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Notes and Comments

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Constitutional Law—Arrest—Search and Seizure

Defendant was arrested by federal agents in the front room of his four-room apartment under valid warrants of arrest charging him with violation of the National Stolen Property Act. While he remained handcuffed in the living room the arresting officers conducted a meticulous five-hour search of the entire apartment, looking through clothes, chest and bureau drawers, personal effects, under the carpets, and generally ransacking the home. Near the close of the search, evidence of violation of the Selective Service Act was discovered in a sealed envelope taken from a bedroom dresser drawer. There was no search warrant. Prior to trial for the latter offense, defendant's motion to suppress the evidence as having been obtained by search violating his rights under the Fourth Amendment was denied, and objections to the evidence on trial were overruled.[1] A divided United States Supreme Court affirmed the conviction on the grounds that the search was incidental to lawful arrest and conducted in good faith to find instruments of the crime and was therefore not unreasonable.[2]

The Fourth Amendment to the United States Constitution[3] guarantees to the people the right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." A search and seizure conducted under authority of a validly executed search warrant is not unreasonable.[4] Likewise, a search and seizure conducted without warrant, but as an incident to a lawful arrest is not unreasonable.[5] The

[1] The federal courts are committed to the rule initially announced in Boyd v. United States, 116 U. S. 616 (1886) that evidence obtained from a person by unlawful search and seizure is, on proper objection, inadmissible against him in any criminal proceeding. Gouled v. United States, 255 U. S. 298 (1921); Weeks v. United States, 232 U. S. 383 (1914). Not all of the states adhere to the federal rule; see CORNELIUS, THE LAW OF SEARCH AND SEIZURE §7, pp. 46-7 (1926).

[2] Harris v. United States, —— U. S. ——, 67 Sup. Ct. 1098, 91 L. ed. (Adv. Ops.) 1013 (1946). Cancelled checks, thought to have been stolen by Harris and used to effect a forgery were the object of the search as instruments of the crime. The Chief Justice, writing for the majority of the court, emphasizes the point that the thoroughness of the search was not inappropriate for the discovery of such objects. This was also stressed in the opinion of the lower court, 151 F. 2d 837 (C. C. A. 10th 1945), the conclusion being reached that by its nature and purpose a search incidental to lawful arrest may be more extensive than that conducted under a valid search warrant.

[3] Similar or identical provisions are contained in the constitutions of each of the forty-eight states. They are collected in CORNELIUS, *op. cit. supra,* note 13, §2.

[4] Gouled v. United States, 255 U. S. 298, 308 (1921).

[5] Since the constitutional provisions for the security of the person and property are to be construed liberally to prevent encroachment upon individual rights, the implication is generally drawn from the Fourth Amendment that ordinarily searches conducted without the authority of a search warrant are unreasonable. Gouled v. United States, 255 U. S. 298 (1921); Byars v. United States, 273 U. S. 28, 32

extent to which the search and seizure may be carried in the first instance is governed by the terms of the warrant itself.[6] In the latter the extent of the search is defined by the courts. Generally the police have the power, upon the making of a lawful arrest, to search without warrant the person of the accused and the place where the arrest is made for fruits of the crime or instruments by which it was committed or weapons that might be used to escape custody.[7] There is no real problem regarding the extent to which the arrested person may be searched—the pockets of the clothing he is wearing may be searched,[8] clothing temporarily laid aside,[9] a suit case or bag, whether carried in the hand[10] or lying nearby.[11] Articles, such as keys, thus seized from the person have been used to gain access to the person's automobile or building, and search thereof held reasonable.[12]

There has been considerable confusion in the courts, however, in their efforts to determine the extent to which a search of the place of arrest may be carried, and it is with this problem that the court in the principal case is concerned. The most common tests devised to define the "place" of arrest are phrased in such variable language as "the immediate surroundings," "the premises within the prisoners control, or

(1927). "The most important exception, however, to the necessity for a search warrant is the right of search and seizure as an incident to lawful arrest." RORRSCHAEFER, AMERICAN CONSTITUTIONAL LAW 745 (1939). This right has been practiced since early times, People v. Chiagles, 237 N. Y. 193, 142 N. E. 583 (1923), and has not been affected by constitutional limitations. Not only is it within the power of the police to search without warrant upon arrest, but ". . . it is also their duty. . . ." Smith v. Jerome, 47 Misc. 22, 23, 93 N. Y. S. 202 (1905).

[6] People v. Preuss, 225 Mich. 115, 195 N. W. 684 (1923).

[7] If the arrest is not lawful, then any search following as an incident thereto is unlawful. Peru v. United States, 4 F. 2d 881 (C. C. A. 8th 1925). Also, the arrest must precede the search in point of time or at least be contemporaneous with it, United States v. Derman, 66 F. Supp. 511 (S. D. N. Y. 1946); and further, it must usually appear clearly to the court that the entry was sought for the purpose of arrest, not search. Papani v. United States, 84 F. 2d 160 (C. C. A. 9th 1936); United States v. Vleck, 17 F. Supp. 110 (D. C. Neb. 1936).

[8] People v. Chiagles, 237 N. Y. 193, 142 N. E. 583 (1923).

[9] People v. Manko, 189 N. Y. Supp. 357 (Sup. Ct. 1921).

[10] Pena v. State, 111 Tex. Cr. R. 218, 12 S. W. 2d 1015 (1929); *cf.* State v. Jenkins, 195 N. C. 747, 143 S. E. 538 (1928) (where arrested person refused to allow search of suitcase, officer may detain him until search warrant is obtained).

[11] Ragland v. Commonwealth, 204 Ky. 598, 265 S. W. 15 (1924); People v. Ruthenburg, 229 Mich. 315, 202 N. W. 358 (1925).

[12] In People v. Garrett, 232 Mich. 366, 205 N. W. 95 (1925) an automobile key was seized during search of the arrested person, the auto several blocks away unlocked and a search thereof held reasonable. Search of a building allowed in Martin v. United States, 155 F. 2d 503 (C. C. A. 5th 1946) where entry gained by key taken during search of the owner arrested beside it. A trunk check may be taken from the person lawfully arrested and used to obtain and search the trunk. United States v. Wilson, 163 Fed. 338 (C. C. S. D. N. Y. 1908); *accord,* Dibello v. United States, 19 F. 2d 749 (C. C. A. 8th 1927) (key taken from bar in plain view of arresting officers used to gain access to nearby basement). *But cf.* State v. Rebasti, 306 Mo. 336, 267 S. W. 858 (1924) (search of safety deposit box without warrant held unreasonable after key to box seized from arrested person).

within his possession," or "the area to which his unlawful activities extend"; and in applying them to a multitude of fact situations not wholly consistent results have been reached. Though "each particular case involving the question of an unreasonable search and seizure must be determined on its own facts and circumstances,"[13] what limitations will be imposed in a given case upon search of the place of arrest depends in large measure upon where the accused is apprehended; i.e., whether in an automobile, in his yard, business establishment, or home. Examination of some of the results announced and legal reasoning employed in these situations will aid in appraising the import of the case under comment.

Extensive freedom is allowed the arresting officer in the automobile cases. Thus, as incidental to lawful arrest of a driver, search may be made inside the car,[14] behind the cushions,[15] in the side pockets,[16] and in the back compartments,[17] on the theory that the entire vehicle is in the driver's possession and control. And this is true even though the search and seizure have no relation to the offense which prompted the arrest,[18] whether it be speeding,[19] a traffic violation,[20] or drunkenness.[21] As a result of the famous *Carroll*[22] case, arrest of a driver and search of

[13] Dibello v. United States, 19 F. 2d 749 (C. C. A. 8th 1927); Go-Bart Importing Co. v. United States, 282 U. S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances").

[14] State v. Hughlett *et al.*, 124 Wash. 366, 214 Pac. 841 (1923).

[15] Haverstick v. State, 196 Ind. 145, 147 N. E. 625 (1925).

[16] Callahan v. State, 42 Okl. Cr. R. 425, 276 Pac. 494 (1929).

[17] Thomas v. State, 196 Ind. 234, 146 N. E. 850 (1925).

[18] Haverstick v. State, 196 Ind. 145, 147 N. E. 625 (1925) ("The fact that articles found on his person or in his immediate possession were being used in the commission of an offense other than the one for which the arrest was made is not sufficient cause for excluding evidence of what the search discloses."); Toliver v. State, 133 Miss. 789, 98 So. 342 (1923); Note 18 CALIF. L. REV. 673 (1930). There is some doubt as to the application of this reasoning where premises other than automobiles are involved; thus, in United States v. Boyd, 1 F. 2d 1019 (W. D. Wash 1924) where an officer detected odor of smoking opium, was admitted to the house and there seized narcotics, he was not also authorized to seize liquor; the crime committed in his presence only supplied the function of a search warrant and authorized a search only for the particular offense. However, in United States v. Charles, 8 F. 2d 302 (N. D. Cal. 1925) a seizure under similar circumstances was allowed. Although the problem of the proper subject of seizure is directly involved in the principal case, it is beyond the scope of the present note. For other cases see United States v. Seltzer, 5 F. 2d 364 (D. Mass. 1925) (counterfeit stamps seized during search for liquor); People v. Harter, 244 Mich. 346, 221 N. W. 302 (1928) (liquor seized while looking through house for person); People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922) (house entered to arrest disorderly occupants, liquor in plain view seized).

[19] Jameson v. State, 196 Ind. 483, 149 N. E. 51 (1925).

[20] United States v. Jankowski, 28 F. 2d 800 (C. C. A. 2d 1928).

[21] Patrick v. Commonwealth, 199 Ky. 83, 250 S. W. 507 (1923). As to search of wagon following arrest for drunkenness see Cole v. Commonwealth, 201 Ky. 543, 257 S. W. 713 (1924); Woods v. State, 37 Okl. Cr. R. 377, 258 Pac. 816 (1927).

[22] Carroll v. United States, 267 U. S. 132 (1925) (since automobiles, ships, wagons and other vehicles are easily removed beyond the hand of the law long

the automobile on public highways is reasonable if the officer has probable cause to believe goods are thereby being illegally transported. In such case, keys may be taken from the person and used to gain access to compartments of the car.[23]

Where the person is arrested on his own property the right of search extends a reasonable distance from the place of arrest to include the land,[24] garages,[25] sheds[26] and other buildings not used as a dwelling. Thus, 25 feet has been held a reasonable distance because not beyond the extent of the offender's unlawful activities;[27] likewise, a barn 100 feet away, since it ". . . was in the immediate vicinity of the place where the arrest was made."[28] But, under these circumstances the private dwelling may not be searched, the power of search incidental to lawful arrest existing as to the home only when the accused is apprehended within it.[29] It was so held in the leading case of *Agnello v. United States*[30] where officers searched Agnello's home shortly after arresting him in another's house several doors away. The right to search the dwelling without warrant was similarly denied where defendant was arrested in front of his house,[31] in his yard,[32] in an automobile driving away from the house,[33] at his place of work.[34] Although there

before a search warrant can be obtained, as to them a different rule from that relating to the search of the dwelling must be employed); see Note 4 TEX. L. REV. 241 (1926) reviewing the rule of the *Carroll* case in the light of later decisions, emphasizing its limited scope in supporting search on probable cause.

Agnello v. United States, 269 U. S. 20, 33 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.") ; and recently, "The law does not permit [a search] merely because there is probable cause to believe contraband articles may be found on the premises." United States v. Derman, 66 F. Supp. 511, 513 (S. D. N. Y. 1946). Courts have implied that probable cause may justify a somewhat more extensive search incident to arrest than would otherwise be deemed reasonable. State v. Adams, 103 W. Va. 77, 136 S. E. 703 (1927). For additional materials see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 207 (1903) and Note 10 N. C. LAW REV. 79 (1931).

[23] Thomas v. State, 196 Ind. 234, 146 N. E. 850 (1925).

[24] Koth v. United States, 16 F. 2d 59 (C. C. A. 9th 1927). Of course, open fields do not come within the protection of the Fourth Amendment, and so may be searched without warrant or arrest of owner. Hester v. United States, 265 U. S. 57 (1924).

[25] State v. Estes, 151 Wash. 51, 274 Pac. 1053 (1929).

[26] State v. Rotolo, 39 Wyo. 181, 270 Pac. 665 (1928).

[27] Shew v. United States, 155 F. 2d 628 (C. C. A. 4th 1946).

[28] Kelly v. United States, 61 F. 2d 843, 847 (C. C. A. 8th 1932)

[29] Weeks v. United States. 232 U. S. 383 (1914).

[30] 269 U. S. 20, 33 (1925) (". . . it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.").

[31] Poulos v. United States, 8 F. 2d 120 (C. C. A. 6th 1925); Thomas v. State, 27 Okl. Cr. R. 264, 226 Pac. 600 (1924).

[32] Fowler v. State, 114 Tex. Cr. R. 69, 22 S. W. 2d 935 (1930)

[33] Papani v. United States, 84 F. 2d 160 (C. C. A. 9th 1936).

