A. Bagley, 46 T.C. 176, 182 (1966) the court said that the rule provided simplicity and certainty but added that "administrative workability [must] yield to logic, reason and justice." However, the First circuit reversed the Tax Court stating that "fairness and administrative certainty are more important than logic." Commissioner v. Bagley, 374 F.2d 204, 207 (1st Cir. 1967).

they have presented is, in reality, the case-by-case approach.[21] Even with such a definite rule there is a possibility of future litigation over whether the "sleep or rest" on which the deduction must now depend is reasonably necessary.[22]

The basic fairness of the rule was also noted by the Supreme Court. The inequality of a rule that would grant a deduction for the cost of meals to a man who begins and ends his work day at home, like any office worker or laborer, merely because he traveled in his occupation troubled the Court.[23] The cost of the noon meal, for a worker not on travel status, is a personal living expense and not deductible.[24] The Court reasoned that the distance traveled should have no relation to the deductibility of the meal.[25] However, the same logic holds true when applied to the rule adopted by the court. Does the addition of the time element make the meal any more deductible? Why should it matter for tax purposes whether the taxpayer eats the evening meal, rents a room and leaves for home early the next morning, or eats the evening meal and, instead of renting a room for the night, begins his trip home at a late hour? In most of the litigation in this area the taxpayers have either worked long hours or arrived home late at night.[26] Strict adherence by the Treasury to the "sleep or rest" rule may occasionally influence a taxpayer in such a case to stay overnight so that he may deduct the cost of three meals (lunch, dinner, and breakfast) as well as his lodging.

The Court was also apparently impressed by the Commissioner's

[21] See cases cited notes 13, 15 *supra*.

[22] Rev. Rul. 61-221, 1961-2 CUM. BULL. 34; the Treasury quotes from the Fifth Circuit's decision in Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961) that the correct rule is: "If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and to obtain sleep or rest . . . his expenditures . . . for the purpose of obtaining sleep or rest are deductible traveling expenses under section 162(a)(2) of the 1954 Code."

[23] United States v. Correll, 36 U.S.L.W. 4055, 4056 (U.S. Dec. 11, 1967).

[24] Amoroso v. Commissioner, 193 F.2d 583 (1st Cir. 1952); Fred Marion Osteen, 14 T.C. 1261 (1950); Rev. Rul. 56-508, 1956-2 CUM. BULL. 126, 128; INT. REV. CODE OF 1954, § 262.

[25] United States v. Correll, 36 U.S.L.W. 4055, 4056. However, the dissent points out that the deduction, according to the statute, depends only on geography and makes no reference to any time element. *Id.* at 4057.

[26] In the instant case the taxpayer was on the road 13 hours, from 4:30 a.m. until 5:30 p.m. In Commissioner v. Bagley, 374 F.2d 204 (1st Cir. 1967), the taxpayer would usually arrive home around 10:00 p.m. In Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961) the taxpayer averaged 16-18 hours for each trip.

claim of Congressional approval of his interpretation of what is meant by "away from home."[27] The Commissioner has contended that Congress endorsed his regulations in 1954 when it enacted section 162(a)(2) substantially unchanged from the 1939 Code.[28] This is based on the fact that the Committee Reports[29] made reference to the "overnight" rule in recommending the amendment of what is now section 62(2)(C) of the 1954 Code.[30] In *William A. Bagley*[31] the Tax Court rejected this argument. The fact that Congress dropped the "overnight" rule as a requisite to the deduction of transportation expenses, without any evidence that it knew of the application of the rule to the deductibility of meals, could be interpreted as evidence of Congressional disfavor of the "overnight" rule. The Court pays lip service at least to the suggestion that the words "meals and lodging" were intended to be a unit because they appear in the statute[32] without being separated by a comma and therefore meals, to be deductible, must be accompanied by lodging. This argument was rejected by the Eighth Circuit in *Hanson*[33] where the court pointed out that section 62(2)(B), which makes specific reference to section 162, reads "travel, meals, and lodging," the comma being intended to denote separability of the expenses.[34]

The final reason given by the Court is the delegation by Congress to the Commissioner of the power to make necessary rules and regulations.[35] It is the duty of the judiciary to insure that he does not exceed this authority. The majority of the Court is of the opinion that the regulation has not been shown to have exceeded this

[27] United States v. Correll, 36 U.S.L.W. 4055, 4057 (U.S. Dec. 11, 1967).

[28] Rev. Rul. 63-239, 1963-2 CUM. BULL. 87; what is now § 162(a)(2) of the 1954 Code, note 4 *supra*, is substantially the same as INT. REV. CODE OF 1939, ch. 1, § 23(a)(1), 53 Stat. 12.