[34] Weeks v. United States, 232 U. S. 383. (1914).

are cases failing to apply this rule in certain situations[35] it has long been the federal law and adhered to by a large majority of the state courts.[36]

There is a sharp division of opinion, most clearly exemplified in the federal cases, as to how broad an area a search incident to arrest in one's place of business may cover. The view that it may go ". . . to the extent that the offender's control and activities likely extend" is expressed in *Sayers v. United States,*[37] where search was allowed in private rooms across the hall from the place of arrest, the court reasoning, ". . . of a person arrested, every garment and pocket may be searched, and the same principle authorizes that of a building, generally every room may be searched."[38] Quoting this language with approval, lower federal courts have upheld searches of the back room in a drugstore following arrest of the owner in the front portion,[39] of the basement to a soft drink parlor after arrest on the main floor,[40] of a proprietor's living quarters in his hotel after arrest in the lobby,[41] and search and seizure of physician's prescription card file after arrest in his office.[42] Representing a contrary view is a statement by Judge Learned Hand

[35] In Patton v. State, 43 Okl. Cr. R. 436, 279 Pac. 694 (1929) where D, upon approach of officers, fled from the back door of his house and was captured some 20 feet away, search of the home was allowed on grounds the arrest was immanently associated with the house, thus distinguishing the case from Wallace v. State, 42 Okl. Cr. R. 143, 275 Pac. 354 (1929) where D was arrested in the front yard and search of the dwelling was specifically said to be prohibited. In State v. Evans, 145 Wash. 4, 258 Pac. 845, 849 (1927) the court, after stating the rule allowing a search of the dwelling after arrest therein, said, "In this instance the defendant was on his way to his place of residence and the fact he was caught before he reached the place ought not to require the application of a different rule." This case and the broad language employed in State v. Much, 156 Wash. 403, 287 Pac. 57 (1930) have led the Washington court to some rather extreme results; State v. Thomas, 183 Wash. 643, 49 P. 2d 28 (1935) (search of dwelling made before arrest but allowed on grounds seizure took place with arrest); State v. McCollum, 17 Wash. 2d 85, 136 P. 2d 165, 141 P. 2d 613 (1943) (search of dwelling allowed a day after arrest took place in a hospital). But a vigorous dissent was filed in the latter case, and in City of Tacoma v. Houston, 177 P. 2d 886 (Wash. 1947), the court referred to the language of the *Evans* case quoted herein as dictum.

[36] Searches of the dwelling have been allowed following an arrest outside the home where officer enters with the prisoner and at his request. Soderberg v. State, 31 Okl. Cr. R. 88, 237 Pac. 467 (1925); State v. Beaupre, 149 Wash. 675, 272 Pac. 26 (1928). The latter case, relying on Evans v. State, *supra* note 35, probably goes to an extreme finding little sanction in other courts, inasmuch as the defendant there had been taken to jail before the search commenced. See note 56 *infra.*

[37] 2 F. 2d 146 (C. C. A. 9th 1924).

[38] *Ibid.,* at page 147. It should be noted that the court found that criminal activity, extending throughout the premises, was being carried on in officers' presence, and that the place was evidently open to the public for the sale of illegal liquor, thereby becoming a place of business and no longer a dwelling for these purposes.

[39] United States v. Seltzer, 5 F. 2d 364 (D. Mass. 1925).

[40] Dibello v. United States, 19 F. 2d 749 (C. C. A. 8th 1927) (using language similar to that of *Sayers* case).

[41] United States v. Charles, 8 F. 2d 302 (N. D. Cal. 1925).

[42] United States v. Lindenfeld, 142 F. 2d 829 (C. C. A. 2d 1944).

that, "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him once you have gained lawful entry."[43] Apparently approving this view, the United States Supreme Court has denied the right to search articles of furniture in an office as incidental to valid arrest made in the same room, where no conspiracy or illegal activity is being carried on in the officers' presence.[44]

As the courts have consistently proclaimed that one's home is to be distinguished from other types of premises for these purposes,[45] our final inquiry is, to what extent then may a search of the dwelling be conducted in a situation such as the principal case presents, *viz.*, in conjunction with a valid arrest in the dwelling? Clearly, all courts will concede that it may cover that which is within easy view of the officer as he takes the person into custody;[46] so that upon lawful entry whiskey on the table[47] or narcotics hurriedly thrown in an open closet[48] may be seized. And most courts agree that clothing,[49] furniture drawers,[50] suitcases[51] and other possessions in the room[52] are subject to examination. The courts then seem to have gone no further, strictly limiting the search to the room of arrest or those places to which the officer must go to execute the arrest,[53] unless the premises is deemed a place

[43] United States v. Kirschenblatt, 16 F. 2d 202, 203 (C. C. A. 2d 1926).

[44] In Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931) a search of papers, records, desks, and a safe, following an arrest in defendant's office was held to be general and exploratory and therefore unreasonable; likewise, a search of desks, a towel cabinet, wastepaper baskets and papers in United States v. Lefkowitz, 285 U. S. 452 (1932). Both cases distinguished Marron v. United States, 275 U. S. 192 (1927) (search of room of arrest, adjoining closet, and seizure of papers allowed on grounds that in that case the criminal enterprise for which the arrest was made was being carried on in the officer's presence and things seized were visible and accessible and in the offender's control).

[45] Davis v. United States, 328 U. S. 582 (1946).

[46] State v. Benson, 91 Mont. 21, 5 P. 2d 223 (1931); State v. Laundy, 103 Ore. 443, 204 Pac. 958 (1922).

[47] People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922); People v. Harter, 244 Mich. 346, 221 N. W. 302 (1928).

[48] Gaines v. State, 28 Okl. Cr. R. 353, 230 Pac. 946 (1924).

[49] Laney v. United States, 294 Fed. 412 (App. D. C. 1923).

[50] Argetakis v. State, 24 Ariz. 599, 212 Pac. 372 (1923); Commonwealth v. Phillips, 244 Ky. 117, 5 S. W. 2d 887 (1928); People v. Cona, 180 Mich. 641, 147 N. W. 525 (1914).

[51] Argetakis v. State, 24 Ariz. 599, 212 Pac. 372 (1923).

[52] Smith v. Jerome, 47 Misc. 22, 23, 93 N. Y. S. 202 (1905) (Police may search ". . . the person of one lawfully arrested, and also the room . . . in which he is arrested, and also any other place to which they can get lawful access. . . .").

[53] Following the language of *Smith v. Jerome* quoted *supra* note 52, People v. Conway, 225 Mich. 152, 195 N. W. 679 (1923) held a warrant for arrest gave the officer ". . . lawful access only to that part of the house which it was necessary to enter in order to serve his warrant. Here, where he was lawfully present, he could search for evidence of the crime for which the arrest was made, but further he could not go. . . ." *Accord, In re* Ginsburg, 147 F. 2d 749 (C. C. A. 2d 1945) (1½ hour search of 4 room apartment); Commonwealth v. Phillips, 244 Ky. 117, 5 S. W. 2d 887 (1928) (search in hall through which officer passed after making

of business,[54] or is used to carry on a criminal enterprise.[55] If the search is not completed at the time the offender is taken, no return may be made to the dwelling for that purpose.[56]

Against this background, it would appear at first blush that *Harris v. United States* has carried the law of search and seizure incidental to arrest in the home far beyond any bounds heretofore established. But it is submitted that actually it introduces a new test, *viz.*, that the scope of this type of search is not to be determined by arbitrary geographical, physical or time limitations, but by whether or not the search was commensurate with its object and made in good faith.[57] It is not easy to anticipate what effect the presence of this new test will have on the law of search and seizure in the United States. In view of past cases one would be inclined to agree with Mr. Justice Jackson that "The decision will be taken, in practice, as authority for a search of any home, office or other premises if a warrant can be obtained for the arrest of any occupant and the officer chooses to make the arrest on the premises,"[58] for in grasping for the general rather than the specific, one is inclined to overlook its distinguishing feature, *viz.*, that the ". . . instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment," so that *in this case,* a more intensive and far reaching search was justified.[59] It is hoped that the case will be taken for that proposition and strictly limited to it, for it should now be clear that the measure of security afforded by the Fourth

arrest in adjoining room); People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922) *semble,* see dissenting opinion; Cornelius, *op. cit. supra* note 1, page 162. *But cf.* State v. One Buick Automobile, 120 Ore. 640, 253 Pac. 366 (1927) (arrest in home, search connecting garage).

[54] United States v. 71.41 Ounces Gold, 94 F. 2d 17 (C. C. A. 2d 1938); Sayers v. United States, 2 F. 2d 146 (C. C. A. 9th 1924).

[55] United States v. Lindenfeld, 142 F. 2d 829 (C. C. A. 2d 1944); Picket v. Marcucci's Liquors, 112 Conn. 169, 151 Atl. 526 (1930); State v. Adams, 103 W. Va. 77, 136 S. E. 703, 704 (1927) ("In cases like this where there is no evidence before the search of the corpus delicti, we are of opinion that the search should be confined to the room or portion of the defendant's premises where the arrest is made.").

[56] People v. Conway, 225 Mich. 152, 195 N. W. 679 (1923); except where goods seized are too bulky to carry, Davis v. State, 30 Okl. Cr. R. 61, 234 Pac. 787 (1925); but then, return must not be unnecessarily delayed, Coffelt v. State, 36 Okl. Cr. R. 365, 254 Pac. 760 (1927).

[57] Harris v. United States, 67 Sup. Ct. 1098, 1102, 91 L. ed at 1017 (". . . the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.").

[58] *Id.* at 1119, 91 L. ed. at 1036 (dissenting opinion).

[59] *Id.* at 1102, 91 L. ed. at 1017 ("Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive."). This suggestion presents at least two more factors with which the courts must now contend, along with the already existing maze of generalities, in deciding each case on its own facts and circumstances, i.e., the size of the object and the meaning of "effective control"; and contains little to aid the law enforcement officer in understanding the extent of his powers.

Amendment, one of the most essential safeguards in our Bill of Rights, depends in large part upon what limitations the courts define and maintain with respect to the right of search without warrant incidental to lawful arrest. A misunderstanding of the *Harris* case may lead to such an extension of these limitations as to necessitate a sharp reversal of policy if the constitutional guarantee is not to be lost.

ERNEST W. MACHEN, JR.

Courts—Federal Jurisdiction—Application of Res Judicata and Erie v. Tompkins to Achieve Uniformity of Law Within a State

In 1940, Angel, a citizen of North Carolina, purchased of Bullington, a citizen of Virginia, land situated in Virginia and gave in payment thereof a series of notes secured by a purchase money deed of trust. The contract was made in Virginia, and the notes were payable in Virginia. Angel defaulted, and Bullington, acting upon an acceleration clause, caused the trustees to sell tne land. A deficiency resulted. Bullington sued Angel in a North Carolina superior court to recover the deficiency. Angel demurred to the cause of action on the basis of the following statute:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same."[1]

The demurrer was overruled and Angel appealed. Bullington challenged the constitutionality of the statute. The North Carolina Supreme Court reversed,[2] holding that the statute precluded the recovery of a deficiency judgment arising out of purchase money deed of trust. It said,[3] "It will be noted that the limitation created by the statute is upon the jurisdiction of the court. . . . This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself." It further said, in substance, that the legislature

[1] N. C. GEN. STAT. (1943) §45-36.
[2] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).
[3] *Id.* at 20, 16 S. E. 2d at 412.

had, *within constitutional limitations,* fixed the jurisdiction of the courts of the state.

Bullington accepted the North Carolina decision at face value, and went into the federal district court where he obtained his deficiency judgment.[4] Upon appeal to the Circuit Court of Appeals the decision was affirmed[5] on the ground that the state court's interpretation of the statute was binding on the federal courts, and since the statute was construed as procedural only, the federal court was not bound to apply it.

Angel appealed to the Supreme Court, contending that under *Erie Railroad Co. v. Tompkins*[6] the federal court erred in not applying the statute. Bullington again questioned the constitutionality of the statute. The court held,[7] (1) the issue of constitutionality was necessarily decided by the North Carolina court and was therefore *res judicata,* (2) under the *Erie* doctrine the courts below erred in not following the statute and dismissing the action.

Erie Railroad v. Tompkins in overruling *Swift v. Tyson*[8] announced the doctrine that in diversity of citizenship cases, federal courts must follow the rules of substantive law of the states in which they sit whether that law is found in state statutes or the decisions of state courts. More important than the actual doctrine of the *Erie* case is the policy which dictated it, i.e., uniformity of result within a particular state regardless of the forum, state or federal, in which suit is brought.[9] Since the *Erie* mandate relates to substantive law as opposed to procedural law,[10] it is obvious that the distinction between substance and procedure has become increasingly important.[11] The policy of uniformity has undermined the traditional distinctions. Whether a state law will be considered substantive or procedural for purposes of the *Erie* rule no longer depends upon what it traditionally has been called nor upon what a state court calls it, but upon what effect it will have on the outcome of litigation.[12] Regardless of which characterization has been placed upon them in the past, it is now settled that state rules as to

[4] Bullington v. Angel, 56 F. Supp. 372 (W. D. N. C. 1944).

[5] Angel v. Bullington, 150 F. 2d 697 (C. C. A. 4th 1945); Notes, 24 N. C. L. REV. 267 (1946), 13 U. OF CHI. L. REV. 195 (1946), 21 IND. L. J. 228 (1946).

[6] 304 U. S. 64 (1938).

[7] Angel v. Bullington, —— U. S. ——, 67 Sup. Ct. 657, 91 L. Ed. 557 (1947).

[8] 16 Pet. 1 (U. S. 1842).

[9] Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945); Erie Railroad Co. v. Tompkins, 304 U. S. 64, 75 (1938).

[10] Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938) (federal courts must search out the entire body of state substantive law).

[11] Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 (1939-40).

[12] Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945) ("... does it [statute of limitations] significantly affect the result of a litigation . . .?").

burden of proof,[13] conflicts of laws,[14] public policy,[15] statutes of limitation,[16] and the admission of parol evidence[17] must be followed by the federal courts.[18]

The majority in the instant case said,[19] "For purposes of diversity jurisdiction a federal court is, 'in effect,' only another court of the state." Under *Swift v. Tyson,* this was true insofar as the application of state statutes bearing upon substantive rights and decisions relating to regulation of local property was concerned.[20] Under *Erie Railroad v. Tompkins* a federal court is "in effect" a state court insofar as the application of all state law, statutory and decisional, of a substantive character is concerned. Thus, the rule was not changed by the *Erie* case; it merely extended it to cases where state decisional law was in issue rather than where state statutory law was involved. *Guaranty Trust Co. v. York*[21] held specifically that state statutes of limitation, although traditionally regarded as affecting the remedy but not the right, must be followed by the federal courts because they significantly affect the outcome of litigation. The *Bullington* case holds specifically that state statutes which deprive the state courts of jurisdiction, if constitutional,[22] must be followed by the federal courts. Neither the *York* case nor the *Bullington* case announced a new rule when it was said that in diversity cases federal courts are courts of the state in which they sit. They represent an extension of the rule so that today federal courts are courts of the state in which they sit so far as the application of state laws which significantly affect the outcome of litigation is concerned, regardless of the traditional characterization of those laws.

It has been settled law that a state court's interpretation of state statutes is binding upon the federal courts. What effect does the

[13] Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939).
[14] Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941).
[15] Griffin v. McCoach, 313 U. S. 498 (1941).
[16] Guaranty Trust Co. v. York, 326 U. S. 99 (1945).
[17] Long v. Morris, 128 F. 2d 653 (C. C. A. 3d 1942).
[18] Also included are state rule as to proving contributory negligence, Palmer v. Hoffman, 318 U. S. 109 (1943); state statute making statutes of limitations applicable to both law and equity, Kithcart v. Met. Life Ins. Co., 150 F. 2d 997 (C. C. A. 8th 1945); state rule as to *forum non conveniens,* Weiss v. Routh, 149 F. 2d 193 (C. C. A. 2d 1945). *But cf.* Williams v. Green Bay & W. R. Co., 326 U. S. 549 (1945) (*forum non conveniens* question left open).
[19] —— U. S. ——, 67 Sup. Ct. 657, 659, 91 L. Ed. 557, 559 (1947).
[20] Neirbo Co. v. Bethlehem Corp., 308 U. S. 165, 171 (1929); Bucher v. Cheshire R. R. Co., 125 U. S. 555 (1887); *Ex parte* Schollenberger, 96 U. S. 369 (1877) (federal courts are courts of the state to the extent that a state statute plus consent of parties may create circumstances which will authorize a federal court to take jurisdiction).
[21] 326 U. S. 99 (1945).
[22] See discussion of constitutionality of statute in Note, 24 N. C. L. Rev. 267 (1946).
[23] Dorchy v. Kansas, 272 U. S. 306 (1926); Kansas City Steel Co. v. Arkansas, 269 U. S. 148 (1925); Knights of Pythias v. Meyer, 265 U. S. 30 (1923); Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445 (1920); Old Colony Trust Co.

principal case have upon that rule? To be binding upon federal courts, the interpretation placed by a state court upon its statutes must comport with the constitution.[24] In the *Bullington* case, the constitutionality of the statute was attacked and necessarily decided by the state court.[25] If the statute were unconstitutional, the North Carolina court was not at liberty to apply it, and the federal court not at liberty to follow it.[26] A state cannot escape its constitutional obligations by withholding jurisdiction from its courts.[27] But, legislative acts are presumed to be constitutional until constitutionality is determined.[28]

Since the issue of constitutionality was necessarily decided below and is *res judicata* unless appealed, and a presumption of constitutionality obtains until a decision on the merits is rendered, bearing in mind the state court characterized the statute as procedural, it would seem to follow from a cursory reading of the opinion that the *Bullington* case rejects the rule that the state court's interpretation is binding. But, it must be remembered that in diversity cases federal courts must concern themselves with uniformity within the state. The court in the instant case has held *not* that the state court's interpretation is no longer binding but that the *effect* of the decision is controlling. For purposes of diversity jurisdiction, in view of the *York* case, the interpretation of state statutes by state courts is material only insofar as it effects the outcome of litigation. It would defeat the policy of the *Erie* case to hold that the literal interpretation of a state statute is binding upon the federal courts but the effect thereof is not.

One important effect of the *Bullington* decision is a change in the rule that a state cannot by legislation enlarge or diminish federal jurisdiction.[29] The practical effect of the decision is without doubt a limita-

v. Omaha, 230 U. S. 100 (1912); American Land Co. v. Zeiss, 219 U. S. 47 (1910); Bucher v. Cheshire R. R. Co., 125 U. S. 555 (1887); Louisiana v. Pillsbury, 105 U. S. 278 (1881); Christy v. Pridgeon, 4 Wall. 196, 203 (U. S. 1866); Gelpke v. Dubuque, 1 Wall. 175 (1863); Commercial Bank v. Buckingham, 5 How. 317 (U. S. 1846); Elmendorf v. Taylor, 10 Wheat. 152, 159 (U. S. 1825) ("This court has uniformly professed its disposition, in cases depending upon the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government. . . . The construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States.").

[24] Broderick v. Rosner, 294 U. S. 629 (1934); Bradford Elec. Co. v. Clapper, 286 U. S. 145 (1931); Elmendorf v. Taylor, 10 Wheat. 152 (U. S. 1825); Mills v. Duryee, 7 Cranch. 481 (U. S. 1813); *accord,* Home Ins. Co. v. Dick, 281 U. S. 397, 407 (1929).

[25] —— U. S. ——, 67 Sup. Ct. 657, 660, 91 L. Ed. 557, 560 (1947).

[26] See cases cited *supra* note 24.

[27] Broderick v. Rosner, 294 U. S. 629 (1934); *accord,* Home Ins. Co. v. Dick, 281 U. S. 397, 407 (1929).

[28] 11 AM. JUR., CONSTITUTIONAL LAW, §92.

[29] David Lupton's Sons v. Auto. Club of America, 225 U. S. 489 (1911); Traction Co. v. Mining Co., 196 U. S. 239 (1904); Chicot County v. Sherwood,

tion on federal diversity jurisdiction resulting from a state statute. The court recognized this fact when it termed *David Lupton's Sons v. Auto. Club of America*[30] obsolete.[31] That case held that a state statute regulating the right of foreign corporations to sue in the state courts was not binding upon federal courts within that state. The emphasis since the *Erie* case being upon the policy of uniformity of result, it would seem to follow that any state statute significantly affecting the result of litigation would be followed by the federal courts regardless of the purpose which the statute was enacted to accomplish.[32] This conclusion is strengthened by the fact that the *Lupton* case was expressly termed obsolete. The statute considered in the *Lupton* case did not bar access to the state courts under any and all circumstances; it merely prescribed conditions precedent to the privilege of using the state courts.[33] There was no inherent want of jurisdiction. The statute involved in the instant case, however, rendered it absolutely impossible to sue in the state courts for a deficiency arising out of a purchase money mortgage. There is an inherent want of jurisdiction. Thus, there is a distinction between the two types of statutes. This distinction could have been pointed out, and the *Lupton* case allowed to stand on the theory that the privilege of invoking the aid of the federal courts need not be subject to the qualifications placed on the privilege by a state. By terming the *Lupton* case obsolete, the court made it reasonably clear that it was more concerned with uniformity of result than with the reasons which motivate a state legislature in enacting such a statute.[34] If this reasoning is correct, it follows that the rule that a state cannot by legislation affect federal diversity jurisdiction is no longer law. At least as between the parties to the state litigation, the state statute has limited the power of the federal courts to grant relief.[35]

148 U. S. 529, 534 (1892); Railway Co. v. Whitton's Adm'r, 13 Wall. 270 (U. S. 1871); Union Bank v. Jolly's Adm'rs, 18 How. 503 (U. S. 1855); Suydam v. Broadnax, 14 Pet. 67 (U. S. 1840).

[30] 225 U. S. 489 (1911).

[31] —— U. S. ——, 67 Sup. Ct. 657, 662, 91 L. Ed. 557, 562 (1947).

[32] A different attitude is expressed in Note, 56 YALE L. J. 1037, 1040 (1947).

[33] 225 U. S. 489, 495 (1911).

[34] The purpose for which the statute in the instant case was enacted is not stated by the North Carolina court. Conceivably, it could have been enacted to relieve court dockets.

[35] Could the federal court grant relief as between persons not parties to the state litigation? Assume a case brought in the federal court in the first instance which would be barred by the statute if brought in the state court. *Res judicata* would not apply, would the *Erie* rule? That question is foreclosed by the decision in the instant case. Federal courts, to effect the policy of uniformity, are obliged to follow state statutes which deprive the state courts of jurisdiction of a particular cause of action, even though the application of such statute results in a limitation of federal diversity jurisdiction. This rule, applies, however, if the state statute does not contravene the federal Constitution. (See p. 68 *infra*). A determination of the constitutionality of the state statute would be necessary. Had the state court upheld the federal constitutionality in a prior suit between different parties, such a ruling would not bind the federal courts. Federal courts are not

The court might, however, have reasoned that the Rules of Decision Act[36] has always required an application by federal courts of state statutes affecting substantive rights. Under *Guaranty Trust Co. v. York,* this statute affects substantive rights because it significantly affects the outcome of litigation. Consequently, this is not a case of a state by legislation affecting diversity jurisdiction, but is a case of Congress regulating the jurisdiction of the federal courts. This is a theoretical approach inconsistent with reality because in the absence of the state statute, federal jurisdiction in this case would be unchanged. The state statute determined whether the federal court had jurisdiction.[37]

Res judicata is a general classification which may be subdivided into two more specific classifications: estoppel by judgment and estoppel by verdict.[38] Estoppel by judgment arises where the second action is between the same parties or their privies upon the same cause of action.[39] Estoppel by verdict arises when the second suit is upon a different cause of action but involves issues which have been raised and decided in a prior suit between the same parties or their privies.[40] Estoppel by judgment concludes the parties as to all matters put in issue and all those which could have been put in issue while estoppel by verdict concludes the parties only as to matters actually decided.[41]

bound by state decisions construing the federal Constitution. Kansas City Steel Co. v. Arkansas, 269 U. S. 148 (1896); Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 (1925); Williams v. Arlington Hotel Co., 15 F. 2d 412 (E. D. Ark. 1926); Eastern Gulf Oil Co. v. Kentucky Tax Comm., 17 F. 2d 394 (E. D. Ky. 1926); Orr v. Allen, 245 Fed. 486 (S. D. Ohio 1917). If the statute were held constitutional, the *Erie* rule would apply and uniformity would be effected. If the statute were held unconstitutional, the *Erie* rule would not apply and relief would be granted. The policy of uniformity would still be accomplished, however, since the state courts could no longer deny relief on the basis of an unconstitutional statute.

[36] REV. STAT. §721 (1875), 28 U. S. C. A. §725 (1940).

[37] Assuming the state statute is constitutional, this reasoning might be used to countervail the argument that an application of the *Erie* rule to a state statute which results in a limitation of diversity jurisdiction, is itself unconstitutional. Congress has the power to limit the jurisdiction of the lower federal courts.

[38] Cromwell v. County of Sac, 94 U. S. 351 (1876); A. B. C. Truck Lines v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946) (*res judicata* relates only to suits on same cause of action; estoppel by judgment applies where causes are different. This is merely confusion of terminology); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946); McKimmon v. Calk, 170 N. C. 54, 86 S. E. 809 (1915); McTeer Clothing Co. v. Hay, 163 N. C. 495, 79 S. E. 955 (1913); Weston v. Roper Lumber Co., 162 N. C. 165, 178, 77 S. E. 430 (1913); Brown v. Wheeling & L. E. R. R. Co., 77 Ohio App. 149, 65 N. E. 2d 912 (1946).

[39] A. B. C. Truck Lines v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 349 (1946); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Pollock v. Bowman, 139 N. J. Eq. 47 (Ct. Err. & App., 1946), 49 A. 2d 40; Milltown v. New Brunswick, 138 N. J. Eq. 552 (Ch. 1946), 49 A. 2d 234; Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919); Tuttle v. Harrill, 85 N. C. 456 (1881).

[40] Oklahoma *ex rel.* Comm'rs v. United States, 155 F. 2d 486 (C. C. A. 10th 1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Coltrane v. Laughlin, 157 N. C. 282, 72 S. E. 961 (1911).

[41] Heiser v. Woodruff, 327 U. S. 726, 735 (1946); Fishgold v. Sullivan Dry-

To say that "for purposes of *res judicata,* the significance of what a court says it decides is controlled by the issues that were open for decision,"[42] is hardly more than saying that the prior suit concludes the parties as to all matters which could have been put in issue. And that is an established rule where estoppel by judgment is applied. In the instant case, the parties are identical and the cause of action is a "carbon copy" of the action in the state court.

Since estoppel by judgment concludes the parties not only with respect to the issues actually raised and decided but also as to all matters which could have been put in issue, it cannot be said that the former judgment or decision is the criterion for applying the doctrine.[43] It cannot always be ascertained from a judgment or decision just what were the questions presented for decision or raised in the case, nor what might have been raised. Accordingly, it is held that the whole record may be searched to determine what was decided.[44] Also, that parol evidence is admissible to ascertain what was decided, i.e., the scope of the judgment.[45] The *effect* of a decision may result in concluding an issue although the decision does not on its face purport to do so.[46] "The value of a plea of former adjudication is not to be determined by the reasons which the court rendering the former judgment may have given for doing so."[47] The result of the decision is material. Thus, estoppel by judgment settles all questions which were raised or those that might have been raised but it settles them in accordance with the entire record and the effect of the decision. The effect of the North Carolina court's decision was that the statute was constitutional.