[29] See note 11 *supra*.

[30] For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

. . . .

(2) TRADE AND BUSINESS DEDUCTIONS OF EMPLOYEES—

. . . .

(C) TRANSPORTATION EXPENSES—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

INT. REV. CODE OF 1954, § 62(2)(C).

[31] 46 T.C. 176, 180 (1966).

[32] See note 4 *supra*.

[33] 298 F.2d 391 (8th Cir. 1962).

[34] *Id.* at 397.

[35] INT. REV. CODE OF 1954, § 7805(a).

authority and usurped the legislative function of the Congress.[36] The three dissenting justices are of the opinion that the regulation has been shown to be an invalid interpretation of the statutory language.[37]

STEPHEN E. CULBRETH

## Torts—Medical Malpractice—Rejection of "Locality" Rule

In *Pederson v. Dumouchel*,[1] plaintiff brought a malpractice action against a physician, dentist, and hospital to recover for brain damage allegedly sustained as a result of an operation.[2] He had suffered a broken jaw and was placed under the care of Dr. Dumouchel, who associated a dentist to reduce the fracture. The operation was performed between 10:20 a.m. and noon the following day. The dentist had no working knowledge of the use of a general anesthetic, which was administered by a hospital nurse. No medical doctor was present during the operation; it was Dr. Dumouchel's afternoon off and he had left the hospital before the operation commenced. Plaintiff suffered convulsive seizures in the recovery room. About 1:30 p.m. another doctor was located who suspected brain damage, consulted a neurosurgeon in Seattle, 110 miles away, and arranged to have plaintiff taken there. He remained unconscious for a month. Expert testimony supported the finding that plaintiff suffered severe brain damage caused by the administration of the anesthetic. Dr. Dumouchel was charged with negligently failing to assume the responsibility for the patient's medical care while in surgery. The trial judge instructed the jury that the standard of care to be applied was "the learning, skill, care, and diligence ordi-

[36] United States v. Correll, 36 U.S.L.W. 4055, 4057 (U.S. Dec. 11, 1967).
[37] *Id.*

[1] —— Wash. 2d ——, 431 P.2d 973 (1967).

[2] The scope of this note is limited to a discussion of the standard of care applied to physicians and surgeons. Generally, the standard for dentists is the same as that applied to doctors.

Much that is said herein about the locality rule is applicable to hospitals as well as physicians. However, hospital liability for negligence necessarily involves additional factors such as administrative supervision, ANNOT., 14 A.L.R.3d 873 (1967), agency principles when plaintiff seeks to establish hospital liability for the negligence of a physician, ANNOT., 69 A.L.R.2d 305 (1960) and the physical facilities of the hospital. *See* 43 N.C.L. REV. 469 (1965). The *Pederson* court held that plaintiff's case against the hospital was sufficient to go to the jury on the doctrine of res ipsa loquitur. *See* ANNOT., 173 A.L.R. 535 (1948); ANNOT., 9 A.L.R.3d 1315 (1966).

narily possessed and practiced by others in the same profession . . . *in the same or in similar localities* . . . ."[3] In holding this instruction to be reversible error, the Washington Supreme Court took the position that the degree of care required is that of an average competent practitioner acting in the same or similar circumstances, and that local practice within geographic proximity is only one factor to be considered. The court set forth the following rule:

> A qualified medical . . . practitioner should be subject to liability, in an action for negligence, if he fails to exercise that degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances. This standard of care is that established in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient.[4]

Although the opinion is somewhat ambiguous, it appears that this court has discarded the "locality" rule and has set forth a standard of care based on the conduct of a reasonable practitioner acting under the same or similar circumstances. If so, the court has taken a major step in conforming the law of malpractice to the conditions of medical practice as they exist today.

The courts have long encountered difficulty in stating a general rule by which to measure the standard of care for physicians and surgeons. Generally, the physician is required to possess and exercise that degree of skill and care ordinarily possessed and exercised by physicians under similar circumstances.[5] The early cases imposed a narrow qualification on the standard by requiring that it be determined by reference to the "same" locality or community in which the defendant-doctor practices.[6] The locality rule is based on the premise that a doctor in a small community does not have the same opportunities and resources as do urban doctors to keep abreast of developments in his profession, and therefore can not

---

[3] —— Wash. 2d ——, , 431 P.2d 973, 976 (1967).

[4] *Id.* at ——, 431 P.2d at 978.

[5] RESTATEMENT (SECOND) OF TORTS § 283 (1965).