The difficulty in applying *res judicata* to the *Bullington* case lies in

dock & Repair, 66 Sup. Ct. 1105, 1110 (1946); Chicot County Drainage Dist. v. Baxter Bank, 308 U. S. 371 (1939); Oklahoma *ex rel.* Comm'rs v. United States, 155 F. 2d 486 (C. C. A. 10th 1946); *In re* Mercury Engineering, Inc., 68 F. Sup. (S. D. Cal. 1946); Buchanan v. Gen. Motors, 64 F. Supp. 16 (S. D. N. Y. 1946); Drittel v. Freedman, 60 F. Supp. 999 (S. D. N. Y. 1945), *aff'd* 154 F. 2d 653 (C. C. A. 2d 1946); Jefferson County v. McAdory, 25 So. 2d 396 (Ala. 1946); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946); People v. Thompson, 392 Ill. 589, 65 N. E. 2d 362 (1946); Hays v. Sturgill, 302 Ky. 31, 193 S. W. 2d 648 (1946); Sou. Dist. Co. v. Carraway, 196 N. C. 58, 144 S. E. 535 (1928); Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919); Stelges v. Simmons, 170 N. C. 42, 86 S. E. 564 (1919); Tuttle v. Harrill, 85 N. C. 456 (1881); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Pollock v. Bowman, 139 N. J. Eq. 47 (Ct. Err. & App. 1946) 49 A. 2d 40; Jones v. Costlow, 354 Pa. 245, 47 A. 2d 259 (1946).

[42] —— U. S. ——, 67 Sup. Ct. 657, 660, 91 L. Ed. 557, 560 (1947).

[43] See Justice Rutledge's dissent, 67 Sup. Ct. 657 at 669 (1947).

[44] Drittel v. Freedman, 60 F. Supp. 999 (S. D. N. Y. 1945), *aff'd,* 154 F. 2d 653 (C. C. A. 2d 1946); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); 2 FREEMAN, JUDGMENTS §725 (5th ed. 1925).

[45] Cromwell v. County of Sac, 94 U. S. 351 (1876); Southerland v. A. C. L. R. R., 148 N. C. 442, 62 S. E. 517 (1908).

[46] Chicot County Drainage Dist. v. Baxter Bank, 308 U. S. 371 (1939); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946).

[47] Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946).

the fact that the doctrine has no application where the former decision was not on the "merits." Is a dismissal for want of jurisdiction a decision on the "merits"? Ordinarily not. Judgments based upon technicality such as defect of pleading, matters in abatement, nonsuits, dismissals and the like are not on the merits.[48] No substantial rights are affected. But, in such cases, the effect ordinarily is not to preclude a litigant from maintaining his action altogether. There is no inherent defect of jurisdiction. The decision merely tells him he is in the wrong court of the forum and should seek his relief in another court of the forum, or cure the technical defect and start over.[49] That did not happen in the case under discussion. Bullington was told he could not maintain his action in any court of the state. There was an inherent defect of jurisdiction. The "merits" of his action were twofold—the right to maintain this action and the right to prove the deficiency. He questioned the constitutionality of the statute denying him the right to maintain his action. The North Carolina decision in effect held the statute constitutional. That which was *res judicata* was the constitutional issue, not whether the state court had jurisdiction.

The question remains, why was it necessary to apply both the *Erie* rule and *res judicata* to reach the result desired? Would not either one have accomplished that end? Assume *first* that the action arose before the *Erie* case, and *res judicata* was not applied. The result would be clear. The federal court would have granted relief because (1) the policy under *Swift v. Tyson* was uniformity within the federal court system, (2) the federal courts were not bound to follow state statutes construed by the state courts as procedural. No constitutional issue would be involved.

Assume *secondly* that the *Erie* rule is in effect; the case comes before the United States Supreme Court. It holds that the policy of *Erie* requires the federal courts in diversity cases to reach the same result that would be reached in the state courts. The lower courts are reversed. The question immediately arises, may the *Erie* rule be so applied as to require a federal court to follow a state court decision upholding the constitutionality of a state statute if in fact the statute is deemed by the federal court to violate the United States Constitution? Thus, under an application of the *Erie* rule alone, a constitutional issue[50] arises which would not arise under our first assumption above. Federal courts are not obliged to follow state court decisions construing the

[48] 2 FREEMAN, JUDGMENTS §733 (5th ed. 1925).

[49] Smith v. McNeal, 109 U. S. 426 (1883); Hughes v. United States, 4 Wall. 232, 237 (U. S. 1866); Walden v. Bodley, 14 Pet. 156, 161 (U. S. 1840); Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057 (1914); Dalton v. Webster, 82 N. C. 279 (1880).

[50] An application of the *Erie* rule by the federal courts to an unconstitutional state statute would itself be unconstitutional. See cases cited *supra* note 24.

federal Contsitution.[51] For the purpose of ruling on state statutes alleged to be in violation of the federal Constitution, the federal courts are independent of the state courts. Since the obligations imposed by the United States Constitution extend to all courts, state and federal, a state statute alleged to be in violation of the federal Constitution could not be followed by the federal courts in the absence of a ruling on its constitutionality by those courts. Thus, a disposition of the constitutional issue is necessary before the *Erie* rule can be applied.[52]

Assume *thirdly* that the United States Supreme Court had decided the case solely on the basis of *res judicata* and did not invoke the *Erie* doctrine. The lower federal courts would have been affirmed for the following reasons: (1) The constitutionality of the statute being *res judicata* it could not be attacked in the *federal court;* (2) the decision of the North Carolina Supreme Court that the statute was purely procedural and did not affect the substantive rights of the parties likewise was *res judicata,* and hence any claim that the statute was other than procedural could not be raised in the federal court; and finally, (3) since the constitutionality of the statute could not be attacked and since as between the parties to the litigation it must be deemed to have no effect on their substantive rights, the federal court must now pass upon those rights without hindrance of the state statute which has already been held merely to bar the state courts from giving the relief sought. Bullington, therefore, had *res judicata* alone been applied, would have obtained in the federal court what he was denied in the state court. The result would have been the same as under *Swift v. Tyson.* The policy of uniformity within the boundaries of the state would have been defeated.[53]

And so we see that without the use of either *res judicata* or the *Erie* doctrine the federal court could have granted relief denied by the state court. We also see that the use of the *Erie* doctrine alone does not require the federal court to follow a state court ruling upholding the constitutionality of a state statute if in fact it contravenes the federal Constitution. And lastly we see that an application of *res judicata* alone

[51] "Where the questions involved arise under the state constitution and laws, the decisions of its highest tribunal are accepted as controlling. Where the Constitution or laws of the United States are drawn into question, the courts of the United State must determine the controversy for themselves." Fuller, C. J., *In re* Tyler, 149 U. S. 164 (1892). See discussion and cases cited *supra* note 35.

[52] Furthermore, had the *Erie* rule alone been applied, it is possible that the decision would have been accepted as an inferential determination of the constitutionality of the North Carolina statute. Indeed, that is the very manner in which the United States Supreme Court regarded the North Carolina decision.

[53] Guaranty Trust Co. v. York, 326 U. S. 99 (1945) ("The nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result.").

would have required the federal court to grant relief on the substantive issue not determined in the state court.

Now let us do as Justice Frankfurter did and combine *res judicata* and the *Erie* doctrine. What is the result? By the use of *res judicata* the constitutionality of the state statute as between the parties is settled. It cannot be attacked in the federal court. By the use of the *Erie* doctrine the state policy of denying relief is to be followed if the state statute establishing such policy is constitutional. But the constitutionality question having been determined by the application of *res judicata* there is now no problem. The state policy enunciated by a "constitutional" statute is now applied in the federal court.

Hence, we see that the desired end of not allowing Bullington a recovery in a federal court when he was denied the same in a state court is attained only by utilizing *both* the doctrines of the *Erie* case and *res judicata.*

CLAUDE F. SEILA.

Declaratory Judgment—Trustees' Request for Instructions

The Elders of the First Presbyterian Church of Salisbury as the trustees under a will probated in 1849, devising a certain plot of land in Salisbury together with the sum of twenty thousand dollars ($20,000) in trust for the church, came into the Superior Court of Rowan County under the declaratory judgment act,[1] asking for a declaration that they had the power "to sell, mortgage, and/or lease" the property in view of changed conditions. The trust instrument specifically withheld the power of sale, and provided that if the trustees should fail or neglect to execute the trust, then the property should go to Davidson College. The trustees were to keep the property so improved that the rent would provide a revenue for the church. Plaintiffs alleged the property was on the edge of the business district in Salisbury and very much in demand by commercial interests, but that they were financially unable to develop and maintain it adequately. Trial court granted the relief requested. *Held:* Reversed and case dismissed. Declaratory judgment inappropriate: (1) plaintiff should have brought trustees' bill in equity for instructions, (2) apparently the court felt that the request for the power of sale would have invoked a forfeiture of the estate.[2]

It is surprising to find the court refusing a declaratory judgment on the first ground, for the declaratory action is an outgrowth and extension of the trustees' bill in equity for instructions.[3] Thus the court indicates

[1] N. C. GEN. STAT. (1943) §§1-253 *et seq.*

[2] Brandis *et al.* v. Trustees of Davidson College *et al.*, *227* N. C. *329*, 41 S. E. 2d 833 (1947).

[3] Little v. Thorne, 93 N. C. 69 (1885) (under the equity jurisdiction of the court, by a trustee's request for instructions, an executor or trustee may apply to

its unwillingness to entertain the declaratory action merely because an alternative remedy is available.[4] There has been a considerable amount of controversy among the various American jurisdictions as to whether or not the declaratory action should be entertained in such a situation.[5] The erroneous conception that it should not be[6] has arisen in part from confusion with the policy that a declaratory suit would not be permitted where a special statutory proceeding has been provided.[7] This misconception has been cleared up in North Carolina.[8]

The declaratory judgment was meant to be an alternative remedy,[9] to be used, in the court's discretion, either where no remedy existed,[10] or where adequate but less appropriate remedies already existed either at law or in equity.[11] The point of the action is to provide anticipatory relief without necessity of prior breach of duty.[12] Here the court de-

the court for advice in the management of the trust, but in such case the advice of the court is given only upon an existing state of facts which calls for some present action, and not in regard to future conduct upon a certain contingency); BORCHARD, DECLARATORY JUDGMENTS 144 (2d ed. 1941).

[4] *Contra:* Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930) (a specific remedy to enable legatees to obtain legacies without bond was viewed as not so exclusive as to deprive the legatee of the power to seek a declaration to like effect).

[5] Tuscaloosa County v. Shamblin, 233 Ala. 6, 169 So. 234 (1936) (declaratory judgment allowed); Lisbon Village District v. Lisbon, 85 N. H. 173, 155 Atl. 252 (1931) (declaratory judgment refused); Woollard v. Schaffer Stores Co., 272 N. Y. 304, 5 N. E. 2d 829 (1936) (declaratory judgment allowed); Loesch v. Manhattan Life Ins. Co. of N. Y., 128 Misc. 232, 218 N. Y. Supp. 412 (1926) (declaratory judgment refused); People's Park & Amusement Ass'n, Inc. v. Anrooney, 100 Wash. Dec. 43, 93 P. 2d 362 (1939) (declaratory judgment refused).

[6] *See* Miller v. Currie, 208 Wis. 199, 205, 242 N. W. 570, 572 (1932); Schmidt v. La Salle Fire Ins. Co., 209 Wis. 576, 580, 245 N. W. 702, 703 (1932) ("The Declaratory Judgments Act is an effort to provide a tribunal in which controversies may be determined which could not otherwise be presented for determination." [quoted in both cases]).

[7] *Compare* Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931) (declaratory judgment on validity of will not allowed before admission of will to probate), *with* Rountree v. Rountree, 213 N. C. 252, 195 S. E. 784 (1938) (allowed declaratory judgment on will after its admission to probate); Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. 2d 619 (1940).

[8] *See* Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 580, 197 S. E. 179, 181 (1938) ("In Mountain Park Institute v. Lovill, 198 N. C. 642, 645, 153 S. E. 114, 116, citing authorities, it is said: 'It is well settled that an executor upon whom the will casts the performance of a duty may, when he needs instruction, bring a suit in equity to obtain a construction of the will.' *In re* Estate of Mizzelle, 213 N. C. 367, 368, 196 S. E. 364. Plaintiff *further* has the right to maintain this action under chapter 102, sec. 3, Public Laws of 1931, known as the 'Uniform Declaratory Judgment Act.' Rountree v. Rountree, 213 N. C. 252, 195 S. E. 784"); *see* Allison v. Sharp, 209 N. C. 477, 481, 184 S. E. 27, 30 (1936) ("*While there was another remedy at law available to them,* they have challenged the constitutionality of the statute under which they contend that the registrar refused them registration. Under such circumstances and conditions, the Uniform Declaratory Judgment Act affords a ready means of testing its validity, ...") [italics supplied].

[9] N. C. GEN. STAT. (1943) §1-253.

[10] N. C. GEN. STAT. (1943) §§1-253, 1-254.

[11] N. C. GEN. STAT. (1943) §1-253.

[12] Borchard, *Declaratory Judgments,* 1939, 9 BROOKLYN L. REV. 1 (1939) (an address delivered before a meeting of the New York State Bar Association at Saranac Inn on June 30, 1939, in which Prof. Borchard said: "It has already been noted

mands the use of the trustees' bill for instructions, which would involve almost identically the same proceedings, the same issues, and the same relief. This is not in accord with the authorities[13] and is a reversion to the holding of the court in the early days of applying the declaratory judgment act; namely, that such an action would not lie merely because other remedies, legal or equitable, already existed.[14]

The court in refusing the declaratory judgment as being in excess of the statutory authorization therefor cited one case in support, *Tryon v. Duke Power Co.*[15] The court in that instance gave as its reason for dismissal the lack of a case or controversy. In the instant case, the court may have felt that this was in reality an *ex parte* proceeding and thus not cognizable under the declaratory judgment act.[16] It is submitted that the possibility of forfeiture upon sale, mortgage or lease without judicial sanction, caused the interests of the parties to be sufficiently adverse to constitute a case or controversy.[17] The trust instrument expressly prohibits sale and provides for possible forfeiture to the college so that the interests of the church and the college are necessarily in conflict. The fact of friendship between the parties (the college did not appeal and was not represented by counsel in the Supreme Court), cannot be said to vary their legal relations.[18] And the trustees want to sell in the immediate future, raising the controversy with the college now. In *Tryon v. Duke Power Co.*, the court in refusing a declaratory judgment said, "The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." There the petitioners wanted the decision not for immediate application but rather to know what they might do if they desired to invoke the judgment in the future.[19]

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that against a responsible defendant a declaration of his duty serves the same purpose as a command to perform it. Just what motive persuades a plaintiff to seek the milder relief of declaration rather than the more drastic relief of coercion is not always apparent. But the simplicity, the friendlier atmosphere, the escape from technicalities, the narrowing of the issues, the inexpensiveness and the speed would in most cases account for the election. In California, Michigan and Kentucky, declaratory actions go to the head of the calendar and the new Federal Rules provide that 'the court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.' [Rule 57]").

[13] Borchard, *The Next Step Beyond Equity, the Declaratory Action*, 13 U. OF CHI. L. REV. 158 (1946) (it appears that the rule that the declaratory action will not be allowed where an alternative remedy, legal or equitable, is available today exists only in Indiana).

[14] Green v. Inter-Ocean Casualty Co., 203 N. C. 767, 167 S. E. 38 (1932).

[15] 222 N. C. 200, 22 S. E. 2d 450 (1942).

[16] *Ibid.*; *In re* Eubanks, 202 N. C. 357, 162 S. E. 769 (1932).

[17] BORCHARD, DECLARATORY JUDGMENTS 927 (2d ed. 1941).

[18] *Accord*, Z. Smith Reynolds Foundation, Inc. v. Trustees of Wake Forest et al., 227 N. C. 500, 42 S. E. 2d 910 (1947) (the court had no difficulty in recognizing the existence of a case or controversy between friendly litigants seeking the same judgment; namely, approval of contract between two groups of charitable trustees).

[19] See note 15 *supra*. (At the time of bringing the declaratory action, the plain-

As to the second ground for refusing a declaratory judgment, namely, the court's feeling that the trustees' request amounts to an admission of failure to execute the trust and the invocation of forfeiture, see *Middleton v. Rigsbee*.[20] There, the court authorized the trustees to sell part of the corpus in spite of specific provisions in the will to the contrary on the ground that if the testator had foreseen the practical situation, he would have permitted the sale in order to preserve the trust and effectuate its purpose. This has frequently been done in situations where the court finds such a sale necessary to the preservation of the trust res.[21] Although courts hesitate longer in giving the power to mortgage, that would seem to have no bearing on the decision in this case, for the court did not consider this aspect of the case, but based its decision solely on the request for power of sale. True, there is a distinction between the present case and the *Middleton* case in the forfeiture provision. There, the parties involved were the life tenant and remaindermen, all of whose interests could best be served by permitting sale and thus preserving the res. Here, the provision for forfeiture to the college if the trustees should fail or neglect to execute the trust or to keep the property productive permits the contention that the interests of the college would not best be served by granting a power of sale to the trustees of the church. But this is the very determination for which the trustees are seeking.

Though the petitioners may admit that they can no longer administer the trust properly without sale, mortgage or lease, the request itself cannot constitute a failure of administration. If the court feels that the terms of the instrument are still binding, it can so decide. The situation is one for which the declaratory action was specifically designed and has been used before[22] and since[23] in this jurisdiction. The decision should be confined to its facts and not extended to other situations.

DANIEL D. RETCHIN.

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tiffs did not contemplate acting in accordance with the decision but only desired to determine whether they could apply a condemnation feature of a contract against the defendants if they wanted to do this at any time in the future, but there was no present intention of such application, and so no case or controversy).

[20] 179 N. C. 437, 102 S. E. 780 (1920); *accord*, Cutter v. American Trust Co., 213 N. C. 686, 197 S. E. 542 (1938); *cf.* in the Petition of the Equitable Trust Co., 17 Del. Ch. 21, 147 Atl. 231 (1929) (trust instrument allowing sale of real estate, ". . . except the farm called Beauclerc Manor. . . ." Sale of part of manor allowed under statute empowering the court to permit sale of property held in trust unless expressly prohibited by the creator of the trust [commented upon favorably in Note, 30 COL. L. REV. 136 (1930)]).

[21] In the Petition of the Equitable Trust Co., *supra* note 20.

[22] N. C. GEN. STAT. (1943) §1-255; Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 197 S. E. 179 (1938).

[23] See note 18, *supra*.

Evidence—Income Tax Returns—Admissibility

In *Davis v. Atlantic Coast Line Co.*[1] the plaintiff claimed damages to his property and business due to the negligence of defendant. For purposes of contradicting plaintiff's testimony as to amount of damages, defendant introduced plaintiff's federal income tax return for the period during which plaintiff claimed he was damaged, and it was allowed in evidence over objections.[2]

The purpose of this note is a brief investigation of the propriety and usefulness of income tax returns as evidence, in civil cases, of income, profit, loss, or other matter reported therein.

Anything that a party has said, if relevant, is admissible against him as an admission[3] to be considered by the jury. And the admission by an employee or agent, acting within the scope of his authority, is admissible against the principal.[4] Declarations by a taxpayer on personal property tax lists are admissible against him on the issue of the value of the property; though real property valuations for tax purposes are held not to be admissions, since they are made by an independent third party.[5] It seems logically to follow that a party's declaration in his income tax return as to his income, or any other matter contained therein, would be admissible against him as an admission; and this would follow whether the return is made out by the party himself, or by someone employed by him for that purpose.[6] Such an admission would, of course, not be conclusive, but merely evidence for the consideration of the jury, and may be explained or shown to have been the result of mistake.[7]

When it becomes desirable for purposes of impeachment to show that an opponent's income is less than claimed in his testimony, his income tax return would seem generally to be the practical source for the purpose; except in an unusual instance the party will have minimized

[1] 227 N. C. 561, 42 S. E. 2d 905 (1947).

[2] In this case the plaintiff's income tax return showed that he had reported therein his income for the period at an even lower figure than he claimed in his testimony. He objected that the effect of the introduction was to discredit him in the eyes of the jury as criminally evading the Federal Income Tax Laws. The court held it competent for the purpose of contradiction of his testimony "since it is a plain contradiction as to his testimony about his income."

[3] Stone v. Guion, 222 N. C. 548, 23 S. E. 2d 907 (1943); McDonald v. Carson, 95 N. C. 377 (1886); Curlee v. Smith, 91 N. C. 172 (1884); Tredwell v. Graham, 88 N. C. 208 (1883); STANSBURY, NORTH CAROLINA LAW OF EVIDENCE §167 (1946); see also, Kauffman v. Meyberg, 140 P. 2d 210 (Cal. 1943) (income tax return admitted to contradict party's testimony concerning the items reported therein).

[4] WIGMORE, EVIDENCE §1078 (3rd ed. 1940); STANSBURY, *op. cit. supra,* note 3, §§156, 168, 169.

[5] Star Manufacturing Co. v. R. R., 222 N. C. 330, 23 S. E. 2d 32 (1942); Daniels v. Fowler, 123 N. C. 35, 31 S. E. 598 (1898).

[6] See note 4 *supra.*

[7] Cheek v. Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400 (1904); Eason v. Sutton, 20 N. C. 622 (1839); STANSBURY, *op. cit. supra,* note 3, §167.

his income in reporting it for tax purposes, at least to the extent legally possible. Or when seeking to show that an opponent's income is greater than claimed in his testimony, even if his income tax return shows an income less than testified to, it might be advantageous to introduce it for the purpose of contradicting him, and at the same time to discredit him in the eyes of the jury as having evaded the income tax laws. Under authority of the principal case[8] this purpose is not objectionable so long as it does contradict the party's testimony.[9]

The simplicity of introduction of the one document and the practical certainty that income will be at the lowest possible figure, or expenses at the highest, are the obvious advantages in the use of an opponent's income tax return over the use of his books of account. And in the case of a party who maintains no accounting records, his income tax return is of primary importance as admissions of the items contained therein.

There would seem to be no particular difficulty in obtaining a copy of a party's income tax return through the process of a subpoena *duces tecum*;[10] and the return would probably be admissible even though wrongfully obtained,[11] though such a practice is not here advocated. Also there may be a possibility of obtaining a certified copy of the party's state income tax return from the office of the state commissioner of revenue,[12] though it seems impossible to obtain in this manner a copy of his federal income tax return.[13]

Where a party wishes to introduce his own income tax return in evidence, he may introduce it to corroborate his testimony as to his income, or other matter reported;[14] and, in North Carolina at least, it would not be error if it were admitted even before the party testified.[15] Also he may use the tax return to "refresh his recollection" as to the matter reported there;[16] or he may introduce the tax return as "recorded

[8] Davis v. Atlantic Coast Line Co., 227 N. C. 561, 42 S. E. 2d 905 (1947).

[9] *Id.* at 566, 42 S. E. 2d at 909. However, when introduced for such a purpose it seems open to the objection that its *only* effect is to excite prejudice. See STANSBURY, *op. cit. supra*, note 3, §80.

[10] N. C. GEN. STAT. (1943) §8-89; N. C. GEN. STAT. (1943) §8-90; FED. R. CIV. P., 34.

[11] *Cf.* Stevison v. Earnest, 80 Ill. 513 (1875); Hernandez v. Brookdale Mills, 201 App. Div. 324 (1922); WIGMORE, EVIDENCE §2183; the only cases found in the North Carolina Digest were criminal cases which are adequately reviewed in State v. Joe McGee, 214 N. C. 184, 198 S. E. 616 (1938); see also STANSBURY, *op. cit. supra*, note 3, §121. Surely if evidence wrongfully obtained is competent in criminal cases, there can be no doubt of its competency in civil cases.

[12] N. C. GEN. STAT. (1943) §8-61; a liberal construction of the statute would be necessary, and it seems at least doubtful that such a construction would be given; see also, N. C. GEN. STAT. (1943) §105-259.

[13] 26 U. S. C. A. §55.

[14] See STANSBURY, *op. cit. supra*, note 3, §51.

[15] State v. Sutton, 225 N. C. 332, 34 S. E. 2d 195 (1945); State v. Freeman, 100 N. C. 429, 5 S. E. 921 (1888); State v. Twitty, 9 N. C. 449 (1823).

[16] STANSBURY, *op. cit. supra*, note 3, §32, and cases there cited.

past recollection" of the matter reported there when he is unable to recall to mind the information sought to be elicited.[17]

Should it become desirable for a party to introduce his own income tax return as substantive evidence of income, expenses, profit, loss, or any other matter contained therein, it may be possible to introduce it as secondary evidence of the contents of the party's "business records."[18] In such case the burden would be upon the proponent to satisfactorily account for his failure to produce his books of account themselves.[19] For example, this requirement might be satisfied by showing that the regular business records have been lost or destroyed;[20] or maybe by showing that the regular business records are so voluminous as to be impractical to bring into court or present to the jury;[21] or maybe by showing that a bringing of the records themselves into court would seriously delay and hamper the operation of the business.[22] Any of these seem to be sound and practical reasons for non-production of the original records, and adequate grounds for admitting the secondary evidence. Particularly would this seem true when viewed in light of the fact that the income tax return is made out as much as a matter of regular business as the ledgers themselves—it is, theoretically at least, an accurate summary of the business records. However, in the case of a small business, where the tax return has been prepared by the proponent himself, the opposing party might successfully object to its introduction on the ground that it may not properly reflect the contents of the original records because of the incentive to minimize income and maximize expense when reporting for tax purposes. But this objection would not be forceful in the case of a large business concern where the return is generally made up by a disinterested third person whose only incentive is to be accurate.

In the case of a party who maintains no accounting records, in the light of the modern view as to admissibility of entries made in the

[17] See discussion in STANSBURY, *op. cit. supra,* note 3, §33.

[18] For discussion of "entries in regular course of business" as an exception to the rule against hearsay, see WIGMORE, EVIDENCE §1517 *et seq.* (3rd ed. 1940); STANSBURY, *op. cit. supra,* note 3, §155.

[19] Mahoney-Jones Co. v. Osborne, 189 N. C. 445, 127 S. E. 533 (1925); see STANSBURY, *op. cit. supra,* note 3, §§190-194 for discussion of "best evidence rule."

[20] *Cf.* American Potato Co. v. Jennette Bros Co., 174 N. C. 236, 93 S. E. 795 (1917); Smith v. R. R., 68 N. C. 107 (1873); Gathings v. Williams, 27 N. C. 487 (1845).

[21] In J. A. Laporte Corp. v. Pennsylvania-Dixie Cement Corp., 164 Md. 642, 165 Atl. 195, 168 Atl. 844 (1933), it was intimated that compilations from ponderous books, even where expressly made up for purposes of the trial, were admissible without the originals, defendant's protection being "by resort to a previous examination of the final book entries, or by an account from them."

[22] *Cf.* Washington Horse Exch. v. Wilson, 152 N. C. 21, 67 S. E. 35 (1910) (witness who had examined the voluminous records was permitted to testify as to the results without bringing the records into court). It seems that a summary by way of an income tax return, prepared after examination of the business records, would be equally as competent to show the contents.

regular course of business,[23] the possibility of allowance of his income tax return into evidence as an "entry in the regular course of business" seems at least worthy of mention. The fact that the tax return is required by law should not detract from its quality of having been prepared in the regular course of business; but in point of time, the business transactions are in such case possibly recorded too late to qualify as having been made in the regular course of business[24]—the income tax return records transactions as much as a year after their occurrence.