[6] *E.g.*, Smothers v. Hanks, 34 Iowa 286 (1872). The cases are collected in McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 569 (1959).

Many courts impose various combinations of additional qualifications on the standard of care such as an "average" physician "in good standing" engaged in "the same general line of practice." RESTATEMENT (SECOND) OF TORTS § 299A (1963).

be held to the same standard. Since laymen are generally considered unqualified to pass judgment on medical questions, courts consistently hold that there can be no finding of negligence without the aid of expert testimony.[7] It follows that the competence of an expert to testify depends upon his familiarity with the customary practice in the locality. This narrow limitation, coupled with the reluctance of any doctor in the community to testify against another,[8] makes it virtually impossible for a plaintiff to make out a malpractice case in jurisdictions applying the "same" locality rule.

Most courts have realized that the "same" locality is too narrow, and have extended the rule to include "same or similar" localities.[9] This liberalization makes it somewhat easier for a plaintiff to obtain experts willing to testify favorably, but it does not alleviate the possibility that a few local doctors can set a standard below that required by law. A few courts operating under a "similar" localities rule have not been content to determine similarity on the basis of population, and have attempted to compare similar "medical localities."[10] Recent decisions indicate that the courts are becoming much more liberal in finding similarity,[11] admitting expert testimony and taking judicial notice that two localities are similar[12] or

[7] Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (1949); Graham v. St. Luke's Hosp., 46 Ill. App. 2d 147, 196 N.E.2d 355 (1964); Berardi v. Menicks, 340 Mass. 396, 164 N.E.2d 544 (1960); Miller v. Raaen, 273 Minn. 109, 139 N.W.2d 877 (1966); Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955); Schroeder v. Adkins, 149 W.Va. 400, 141 S.E.2d 352 (1965). Expert testimony is not required, however, if the negligence is so grossly apparent or treatment of such common occurrence that a layman would be able to appraise it. Graham v. St. Luke's Hosp., 46 Ill. App. 2d 147, 196 N.E.2d 355 (1964); Grosjean v. Spencer, 258 Iowa 685, 140 N.W.2d 139 (1966); Hammer v. Rosen, 198 N.Y.S.2d 65, 165 N.E.2d 756 (1960).

[8] W. PROSSER, LAW OF TORTS, 167 (3d ed. 1964); Seidelson, *Medical Malpractice and the Reluctant Expert,* 16 CATH. U.L. REV. 158 (1966).

[9] Engle v. Clarke, 346 S.W.2d 13 (Ky. 1961); Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363 (1880); Bradshaw v. Blaine, 1 Mich. App. 50, 134 N.W.2d 386 (1965); Nance v. Hitch, 238 N.C. 1, 76 S.E.2d 461 (1953); Teig v. St. John's Hosp., 63 Wash. 2d 369, 387 P.2d 527 (1963).

[10] Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931); Cavellaro v. Sharpe 84 R.I. 67, 121 A.2d 669 (1956).

[11] Christopher v. United States, 237 F. Supp. 787 (E.D. Pa. 1965) (a Philadelphia surgeon permitted to testify in Baltimore); Riley v. Layton, 329 F.2d 53 (10th Cir. 1964) (California physician familiar with small-town practice qualified to testify in Utah town); Couch v. Hutchison, 135 So. 2d 18 (Fla. App. 1961) (Florida surgeon allowed to testify on teachings of a Philadelphia medical school).

[12] Cook v. Lichtblau, 144 So. 2d 312 (Fla. App. 1962).

that the witness was familiar with general practice in the community.[13]

In furtherence of the tendency to liberalize the area qualification of the standard, the courts have devised additional ways to minimize or circumvent the effect of the locality rule. First, the conduct of a general practitioner is tested by (1) the degree of skill and knowledge *possessed* by the other physicians in the same or similar locality, and (2) the degree of care and diligence *exercised* by those physicians in applying their skill.[14] Malpractice liability may result either through lack of skill and knowledge or neglect to apply it, if possessed.[15] In *Williams v. Chamberlain*,[16] a physician was charged only with failure to exercise the necessary "care." The Missouri Supreme Court, by strong dictum, stated that the original reasons for the locality rule pertain to the inability of a rural physician to possess the skill and knowledge of urban physicians; that where a physician is charged only with failure to exercise due "care," the locality should make no difference and there should be a national standard. While the distinction is perhaps theoretically sound, as a practical matter it may not mean very much. Can the courts really tell whether a physician's conduct was a failure to exercise "care" or a failure to possess knowledge to exercise it?