There is the possibility of an objection against a party seeking to introduce his own income tax return as substantive evidence on the grounds that it is "self-serving."[25] This would not be a valid objection, however, *if* it has been qualified under some one of the exceptions to the rule against hearsay; because, unless the evidence is inadmissible under some hearsay rule, the fact that it is self-serving is not an independent ground for objection.[26]

Suppose that it became necessary or desirable to introduce the income tax return of a third party, would it be admissible when relevant? To avoid exclusion under the rule against hearsay, the requirements of a declaration against interest (or admission by a predecessor in title, discussed *infra*) must be met; i.e., the declarant must be dead, or for some adequate reason be unavailable as a witness;[27] the fact stated must have been against the declarant's interest at the time of the declaration, and he must have been conscious at the time that it was against his interest.[28] It would seem logically to follow that any taxable item set forth in an income tax return would be a declaration against interest because the declarant would thereby be rendered liable for the tax;[29]

[23] 28 U. S. C. A. §695; MODEL CODE OF EVIDENCE, Rule 514 (1942); STANSBURY, *op. cit. supra*, note 3, §155.

[24] One of the common law requirements for admissibility of business records is that they should have been made at or near the time of the transaction. WIGMORE, EVIDENCE §1526. This requirement is also incorporated into the code of evidence as adopted by the American Law Institute (see MODEL CODE OF EVIDENCE, Rule 514 [1942]), and into the federal Business Records Act (28 U. S. C. A. §695).

[25] Farmer v. Associated Professors of Loyola College, 166 Md. 455, 171 Atl. 361 (1934) (in suit to set aside alleged gifts of bonds, donor's income tax return held to be a self-serving declaration, and not admissible to prove donor's belief that she still owned the bonds; qualification as entry in regular course of business not argued); Clay v. Richardson, 38 S. W. 2d 849 (Texas 1931) (intimated that plaintiff might not be allowed to introduce income tax return to show loss of income over objection that it was self-serving; but here primary question was failure of plaintiff to account satisfactorily for failure to produce his books).

[26] STANSBURY, *op. cit. supra*, note 3, §140.

[27] Currin v. Currin, 219 N. C. 815, 15 S. E. 2d 279 (1941); Roe v. Journegan, 175 N. C. 261, 95 S. E. 495 (1918); Jones v. Henry, 84 N. C. 320 (1881); Woodhouse v. Simmons, 73 N. C. 30 (1875).

[28] Roe v. Journegan, 175 N. C. 261, 95 S. E. 495 (1918); STANSBURY, *op. cit. supra*, note 3, §147.

[29] *But see, In re* Stratman's Estate, 231 Iowa 480, 1 N. W. 2d 636 (1942) (complainants own assessment rolls showing money due from defendant held not

and conversely, any item of expense or loss would not be against interest, because the declarant's liability for taxes would thereby be lessened. But such a general conclusion might be upset when applied to the specific case.[30] Suppose, for example, *A* purchased from *B* a thriving resort hotel, and shortly thereafter *B* dies. In the meantime *C* has started operating a rock quarry on the lot adjoining the hotel, and not caring to mix the noise from the quarry with their afternon tea, practically all of *A*'s clientele have abandoned him. *A* brings action against *C* for damages, and desiring to show his loss of income he offered *B*'s income tax returns for the past several years. Are they admissible as declarations against interest? It could be argued that since *B* had been rendered liable for taxes by reporting his income in large amounts, that it was a declaration against his interest. Could it not also be argued that the large incomes reported enhanced the value of the property in the eyes of *A* and enabled *B* to ask a higher price in the sale to *A*, so that it was not against *B*'s interest? The sounder argument would seem in favor of a declaration against interest, because it is extremely unlikely that *A* relied on the income tax returns of *B* in arriving at his decision as to what he would pay for the property; he would, rather, depend on his inspection of the condition of the building and premises, and the average number of patrons.

Suppose in the same fact set up, blasting from *C*'s quarry had so weakened the foundations of the hotel that the walls collapsed, and in *A*'s suit for damages, *C* seeks to introduce *B*'s income tax return to show the actual value of the building after depreciation over the period of *B*'s ownership. Is it admissible as a declaration against interest? It could be argued that it is against interest, because by depreciating the building *B* thus admitted its lowered value. But it could also be argued that it is not against interest, because by so depreciating the building *B* was able to introduce the depreciation expense against his income and thus reduce liability for income tax. The sounder argument here would seem to be in favor of holding it not against interest, because the depreciated value of a building is seldom the basis upon which a purchaser makes his offer. The offer would be based upon the actual physical condition, so that *B* would not be declaring against his interest to report the building at its depreciated value.

to be "admissions against interest" merely because they subjected complainant to liability for taxes. Note, however, that the assessment rolls were those of a living person available as a witness, and the exclusion may have been for that reason; the decision is not clear on the point. *Quaere,* shouldn't it have been introduced, as suggested heretofore, as corroborative evidence?).

[30] It might conceivably be argued that the payment of taxes is for the mutual benefit of society, and that, theoretically at least, the taxpayer will benefit from paying his taxes, and thus declarations in a tax return rendering the declarant liable for taxes could never be against his interest. However, his honor being himself a taxpayer, may entertain doubts that are difficult to dispel.

In evaluating the possibility of admissibility in each particular case, there are two important requirements which must not be overlooked; the proponent of the evidence has the burden of showing that the declaration was in fact against interest,[31] and that the declarant believed it to be against his interest;[32] both are necessary because, for example, should the interest of the declarant be erroneously supposed by him to be served by the statement which he is making, the latter is devoid of probative force, although as the situation actually exists it is very much against his pecuniary or proprietary interest.[33]

In some rare case the income tax return of a third person *(B)* might also be advantageously introduced against that third person's successor in interest *(A)* as a "vicarious admission."[34] The prerequisite for the introduction of such evidence is a showing of privity between *A* and *B* as successive holders of a title,[35] that *B* made the statement while he was holder of the title, and that it could have been used against *B* in litigation over his title.[36] Contrary to the requirements of a "declaration against interest," here there is no need of a showing that the declarant is dead, or that the declaration was against interest;[37] however, such an admission is competent only *against* the successor in interest, and not in his favor.[38]

Civil cases involving the use of income tax returns as evidence seem to be extremely limited in number, but with the requirement of tax returns from practically everyone in the United States today, their statements of their financial positions are thus opened to the possibility of scrutiny; and it is not improbable that income tax returns will come into use as evidence more and more.

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Insurance—Fraud and Materiality of Representations—Statutory Construction

The recent case of *Carroll v. Carolina Casualty Ins. Co.*[1] serves to illustrate the relatively confused interpretations that are found to exist with respect to the short but sweeping North Carolina insurance statute[2]

[31] See note 28 *supra.*
[32] See note 28 *supra.*
[33] Roe v. Journegan, 175 N. C. 261 at 265, 95 S. E. 495 (1918) (quoting with approval from 2 CHAMBERLAYNE ON EVIDENCE §2782 [1913]).
[34] For discussion of "admissions by predecessors in interest," see STANSBURY, *op. cit. supra,* note 3, §174.
[35] Satterwhite v. Hicks, 44 N. C. 105 (1852); Guy v. Hall, 7 N. C. 150 (1819).
[36] WIGMORE, EVIDENCE §1081 (3rd ed. 1940); STANSBURY, *op. cit. supra,* note 3, §174, and cases there cited.
[37] STANSBURY, *op. cit. supra,* note 3, §174.
[38] Roberts v. Roberts, 82 N. C. 29 (1880).

[1] 227 N. C. 456, 42 S. E. 2d 607 (1947).
[2] N. C. GEN. STAT. (1943) §58-30.

which provides that "all statements . . . in any application for insurance, or in the policy itself, shall be deemed representations and not warranties, and . . . unless material or fraudulent, will not prevent a recovery on the policy."

It should be noted particularly that this statute applies to all statements and to all types of insurance. Other states have somewhat similar statutes but most are limited to a particular form of insurance or to the application or negotiation only.[3]

The statute would appear to be unambiguous but the cases interpreting it do not appear unanimous in two respects at least. The first problem has to do with the test to be used in determining the materiality of a statement made by an applicant and the second concerns the necessity of finding fraud on the part of the applicant in the event the statement is untrue.

The application of the statute to other circumstances raises additional problems of interest, but they are beyond the scope of this note, its purpose being only to investigate the position of the North Carolina Supreme Court as to the above two points.[4]

In the principal case the applicant for hospital insurance, in answer to a specific question on the point, incorrectly asserted that his wife did not have hernia. The feme plaintiff was later hospitalized for an appendectomy and the hernia was incidentally repaired at the same time, but there was no evidence that the hernia was a contributing factor to the initial hospitalization. The defendant insurer refused payment of the hospital expenses on the ground that the untrue statement was of such importance that had the truth been known the policy would not have been issued.

The jury determined that the statement by the insured was not made with intent to deceive and that it did not materially affect acceptance of the risk by the insurer. Recovery was, therefore, allowed. On appeal, the verdict for plaintiff was not disturbed.

In searching for a test for determining the materiality of a representation the North Carolina Supreme Court has used several approaches, and the divergence of the theories is sometimes noticeably apparent. In the principal case the court says, "the general rule is that the materiality of the representation depends on whether it was such as would naturally and reasonably have influenced the insurance company with respect to

[3] PATTERSON, ESSENTIALS OF INSURANCE LAW §§72-74 (1st ed. 1935); 26 states have similar statutes applying to life, accident, or health insurance. North Carolina one of few extending this to all types.

[4] Effect on continuing warranties, conditions precedent, concealment, etc. See PATTERSON, *op. cit. supra*, note 3, §72, for seven basic factors to be considered in determing the applicability and scope of this type statute.

the contract or risk." Numerous decisions have used similar language in describing the test sought for.[5]

The rule as stated raises considerable doubt as to whether an objective or a subjective test is intended. The classic phrase "naturally and reasonably" suggests an objective standard, of course. This would be in agreement with most jurisdictions which have enacted statutes directed toward similar ends.[6] But some doubt is cast on this conclusion by the next phrase pertaining to influencing "the insurance company," which would seem to indicate that perhaps a subjective test is intended, *i.e.*, would this particular insurance company have accepted the risk had the true facts been known at the time.[7] This interpretation is further strengthened by statements explaining similar definitions in other cases, as in *Schas v. Equitable Life Ins. Co.*[8] where it was said that the misrepresentation need not have contributed to the loss or damage suffered, but whether or not it was material depends upon whether the applicant's answer "would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk, and what rate of premium should be charged." Such explanations suggest that the practices of the particular company may be the determining factors to be considered by North Carolina juries.[9]

A somewhat different approach to the problem of materiality is frequently noticed in the innumerable cases interpreting and applying this statute. It is found in the North Carolina decisions as well as in those of the federal courts, apparently originating in its present form in this state in *Mutual Life Ins. Co. v. Leaksville Woolen Mills*[10] and seems to have been appropriated from the Supreme Court of the United States.[11] The test as laid down in the *Leaksville* case and subsequently

[5] *E.g.*, Wells v. Jefferson Stand. Life Ins. Co., 211 N. C. 427, 429, 190 S. E. 744, 745 (1937); Washington Life Ins. Co. v. Box Co., 185 N. C. 543, 546, 117 S. E. 785, 786 (1923); Schas v. Equitable Life Ins. Co., 166 N. C. 55, 58, 81 S. E. 1014, 1015 (1914); Alexander v. Metropolitan Life Ins. Co., 150 N. C. 536, 538, 64 S. E. 432, 433 (1909); Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 184, 60 S. E. 983, 985 (1908); Fishblate v. Fidelity Co., 140 N. C. 589, 593, 53 S. E. 354, 356 (1906).

[6] The text writers do not seem to advocate any particular form of test. See VANCE, INSURANCE §382 (2d ed. 1930) describing the test in words similar to those used by the court in the principal case; PATTERSON, ESSENTIALS OF INSURANCE LAW §82 (1st ed. 1935) suggesting what appears to be a hybrid test, as, "the fairest solution . . . maintain individual standard as the ultimate test, allowing the insurer to produce proof of its own standard and claimant to refute . . . by . . . proof of practices of other insurers . . . for showing . . . this insurer arbitrary and exceptional."

[7] If the standard enunciated in the charge was truly subjective, the court, on appeal, even though it preferred an objective test for materiality, might be disinclined to disapprove, since a subjective standard is most favorable to the insurer and thus cannot be said to be prejudicial to him.

[8] 166 N. C. 55, 81 S. E. 1014 (1914).

[9] Particularly is this indicated by opinions which approve charges capitalizing the words, as, "The Insurance Company."

[10] 172 N. C. 534, 90 S. E. 574 (1916).

[11] Jeffries v. Economical Life Ins. Co., 22 Wall. 47 (U. S. 1875).

approved many times is essentially subjective and is to the effect that the determination of the materiality of representations is not always open to dispute and that it is only necessary to look to the policy or to the application for the answer, for when the representation is in the form of a written answer to a written question it is deemed to be made material by the acts of the parties to the contract. In other words, the mere fact that the question was asked by the insurer and answered by the insured is said to be a conclusive indication of materiality.[12] The answer then must be true or recovery will be denied. In these cases materiality is found by the court as a matter of law, the only thing remaining for the jury to determine is whether the statement was false.

At first glance, this approach, which may be termed the "written question-written answer: therefore material" doctrine, would seem to be a considerable departure from the rule of the principal case. Indeed, if carried to its logical conclusion an opposite result would be warranted in the principal case. However, an analysis of the various cases using this approach shows that, although the court supports its conclusion by reference to the "written question-written answer" doctrine, the facts are of such a nature that the result would be the same by the objective, subjective, or any other reasonable standard.[13] Reasonable men could not differ on the question. It therefore seems unnecessary to fear that any such sweeping rule will ever be adopted to apply to any and all statements made by the insured, else insurance law in this state would be reverting to the mechanical standards applied by the common law. The North Carolina Supreme Court is not unaware of the purpose of the

[12] In effect, such an approach seems to defeat the purpose of the statute completely, for, instead of all statements becoming representations, the reverse is made the result and all statements assume the legal effect of common law warranties merely because the insurer chose to demand a written answer to a written question. The *Jeffries* case, *supra* note 11, would appear to be poor authority for the proposition since no comparable statute was involved there and the court merely applied the common law rule of warranties, which is the very rule intended to be abrogated by N. C. GEN. STAT. (1943) §58-30. See Note, 131 A. L. R. 617, 625 (1941).