Second, as the courts learn more about medical practices, they are beginning to formulate with specificity what is required of the reasonable physician in certain circumstances, rather than depending upon experts to formulate it. For example, once the doctor-patient relationship is established, a doctor has a duty to examine the patient,[17] not to abandon the patient until the relationship terminates,[18] to disclose any abnormal risks in the treatment,[19]

[13] Teig v. St. John's Hosp., 63 Wash. 2d 369, 387 P.2d 527 (1963).

[14] D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES, § 8.04 (1966).

[15] DeLaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964); Newport v. Hyde, 244 Miss. 870, 147 So. 2d 113 (1962); Williams v. Chamberlain, 316 S.W.2d 505 (Mo. 1958); Mehigan v. Sheehan, 94 N.H. 274, 51 A.2d 632 (1947).

[16] 316 S.W.2d 505 (Mo. 1958).

[17] *E.g.*, Stephens v. Williams, 226 Ala. 534, 147 So. 608 (1933); Wheatley v. Heideman, 251 Iowa 695, 102 N.W.2d 343 (1960).

[18] *E.g.*, Capps v. Valk, 189 Kan. 287, 369 P.2d 238 (1962); O'Neil v. Montefiore Hospital, 11 A.2d 132, 202 N.Y.S.2d 436 (1960); see ANNOT., 57 A.L.R.2d 432 (1958).

[19] Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962); Watson v. Clutts, 262 N.C.

to instruct patients how to carry out treatment (especially drugs),[20] and to follow the progress of treatment.[21] If the facts of a particular case reveal a clear breach of such a duty, the court may permit a jury to find negligence without the aid of expert testimony,[22] the result being to minimize or remove the effect of the locality rule.

Third, the court may simply disregard the locality rule. In *Koury v. Follo,*[23] a Greensboro, North Carolina physician was charged with prescribing an injection of a drug containing streptomycin for plaintiff's nine-month old baby for treatment of a cold and bronchitis; afterward the child became deaf. The label on the drug container stated "Not for Pediatric Use," accompanied by a warning against use for children. The plaintiff's expert witness testified that deafness was a known hazard, and, in effect, that such use was dangerous. The opinion does not reveal whether or not the expert was familiar with the practice in Greensboro. The defendant testified that other pediatricians in Greensboro were then using the drug in like dosages for children as young as nine months of age. Nevertheless, the court held that plaintiff's evidence was sufficient to justify a finding by the jury that the defendant was negligent. By disregarding the locality rule, it appears that the court found plaintiff's evidence sufficient to prove that defendant's conduct subjected the child to an unreasonable risk of harm, notwithstanding the fact that such conduct was customary in Greensboro.

Most writers generally agree that today the locality of practice is of diminishing importance.[24] As early as 1916, in *Viita v. Flemming,*[25] the Minnesota Supreme Court rejected the concept that the

153, 136 S.E.2d 617 (1964); Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955).

[20] *E.g.,* Beck v. The German Klinik, 78 Iowa 696, 43 N.W. 617 (1889); McKenzie v. Siegel, 261 Minn. 299, 112 N.W.2d 353 (1961).

[21] Revels v. Pohle, 101 Ariz. 208, 418 P.2d 364 (1966); Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (1949); Willard v. Hutson, 234 Or. 148, 378 P.2d 966 (1963).

[22] Revels v. Pohle, 101 Ariz. 208, 418 P.2d 364 (1966). "[L]aymen can say that in all cases where there are continual complaints of pain from a patient over a substantial period of time, that it is a departure from standard medical practice for the doctor to fail to examine the patient in any manner." *Id.* at ——, 418 P.2d at 367. Capps v. Valk, 189 Kan. 287, 369 P.2d 238 (1962); Engle v. Clarke, 346 S.W.2d 13 (Ky. 1961).

[23] 272 N.C. 366, 158 S.E.2d 548 (1968).

[24] D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES, § 8.06 (1966); McCOID, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549 (1959); W. PROSSER, LAW OF TORTS 167 (3d ed. 1964); 14 STAN. L. REV. 884 (1962).

[25] 132 Minn. 128, 155 N.W. 1077 (1916).

locality is an overall qualification of the standard. That court stated, in effect, that the standard of care should be expressed in terms of "like circumstances," and the locality should be considered only as one of the circumstances. Since 1916, this development has gained judicial support,[26] some of which has been by word rather than by deed.[27] If this rule is applied as stated, an expert otherwise qualified would not be required to possess personal knowledge of the standards in the same or in a similar locality. He would be permitted to testify to standards of care possessed by the profession generally, and if any evidence concerning local practice is before the court, the jury could consider it in determining the weight to be given the expert's testimony. This rule greatly increases a plaintiff's ability to find favorable expert witnesses as well as easing his overall burden of proof. In *Murphy v. Little*,[28] the Georgia Supreme Court applied this concept of a national standard of care operating under a statute which requires a physician or surgeon to exercise a reasonable degree of care and skill.

The compelling interpretation of the *Pederson* case is that the court reached the same result as the *Murphy* case without the aid of a statute, and thus effectively discarded the locality rule.[29] Superficially, the case is subject to the criticism that by its definition of

[26] Flock v. J. C. Palumbo Fruit Co., 63 Idaho 220, 118 P.2d 707 (1941); McGulpin v. Bessemer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Carbonne v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953); Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939).

[27] Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (1949). The California Supreme Court said "The essential factor is knowledge of similarity of conditions; geographical proximity is only one factor to be considered." *Id.* at 756, 205 P.2d at 7. However, when plaintiff argued that the area for determination of the standard should be the San Joaquin Valley, containing two cities of over 50,000 people and smaller towns including the community of defendant-doctor's practice, the court balked, saying that plaintiff "seeks to advance this development beyond permissible bounds." *Id.* at 755, 205 P.2d at 6.

[28] 112 Ga. App. 517, 145 S.E.2d 760 (1965).

[29] In a more recent Washington case, Versteeg v. Mowery, —— Wash. 2d ——, 435, P.2d 540 (1967), the Supreme Court cited *Pederson* with approval. At first blush, the language of the court seems to indicate that the court has retained the locality rule. However, the plaintiff totally failed to establish any standard of care at all. The expert testimony merely offered evidence that each surgeon uses different surgical methods when inserting a plastic implant into female breasts. The court said that a jury is not capable of choosing between conflicting standards of the various expert witnesses. "[T]he medical standard or the minimal standard may be the same here that it is in Beverly Hills or New York or some place else, *but nobody has said so*." 435 P.2d at 543-44.

geographic proximity[30] it adds confusion to an already confused area of the law. Such phrases as "coextensive with the means available," and "readily accessible" mean very little in themselves without further judicial interpretation. The real significance of the case, however, lies in what the court intended by defining geographic proximity in this manner. One possible interpretation is that the court has retained a "similar" locality qualification on the standard, and has defined a "medical locality" making the "similar locality" a broader concept. This would be entirely inconsistent with the court's statement that the standard of care is to be expressed in terms of "the same or similar circumstances," and that locality is to be only one of the circumstances. It seems probable, upon analysis of the entire opinion, that the court did not intend to retain any concept of geographic qualification, especially since it stated that it is no longer proper "to limit the definition of the standard of care . . . to the practice or custom of . . . a geographical area."[31] The more tenable interpretation is that the standard of care is that required of a reasonable physician acting under the same or similar circumstances. The geographic proximity remains important, but only to the extent that it is necessary to determine what the reasonable doctor would have done in the same or similar situation. An expert, witness, unfamiliar with customary practice and the local level of knowledge and skill, would be competent to give his opinion of what is required of the profession generally. If the local practice differs from the expert testimony from the plaintiff's side, then it rests with defendant's counsel to bring such evidence before the court. Then, under proper instruction, it is the province of the jury to determine what is required of the average physician under these circumstances.

This is a most welcome decision. Most courts are operating under standards of care encumbered with rigid qualifications to the point that it is often difficult to discern that the malpractice action is grounded in negligence. The *Pederson* court recognized that the controlling question should be whether or not the conduct of the physician subjects the patient to an unreasonable risk of harm, and not what is the practice in the particular locality. It becomes ever more apparent that the original reasons employed to justify the lo-

[30] Note 4, *supra*, and accompanying text.

[31] Pederson v. Dumouchel, —— Wash. 2d ——, ——, 431 P.2d 973, 978 (1967).

cality rule no longer exist.[32] In *Pederson* the court reasoned "Now there is no lack of opportunity for a physician or surgeon to keep abreast of the advances in his profession . . . ."[33] The standards required by state medical licensing boards, the comprehensive coverage of medical journals, the "detail men" of drug companies, and post graduate courses serve to keep physicians abreast of national standards.[34] It is not contended that the facilities in smaller communities are now equal to those in larger towns and cities, nor that the ability and methods of treatment are everywhere the same. It is contended, however, that the older barriers no longer exist that would prevent any competent physician from knowing the extent of his ability and the capabilities of his facilities. There is nothing to prevent the doctor from knowing what skills and facilities are readily accessible for the proper treatment of the patient. "Increasingly realistic judges . . . will acknowledge that the legal rule ceases when the reasons for it cease."[35]

HAROLD N. BYNUM

## Wills—Ademption by Trustee of Incompetent Testator in North Carolina—Adoption of the Intent Rule

In *Grant v. Banks*[1] the North Carolina Supreme Court held that the sale by a trustee of property specifically devised by his ward prior to incapacitation did not adeem the devise and that proceeds from the sale still remaining in the estate were recoverable under

[32] In 1940, in Tevdt v. Haugen, 70 N.D. 338, 349, 294 N.W. 183, 188 (1940), the North Dakota Supreme Court stated:

"The duty of a doctor to his patient is measured by conditions as they exist, and not what they have been in the past or may be in the future. Today, with rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality or community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of his limited facilities or training is unable to give."