[13] *E.g.*, Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574 (1916) (applicant stated "no operation since childhood" when actually he had undergone several of a serious nature); Petty v. Pacific Mutual Life Ins. Co., 212 N. C. 157, 193 S. E. 228 (1937) (declaration of good health, but actually under treatment for duodenal ulcer from which he later died); Washington Life Ins. Co. v. Box Co., 185 N. C. 543, 117 S. E. 785 (1923) (knowingly denied any spitting of blood, but later died of tuberculosis); Alexander v. Metropolitan Life Ins. Co., 150 N. C. 536, 64 S. E. 432 (1909) (untrue assertion that applicant was not under treatment for a kidney disease); Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 983 (1908) (denial of physician's care for two preceding years, although being treated for consumption); Jeffress v. New York Life Ins. Co., 74 F. 2d 874 (C. C. A. 4th 1935) (non-disclosure of treatment for hookworm and secondary anemia); Dudgeon v. Mutual Ben. Health & Accident Ass'n, 70 F. 2d 49 (C. C. A. 4th 1934) (claim of temperate habits and no prior refusal of insurance, the reverse being true); Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F. 2d 120 (C. C. A. 4th 1932) (claim of good health although recently advised of necessity for appendectomy).

statute.[14] This conclusion is borne out by another group of cases where, although written answers are given to written questions, the court rules as a matter of law that the statements are immaterial. Here also, reasonable men could not differ on the inferences from the facts concerned, as an analysis of each case will show.[15]

It can therefore be said that our court is somewhere near the middle of the road, treating the question of materiality as any other question of fact, or mixed law and fact; submitting it to the jury when doubtful, otherwise ruling it material or immaterial as a matter of law,[16] even though sometimes utilizing the anomalous "written question-written answer" doctrine. Although, as pointed out above, when the issue of materiality is left to the jury the standard to be applied is doubtful, the tenor of the decisions seems to indicate that the court, in furthering the purpose of the statute, would approve an objective standard when materiality depends upon some practice peculiar to the particular insurer.

As to the necessity of finding fraud on the part of the applicant, the statute clearly says that to prevent a recovery, the misrepresentation must be "material *or* fraudulent" and this plain meaning is generally followed by the court, to the extent of holding that if materiality is found no fraud need be present. Typical of this is *Equitable Life Assurance Society v. Ashby*[17] where it is said that "if the representation is false it need not be fraudulently made to invalidate the policy. . . . The misrepresentation of a material fact . . . avoids the policy even though the assured be innocent of an intent to wrongfully induce the assurer to act. . . ."

No recent case has been found where a fraudulent immaterial representation alone has been sufficient to prevent recovery on the policy. It is submitted that this is as it should be, for the purpose of the statute would seem to be to relieve the harshness of the common law doctrine which was uncompromising in its demand for literal compliance with all warranties in insurance policies.[18] Yet by the use of the word "or" in the statute, it would appear that even an immaterial misrepresentation, if fraudulently made, would be fatal to the rights of the insured. This

[14] Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 261, 84 S. E. 274, 275 (1915) ("prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts").

[15] *E.g.*, Wells v. Jefferson Stand. Life Ins. Co., 211 N. C. 427, 190 S. E. 744 (1937) (non-disclosure of temporary indisposition); Anthony v. Teachers' Protective Union, 206 N. C. 7, 173 S. E. 6 (1934) (failure to disclose treatment of temporary disorder, but revealing treatment of more serious nature); Howell v. American National Ins. Co., 189 N. C. 212, 126 S. E. 603 (1925) (false statement that beneficiary was applicant's daughter).

[16] Howell v. American National Ins. Co., 189 N. C. 212, 214, 126 S. E. 603, 605 (1925).

[17] 215 N. C. 280, 1 S. E. 2d 830 (1939).

[18] See note 14 *supra*.

would prejudice the insured more than would the common law rule.[19] The Minnesota Supreme Court, in a case[20] construing a similar statute,[21] decides that surely the legislature did not intend to make the insurer's liability any less.

For all practical purposes then, the words, "or fraudulent," can be considered surplusage. Yet in one recent case[22] our court, in its effort to equalize the relative positions of insurer and insured, appears to have interpreted this statute as requiring the insurer to prove fraud on the part of the applicant, even though the misrepresentation was clearly material to the risk, contributed to the loss, and induced the insurer to undertake a risk otherwise unacceptable. In this action to cancel the policy the court referred to N. C. GEN. STAT. (1943) §58-30, seized upon the lack of fraud, and refused to allow a cancellation. At first glance this decision would appear to give some meaning to the word "fraudulent" in the statute, for a literal interpretation would indicate that the misrepresentation must be both material *and* fraudulent rather than material *or* fraudulent, but it should be pointed out that the decision was not rested solely upon the statute in question. Reliance also was placed upon a companion statute[23] which bars relief, in the absence of fraud, when no physical examination is required. The peculiar circumstances of the case[24] and the applicability of this companion statute probably explain the apparent reliance on the word "fraudulent" and indicates that the departure from the usual interpretation of the statute is less real than apparent. At any rate, this approach should not be unduly extended for such a position not only flaunts the plain wording of the statute, but fortifies the position of the insured to such an extent that a recovery on a policy would seldom be refused, for most untrue statements are inadvertant rather than fraudulent. The scales would be tipped too far in favor of the insured, who, under the common law, was in much the weaker position.

The North Carolina statute can thus be said to affect the common law as little as any comparable enactment. In short, the net effect is only to convert statements which by the common law might have been called warranties (and thereby subject to rigid compliance), into repre-

[19] VANCE, INSURANCE §395, n. 78 (2d ed. 1930) ("Most common law decisions under the doctrine of representations refused to avoid a policy for any immaterial misrepresentations.").

[20] Johnson v. National Life Ins. Co., 123 Minn. 453, 457, 144 N. W. 218, 220 (1913).

[21] MINN. GEN. STAT. (1913) §3300.

[22] Missouri State Life Ins. Co. v. Hardin, 208 N. C. 22, 179 S. E. 2 (1935).

[23] N. C. GEN. STAT. (1943) §58-200.

[24] Applicant consulted many doctors because of dizziness some years prior to issuance of policy. Diagnosis of disease was creeping paralysis which was incurable so doctors decided not to inform applicant who thus stated "no diseases last 10 years" and failed to disclose fact of consultation.

sentations. The common law of representations remains relatively unchanged. Materiality of representations has always been a prerequisite for cancellation of a policy of insurance or for prevention of recovery by the insured. Fraudulent, but immaterial, representations have never been considered by the common law, or under modern statutes, as warranting an avoidance of a policy of insurance. Further relaxation of the common law, then, must come in the standard selected and applied by the court for determining the materiality of the incorrect statement being contested. The "written question-written answer" doctrine certainly will do nothing toward furthering the purpose of the statute and it is hoped that this proposition will not again be heard, but that the North Carolina Supreme Court will in the future adopt some form of objective standard.

JOSEPH C. MOORE, JR.

Judgments—Opening Default Judgment for Neglect of Attorney—Discretionary Power in Trial Judge

The plaintiff sued in claim and delivery for the recovery of an automobile and had judgment by default for want of an answer. When execution issued defendant appeared and moved that the judgment be set aside for excusable neglect. The clerk allowed the motion and the plaintiff appealed to the judge of the superior court who affirmed the order vacating the judgment upon the following findings of fact: summons was duly served on defendant together with an order extending the time to file complaint (G. S. §1-121) whereupon she employed an attorney who mistakenly advised her that the plaintiff could not proceed until additional papers were served on her, and that he would request the clerk to notify him of the filing of the complaint, and would inform her when it became necessary for her to answer; the attorney then became seriously ill and was unable to attend to the duties of his office, as a result of which no further action was taken and the default judgment was entered; the defendant was unacquainted with court procedure and had not herself been negligent; she had a meritorious defense to the cause as an innocent purchaser for value. The Superior Court ruled, therefore, that the default was occasioned by the negligence of the attorney and that the same was not imputable to the defendant who was without fault. The plaintiff appealed to the Supreme Court. *Held:* order vacating the judgment affirmed.[1] Since the failure to answer was not wholly due to the attorney's erroneous belief that additional papers[2] would have to be served on the defendant, the major-

[1] Rierson v. York, 227 N. C. 575, 42 S. E. 2d 902 (1947).
[2] The complaint. Record, p. 22.

ity ruled that the judge in the exercise of a sound discretion was authorized to set the judgment aside.[3]

The statute under which relief from the judgment was allowed reads in part as follows: "The judge shall upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect. . . ."[4]

In its application, North Carolina at an early date recognized a distinction between the negligence of the litigant and that of his attorney, and ruled that the negligence of the latter, whether excusable or not, would not be imputed to the former so as to bar relief.[5] The movant's attorney, however, must be one licensed to practice in this state,[6] and his negligence on which the prayer for relief is predicated must have been some failure in the performance of professional duties[7] which occurred prior to and was the cause[8] of the judgment sought to be vacated. And the movant himself must be without fault.[9]

The rule of non-imputation is a departure from the general doctrine of agency which holds the principal responsible for the acts of his agent, and represents the minority[10] rule in the construction of statutes substantially the same as that above,[11] the majority holding that negligence of an attorney is ground for setting a judgment aside only when excusable.[12] In view of its general acceptance, it would seem that little

[3] Chief Justice Stacy dissented without opinion.

[4] N. C. GEN. STAT. (1943) §1-220.

[5] Griel v. Vernon, 65 N. C. 76 (1871) (attorney's neglect to file a plea is a surprise on the client whose failure to examine the record to ascertain that it had been filed is an excusable neglect); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Grandy v. Carolina Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Schiele v. North State Fire Ins. Co., 171 N. C. 426, 88 S. E. 764 (1916).

[6] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 936 (1898); *see* Harrell v. Welstead *et al.*, 206 N. C. 817, 820, 175 S. E. 283, 286 (1934).

[7] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 936 (1898); Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916) (in the performance of non-professional acts the attorney is an ordinary agent whose negligence is attributable to his principal).

[8] Dail v. Hawkins, 211 N. C. 283, 189 S. E. 774 (1937) (by implication); Lumber Co. v. Cottingham, 173 N. C. 323, 327, 92 S. E. 9, 11 (1917) ("Excusable negligence is something which must have occurred at or before the entry of the judgment, and which caused it to be entered, not matter ex post facto which had no relation to the action of the court or to anything which transpired before its rendition."); *see* Bradford v. Coit, 77 N. C. 72, 75 (1877).

[9] Kerr v. North Carolina Joint Stock Land Bank, 205 N. C. 410, 171 S. E. 367 (1933); Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587 (1928); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Taylor v. Pope, 106 N. C. 267, 11 S. E. 257 (1890); Griel v. Vernon, 65 N. C. 76 (1871); *see* Cahoon v. Brinkley, 176 N. C. 5, 9, 96 S. E. 650, 652 (1918).

[10] *Accord,* Sullivan v. Sullivan, 266 Mass. 228, 165 N. E. 89 (1929); Jensen v. Backman *et al.*, 246 App. Div. 741, 283 N. Y. Supp. 862 (2d Dep't 1935).

[11] *E.g.,* CAL. CODE. CIV. PROC. (Deering, 1941) §473; MONT. REV. CODES (Anderson & McFarland, 1935) §9187; N. D. REV. CODE (1943) §28-2901; S. C. CODE (1942) §495; WIS. STAT. (1941) §269.46.

[12] Stub v. Harrison, 35 Cal. App. 2d 685, 96 P. 2d 979 (—— Dep't 1939);

need be said in support of the validity of the majority rule. For the minority, the rationale of the rule against imputation of the attorney's neglect is well stated in *Schiele v. North State Fire Ins. Co.*

> "And why is not this the wise and just rule and in accordance with the letter and spirit of the statute? The attorney is an officer of the court, and acts under its direction and control, and the client employs him because of his learning and skill, to do something he cannot do for himself, and his fitness for the duty is certified to by the courts who have licensed him. If so, and the client has been guilty of no neglect, and a valuable right has been lost by the failure of the attorney to file an answer, why should he not be relieved under a statute . . . which gives authority to the court to relieve a 'party' on account of 'his' surprise, etc. . . ."[13]

In 1921, the legislature of Idaho amended[14] a statute[15] substantially similar to G. S. 1-220 to require[16] the trial judge to set aside a judgment occasioned by the negligent failure of an attorney to file or serve any paper in the cause as to which his client was without fault, and to enable the judge in his discretion to require the attorney to pay the costs or actual expenses of the successful party in the judgment to be set aside and a fine of not more than one hundred dollars. This provision alleviates an undue hardship on the successful party and avoids penalizing the unsuccessful party by placing the hardship where it belongs, *i.e.*, on the attorney lacking a sufficient excuse for his delinquency. It is submitted that adoption of this amendment would promote certainty in the law as applied to motions for relief on the ground of counsel's negligence, and would make the rule of non-imputation a great deal more just.

The standard of care required of the litigant in every case is that which a man of ordinary prudence usually bestows on his important business.[17] He must show that he has been active and diligent,[18] and

Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002 (1914); Rieckhoff v. Woodhull, 106 Mont. 22, 75 P. 2d 56 (1937); Smith v. Wordeman, 59 S. D. 368, 240 N. W. 325 (1932); Haskins v. Haskins' Estate, 113 Vt. 466, 35 A. 2d 662 (1944); *see* 15 R. C. L. §161; Notes, 34 HARV. L. REV. 559 (1921); 9 N. C. L. REV. 91 (1930).

[13] 171 N. C. 426, 432, 88 S. E. 764, 767 (1916).