[33] Pederson v. Dumouchel, —— Wash. 2d ——, ——, 431 P.2d 973, 977 (1967).

[34] *Id.* at ——, 431 P.2d at 977.

[35] D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES, § 8.06 (1966).

[1] 270 N.C. 473, 155 S.E.2d 87 (1967).

the doctrine of equitable conversion.[2] The issue of ademption[3] by act of a trustee for an incompetent testator was one of first impression in North Carolina. Prior North Carolina ademption cases are based on the acts of testator[4] or events happening during the life of testator[5] while he retained testamentary capacity.[6]

In this case the testatrix had executed a will in 1951 providing for the disposition of her personal property and for the sale of her homeplace, the proceeds of which were to be distributed to her nephews and nieces or their heirs. The will further provided that, subject to the right of the estate to control and possession for two years, a store and lot owned by testatrix was to go to the Methodist Orphanage. In 1957 testatrix was struck and seriously injured by an automobile and required constant medical and custodial care until her death in 1964. She was adjudged mentally incompetent and a trustee was appointed. With court approval the homeplace and lot were sold to provide funds to support the incompetent. Upon depletion of these and other cash reserves permission was obtained to sell the store and lot devised to the Methodist Orphanage. Of the 90,000 dollars received from the sale of the store and lot, between 40,000 dollars and 50,000 dollars remained in the estate at the time of testatrix's death. The issue raised in the suit was whether the specific devise of the store and lot was adeemed by the trustee's sale or if the remaining proceeds of the sale should go to the orphanage.

The ability of a trustee to adeem property specifically devised by his ward is the subject of sharp conflict among American courts.

> This conflict is largely due to the fact that some courts have applied the rule that the intention of the testator must control, so that ordinarily there would be no ademption, while others take the view . . . that the true test is whether or not the thing spe-

[2] *Id.* at 485, 155 S.E.2d at 95. "Conversion is the fictional change of realty into personalty or of personalty into realty for equitable purposes." Scott v. Jordan, 235 N.C. 244, 250, 69 S.E.2d 557, 562 (1952). Thus the equitable conversion doctrine applied here is that the sale proceeds are impressed with the characteristics of the specific devise so that they might pass to the specific devisees under the will.

[3] There are several types of ademption possible in the law of wills, *i.e.*, ademption by gift during testator's life, ademption by extinguishment, *etc.* *See* 96 C.J.S. *Wills* § 1172 (1957); 57 AM. JUR. *Wills* §§ 1579, 1580 (1948). This note, however, is concerned only with ademption by extinction of the subject matter.

[4] *E.g.*, Tyer v. Meadows, 215 N.C. 733, 3 S.E.2d 264 (1939).

[5] *E.g.*, Rue v. Connell, 148 N.C. 302, 62 S.E. 306 (1908).

[6] 270 N.C. at 481, 155 S.E.2d at 93.

> cifically bequeathed remains in specie at the time of testator's death. . . .[7]

The latter view, known as the English or specie test, is the minority rule.[8] The minority jurisdictions reason that if the specific devise is not in the testator's estate at the time of death, the courts have no power absent specific statutory direction to change the residuary estate into the specific devise.[9] The majority follow the view that no ademption occurs when the trustee of an incompetent testator sells the property devised because of the inability of the testator to express his testamentary intent other than as expressed in the will.[10] Even the majority, however, generally agree that there is an ademption pro tanto of the proceeds used in the ward's maintenance.[11]

In adopting the majority rule the supreme court relied on *Brown v. Cowper*.[12] The court there, in construing N.C. GEN. STAT. § 33-32, stated: "The general rule is that, where the real estate of a lunatic is sold under a statute, or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic."[13] Despite the fact that the above case applied to an intestate lunatic, the court could "see no reason why . . . this rule should not apply to an incompetent testator."[14] Reasoning further the court stated:

> Trustee and ward is a trust relation in which the trustee acts for the ward, whom the law regards as incapable of managing his own affairs. The legal title to the property is in the ward, the trustee being merely the custodian, manager, or conservator of the ward's estate. In his limited capacity . . . the trustee has no power to change the will of his ward by merely commingling assets in his hands. To so hold would reach the preposterous

---

[7] 57 AM. JUR. *Wills* § 1590 (1948).

[8] *E.g.*, Roderick v. Fisher, 97 Ohio App. 95, 122 N.E.2d 475 (1954). *See* 96 C.J.S. *Wills* § 1174 (1957); *Annot.*, 51 A.L.R.2d 770 (1957).

[9] *In Re* Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931), *changed by statute*, NEW YORK CIVIL PRACTICE ACT, § 1399 (1933); *accord*, Jones v. Green, (1868) L.R. 5 Ch. 555.

[10] N. WIGGINS, NORTH CAROLINA WILLS § 143 (1964); 3 AMERICAN LAW OF PROPERTY § 14.13 (1952).

[11] *Annot.*, 51 A.L.R.2d 770 (1957); *Contra, In Re* Mason's Estate, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965).

[12] 247 N.C. 1, 100 S.E.2d 305 (1957). In this case the guardian of a lunatic had sold his ward's interest in land with court approval. Upon his death the heirs at law sought to take the personal property as if it were realty.

[13] *Id.* at 9, 100 S.E.2d at 311.

[14] 270 N.C. at 484, 155 S.E.2d at 95.

> result of allowing a guardian or trustee to rewrite and alter the provisions of a will so as to destroy the testamentary intent of testator.[15]

Although this reasoning is in line with many recent decisions on this point[16] it does not necessarily follow that this is the most just or equitable rule.

In adopting the intent test the court stated that a failure to do so "would reach the preposterous result of allowing a guardian or trustee . . . to destroy the testamentary intent of testator by merely commingling funds."[17] In appellant's brief, however, it was noted that

> it is well to remember in this case that the trustee . . . elected to sell and dispose of the homeplace prior to his sale and disposal of the downtown property. Had he first sold the downtown property, the homeplace, which brought $17,500 (an amount much less than that which is now on hand), would have remained intact.[18]

Thus by choosing the order in which the various pieces of property were sold the trustee did *in fact* decide who would take under the will. It is difficult to understand how this result is any less "preposterous" as regards testatrix's actual intent.

The court in following the majority rule apparently adopted the major exception to it,[19] *i.e.,* that proceeds of the sale used in the support and maintenance of the ward are adeemed pro tanto. It should be noted, however, that such pro tanto ademption was unavoidable in that no other funds were available to support the testatrix. Should a case arise in which the trustee sells property subject to a specific devise for support of the ward while "generally devised" property remains intact at death, will the court require the latter property be given to the specific devisees up to the value of the specific devise because of the inability of the trustee to change testator's intent?[20] It would seem logical so to hold under the present rule

[15] *Id.* at 485, 155 S.E.2d at 95, 96.

[16] *See, e.g.,* Forbes v. Burket, 181 So. 2d 682 (Fla. App. 1966); Our Lady of Lourdes v. Vanator, 422 P.2d 74 (Idaho 1967); Stake v. Cole, 257 Iowa 594, 133 N.W.2d 714 (1965).

[17] 270 N.C. at 485, 155 S.E.2d at 95, 96.

[18] Brief for Respondent-Appellant at 5, Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967).

[19] 270 N.C. at 485, 155 S.E.2d at 95. The court allowed only the recovery of those funds which were not used in the support of the ward or in costs of administration.

[20] At least one court has so done. In *In Re* Mason's Estate, 62 Cal. 2d

since the court, by denying the trustee the power "to destroy the testamentary intent of testator" implies *a fortiori* that the testamentary intent will thus be preserved.

In preserving the testamentary intent the court reasoned that the doctrine of equitable conversion should apply to the incompetent testate situation as well as the incompetent intestate situation.[21] This reasoning seemingly overlooks one important factor—the will as an expression of testator's intent as to the ultimate disposition of his entire estate. In the intestate situation the legislature provides a will for the decedent. The principle underlying the various classifications delineated by descent and distribution statutes is that those who generally would be the natural objects of a decedent's bounty take over those who would not.[22] Had the instant case been an intestate situation the Methodist Orphanage would have had no claim.[23] Since it is testate, however, the court holds that the orphanage takes the money remaining in the estate to the exclusion of the next of kin. In so doing the court places great emphasis on the fact that the orphanage was to get a specific devise while the next of kin were intended to take only the residuary estate. Was this in fact the intention of the testatrix?

Although this is a problem of ademption rather than construction of wills, it is helpful to refer to the will to determine whether the result attained under the majority rule is in accord with testatrix's intentions—the implied purpose of adopting the rule. Generally the will must be construed as a whole to ascertain the intent of the testator.[24] In the present case testatrix bequeathed the store and

213, 397 P.2d 1005, 42 Cal. Reptr. 13 (1965), there was a specific devise of testator's home to the son of a friend. After incompetency, the guardian bank sold the home for testator's support, keeping the 21,000 dollars sale proceeds in a separate account. At death only 556.66 dollars of this money remained. Other property in the estate valued at 6,808.08 dollars was to go to the residuary legatees. In holding that there was no ademption pro tanto of the specific devise, the court stated that "when specifically devised property has been sold and the proceeds used to pay debts and expenses, the devisee may have his gift redeemed from the remainder of the estate." 62 Cal. 2d at 217, 397 P.2d at 1008, 42 Cal. Rptr. at 16.

[21] 270 N.C. at 484, 155 S.E.2d at 95.

[22] *See* 23 AM. JUR. 2d *Descent and Distribution* § 10 (1965); *e.g.*, Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N.W. 239 (1930).

[23] *See* N.C. GEN. STAT. §§ 29-1 to -29 (1962).

[24] *E.g.*, Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965); Wachovia Bank & Trust Co. v. Taliaferro, 246 N.C. 121, 97 S.E.2d 776 (1957); Mewborn v. Mewborn, 239 N.C. 284, 79 S.E.2d 398 (1954).

lot to the orphanage subject to the control and possession of her estate for two years, the bequest being "made at the request of my [deceased] husband."[25] The will further provided that "the rest and residue which remains in the hands of my said Executor . . . shall . . . be equally divided between [the children of my brothers or their heirs]."[26] Obviously testatrix did not contemplate her future incompetency at the time she executed the will. Construing the will as a whole it is extremely doubtful that she intended her nephews and nieces to be excluded under any circumstances. Even as to the specific devise she provided that it was to be subject to the right of the residuary estate to possession for two years.[27] Indeed, by her very words the testatrix provided for the orphanage at the request of her deceased husband. Under the intent rule adopted by the court, however, an entity outside of the family relationship took the whole of the residuary estate to the exclusion of her family. It was just such a result which led the New York court to adopt the English view, saying "an intention to hold . . . shares of the preferred stock for the benefit of a stranger, while spending the remainder of his estate which would naturally go to his children, for doctors, nurses, and maintenance can hardly be imagined."[28]

Perhaps a more equitable rule in situations like the present is the Scottish rule cited by our court but not followed.[29] This rule states that "no act of a *curator bonis* can avail to affect the order of his ward's succession . . . unless it can be shown not only that it was a proper and necessary act of administration on the part of the curator, but that it would have been a necessary and unavoidable act on the part of the ward if *sui juris*."[30] Comparing this test with the majority and minority American doctrines it seems a safe middle ground in that (1) it does not require ademption every time the character of the specific devise is changed (minority rule), while (2) it does not deny ademption every time the change in the devise is

[25] Record at 13, Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967).

[26] *Id.* at 14.

[27] Thus, should not the court have allowed as a minimum the right of the residuary legatees to possession and control of the remaining money for two years?

[28] *In Re* Ireland's Estate, 257 N.Y. 155, 160, 177 N.E. 405, 406 (1931), *changed by statute,* NEW YORK CIVIL PRACTICE ACT, § 1399 (1933).

[29] 270 N.C. at 482, 155 S.E.2d at 93.

[30] Macfarlane's Trustees v. Macfarlane, 47 Scot. L.R. 266, 269, 1 Scots L.T.R. 40, 42 (1910); *accord,* Davidson v. Davidson, 39 Scot. L.R. 106, 9 Scot. L.T.R. 253 (1901).

caused by act of a trustee (majority rule). This rule would not give the trustee the power "to destroy the testamentary intent of testator" because it requires not only that the change be a necessary act on the part of the trustee but that it be an act which the testator would have made himself if *compos mentis*. Applying this rule to the instant case there would be an ademption of the specific devise and the heirs would take the residuary estate. Since the store and lot was the only estate asset left at the time of the sale, the testatrix would have had to sell the property for support had she been *sui juris*.

Although the North Carolina Supreme Court followed the great weight of American authority in adopting the intent test it seems that the rule adopted did not give effect to the intention of testatrix. The basic fault in both the majority and minority rules in this country is their failure to give effect to the will as a whole in determining the intent of testator. In light of this failing the Scottish rule of necessity would ostensibly bring about a more equitable solution.

JAMES R. CARPENTER, JR.