[14] Idaho Sess. Laws 1921, c. 235, §1.

[15] IDAHO LAWS ANN. (1943) §5-905.

[16] Wagner v. Mower, 41 Idaho, 380, 237 Pac. 118 (1925) (if the judgment was occasioned by the attorney's negligence, the judge has no discretion but must set it aside).

[17] Whitaker v. Raines, 226 N. C. 526, 39 S. E. 2d 266 (1946); Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919); Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914); Roberts v. Allman, 106 N. C. 391, 11 S. E. 425 (1890); Sluder v. Rollins, 76 N. C. 271 (1877); Elms v. Elms, 72 Cal. App. 2d 508, 164 P. 2d 936 (1946) ("If judgment be entered against a party in his absence before he can be relieved therefrom he must show that it was the result of a mistake or inadvertance which reasonable care could not have avoided, a surprise which reason-

he must have employed counsel.[19] It has been held, however, that mere employment of counsel is not enough,[20] that the litigant may not abandon his case on the employment of counsel,[21] and that when he has a case in court, he must attend to it.[22] These principles have served as the basis for decision in a number of cases[23] wherein the net result was to impute the causative negligence of the attorney to his client, on the theory that the latter had not lived up to these requirements. In other cases, indistinguishable on the facts reported,[24] the litigant was held not negligent and the rule of non-imputation applied to permit vacating the judgment. In the instant case, defendant employed an attorney and thereafter did nothing more than make a single telephone inquiry[25] (some thirty days before the default judgment was rendered), regarding the progress of the case. On the basis of previous ruling involving the question of vacating default judgments the court could have found precedent for either granting or denying the relief.[26] The allowance of relief in this case is in line with the liberal view evidenced in more recent decisions.[27]

It is true that in the case under consideration the defendant's attorney erred when he advised his client that the complaint would have to be served on her before the plaintiff could proceed to judgment.[28] Plaintiff's counsel therefore contended on appeal that the defendant was

able precaution could not have prevented, or a neglect which reasonable prudence could not have anticipated.").

[18] Carter v. Anderson, 208 N. C. 529, 181 S. E. 750 (1935); Gaster v. Thomas, 188 N. C. 346, 124 S. E. 609 (1924); Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914).

[19] Holland v. Benevolent Assn., 176 N. C. 86, 97 S. E. 150 (1918); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883); *see* Sutherland v. McLean, 199 N. C. 345, 347, 154 S. E. 662, 663 (1930).

[20] *E.g.*, Hyde County Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925).

[21] *E.g.*, Roberts v. Allman, 106 N. C. 391, 11 S. E. 425 (1890).

[22] *E.g.*, Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903).

[23] Hyde County Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925); Hardware Co. v. Buhmann *et al.*, 159 N. C. 511, 75 S. E. 731 (1912); Reynolds v. Greensboro Boiler & Machine Co., 153 N. C. 342, 69 S. E. 248 (1910).

[24] Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Meece v. Commercial Credit Co., 201 N. C. 138, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Gwathney v. Savage, 101 N. C. 103, 7 S. E. 661 (1888); English v. English, 87 N. C. 497 (1882).

[25] Record, p. 22.

[26] Compare cases cited note 23 *supra* with those cited note 24 *supra*.

[27] See Craver v. Spaugh, 226 N. C. 450, 451, 38 S. E. 2d 525, 527 (1946); Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).

[28] N. C. GEN. STAT. (1943) §1-121 (where the plaintiff is given additional time in which to file complaint, the statute provides that a copy of such order be served with the summons; plaintiff is required to prepare a copy of the complaint for the use of defendant and his attorney, but it is then filed with the clerk rather than being served on defendant).

barred from relief, for a mistake of law whether made by the litigant[29] or by his attorney[30] does not constitute ground for setting a judgment aside. North Carolina holds with the majority[31] that the statute has reference to mistakes of fact[32] and not of law. But since defendant's attorney promised to secure a copy of the complaint when filed,[33] and presumably would have done so had it not been for his illness, there seemed to be no real reliance on his misapprehension of the law either by himself or by the defendant. The question of the right of a litigant to have a judgment set aside on the ground of a mistake of law made by his attorney was thus not squarely before the court and therefore not decided.[34]

The court in the instant case ruled that motions under the statute to vacate judgments are addressed to the sound legal discretion of the trial court, whose ruling thereon can be reviewed only for an abuse of discretion.[35] As a general proposition, this agrees with the cases in our own reports[36] and those of other jurisdictions.[37] But it must be remembered that the existence of a discretionary power depends on whether the negligence which occasioned the judgment complained of is ex-

[29] Lerch Bros. v. McKinne Bros., 187 N. C. 419, 122 S. E. 9 (1924); Skinner v. Terry, 107 N. C. 103, 12 S. E. 118 (1890).

[30] Phifer v. Ins. Co., 123 N. C. 405, 31 S. E. 715 (1898).

[31] Kingsbury v. Brown, 60 Idaho 464, 92 P. 2d 1053 (1939); Rieckhoff v. Woodhull, 106 Mont. 22, 75 P. 2d 56 (1937); Lucas v. North Carolina Mut. Life Ins. Co., 184 S. C. 119, 191 S. E. 711 (1937); *cf.* Savage v. Cannon, 204 S. C. 473, 30 S. E. 2d 70 (1944) (where defendant's attorney was mistaken as to the time allowed for answering, order vacating the default judgment was affirmed). Plano Manufacturing Co. v. Murphy, 16 S. D. 380, 92 N. W. 1072 (1902); see Note, 153 A. L. R. 449, 455 (1944); 1 FREEMAN, JUDGMENTS §238 (5th ed., Tuttle, 1925).

[32] 1 FREEMAN, *op. cit. supra,* note 31, §241 ("Where the statute enumerates excusable neglect as one of the grounds for vacating a judgment, it seems superfluous to name any other; for such other grounds as have been named, to wit, mistake, surprise, inadvertance, unavoidable casualty or misfortune, if they or any of them exist under circumstances such as entitle the moving party to relief constitute a case of excusable neglect."); *see* Marsh v. Griffin, 123 N. C. 660, 667, 31 S. E. 840, 842 (1898) for a similar observation. *But cf.* Mann v. Hall, 163 N. C. 50, 79 S. E. 437 (1913) (relief on the ground of a mistake of fact allowed without consideration of the question of fault in making the mistake, the court holding that the several grounds for relief specified in the statute are separable and not "mere surplusage").

[33] Record, p. 22.

[34] Rierson v. York, 227 N. C. 575, 578, 42 S. E. 2d 902, 903 (1947) ("There was evidence from which the judge might find, and did find, that the neglect was due to the incapacity of the lawyer induced by serious illness. The larger part of the court's jurisdiction under this statute is invoked under 'excusable neglect' where there is neither mistake of law or fact.").

[35] *Ibid.*

[36] Dunn v. Jones, 195 N. C. 354, 142 S. E. 320 (1928); Sikes v. Weatherly, 110 N. C. 131, 14 S. E. 511 (1892); *see* Garner v. Quakenbush, 187 N. C. 603, 606, 122 S. E. 474, 476 (1924).

[37] Riskin v. Towers, 24 Cal. 2d 274, 148 P. 2d 611 (1944); Drinkard *et al.* v. Spencer, 72 Colo. 396, 211 Pac. 379 (1922); Atwood v. Northern Pac. R. R., 37 Idaho 554, 217 Pac. 600 (1923); Savage v. Cannon, 204 S. C. 473, 30 S. E. 2d 70 (1944); Green v. McLoud Co., 87 Vt. 242, 88 Atl. 810 (1913).

cusable.[38] And the question of excusability is one of law and therefore reviewable in every case.[39] The leading case for this principle is *Norton v. McLaurin*[40] wherein the court outlined the rules governing application of the statute. Upon entry of the motion to set aside, the judge finds the facts on which it is based, and these findings are conclusive on appeal when supported by the evidence. From such findings, he determines whether excusable negligence has been shown. And from this determination, either party may appeal. If he correctly determines the negligence is not excusable, that puts an end to the motion. If he correctly determines the negligence is excusable, then he may in the exercise of his discretion grant or deny relief, and it is his ruling in this particular that is reviewable only on a showing of abuse of discretion. Hence, as might be expected, most of the cases in the reports have turned on whether the legal ruling below was correct[41] rather than whether the court had abused its discretion.[42] The question of an abuse of discretion thus becomes pertinent only[43] where, as in the instant case, the supreme court decides that the trial court in vacating the judgment correctly held the negligence to be excusable.

DAVID M. MCLELLAND.

Labor—Collective Bargaining Agreements—Union Liability for Damages Under the Taft-Hartley Act

On June 23, 1947, the Taft-Hartley Act[1] made labor unions liable in damages for the breach of collective bargaining agreements[2] and for injuries resulting from certain "unlawful" strikes and boycotts.[3] In both types of cases the injured party is provided with unobstructed

[38] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 963 (1898); Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896); State Bank, Ltd. v. Post Falls Land & Water Co., 29 Idaho 587, 161 Pac. 242 (1916). Movant must also show that he has a meritorious defense. Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946).

[39] Marsh v. Griffin, 123 N. C. 660, 31 S. E. 840 (1898); Griel v. Vernon, 65 N. C. 76 (1871); FREEMAN, *op. cit. supra*, note 31, §290 ("This discretion relates only to the question whether under the particular facts and circumstances disclosed the case is one which merits relief. . . . It has no relation to questions of law which may arise upon the facts, but such questions must, of course, be determined and be subject to review the same as any other matter of law.").

[40] 125 N. C. 185, 34 S. E. 269 (1899).

[41] Whitaker v. Raines, 226 N. C. 526, 39 S. E. 2d 266 (1946); Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); Wachovia Bank & Trust Co. v. Turner, 202 N. C. 162, 162 S. E. 221 (1931); Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930); Warren v. Harvey, 92 N. C. 137 (1885).

[42] Brown v. Hale, 93 N. C. 188 (1885); Kerchner v. Baker, 82 N. C. 169 (1880); Bank of Statesville v. Foote *et al.*, 77 N. C. 131 (1877).

[43] No case has been found wherein the trial judge denied the motion to set aside notwithstanding a legally correct ruling that movant's negligence was excusable.

[1] "Labor Management Act, 1947," 61 STAT. ——, 29 U. S. C. A. §141 (Supp. 1947).

[2] *Id.* §185. [3] *Id.* §187.

access to the federal courts to enforce his rights, and the union treasury is subject to execution on the judgment. The person who has been injured by an "unlawful" strike or boycott has the additional privilege of seeking his remedy in any other court with jurisdiction over the parties.

The amenability of unions in state courts has been chaotic. About one third of the states have statutes making unincorporated associations suable in their common names, but some of these statutes have been judicially restricted to include only "business" associations. In states without statutes on the subject the case law is even more confused. Some accord unions the common law immunity[4] of unincorporated associations, others utilize the devices of class suits or "waivable defect" or estoppel, while a few allow unions to be sued on grounds of policy and necessity.[5]

Whether a collective bargaining agreement be considered a treaty, or a mutually acceptable list of shop rules, or a common law contract has also been in a state of confusion.[6] Congress considered the divergence among the states as to the status of collective bargaining agreements and as to the suability of unions to be an interference with collective bargaining and thereby a burden on interstate commerce. Therefore, Congress took the next logical step in encouraging collective bargaining by recognizing such agreements as binding contracts and opening the federal courts to insure a remedy.

The minority report of the Senate Committee[7] attacked the constitutionality of the provision conferring upon the federal courts jurisdiction over suits for breach of contract "without regard to the citizenship of the parties."[8] Such a suit would have to come within one of two possible grounds of judicial power as defined and required by the Constitution.[9] There must be either diversity of citizenship, or the suit must be one "arising under [the] Constitution, [or] the laws of the United States," that is, it must involve a federal question. Since diversity of citizenship is not a prerequisite under the Taft-Hartley Act, the sole remaining source of judicial power is that of suits involving a federal question. The minority contended that suits on collective bargain-

[4] Hallman v. The Wood, Wire and Metal Lather's International Union, 219 N. C. 798, 15 S. E. 2d 361 (1941); Note, *Suability of Unincorporated Associations in North Carolina*, 25 N. C. L. REV. 319 (1947).

[5] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922); Busby v. Electric Utilities Employees Union, 147 F. 2d 865 (App. D. C. 1945); see generally: Witmer, *Trade Union Liability*, 51 YALE L. J. 40 (1941); Note, 33 CAL. L. REV. 444 (1945).

[6] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 492 (1940); GREGORY, LABOR AND THE LAW 378 (1946); HARRIS AND WILLIAMSON, TRENDS IN COLLECTIVE BARGAINING 58 (1945).

[7] SEN. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 14 (1947).

[8] 61 STAT. ——, 29 U. S. C. A. §185(a) (Supp. 1947).

[9] U. S. CONST. Art. III §2.

ing agreements would not meet the requirements of the federal question type of judicial power in that such suits would involve primarily questions of state law and questions of fact.

The issue will arise when a suit in which the judgment is enforceable against the union treasury and not against the individual members is brought by or against a labor union in its common name for damages on a collective bargaining agreement that Congress has declared binding. Under such a state of facts, will the suit qualify as one "arising under [the] Constitution, [or] the laws of the United States" and thereby invoke the judicial power of the federal courts?

An affirmative answer to the proposition is called for by *Osborne v. The United States Bank* in which Chief Justice Marshall said:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.
>
> "When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this entity a right to sue? . . . This depends on a law of the United States. . . . (This is an important question, and it exists in every possible case.)"[10]

The Act appears to give extraordinary privileges to a party bringing an action. The suit may be brought without regard to either diver-

[10] 9 Wheat. 738, 823 (U. S. 1824). *Accord,* Davis v. Slocumb, 263 U. S. 158 (1923); Tex. & Pac. R. R. v. Kirk, 115 U. S. 1 (1885); Lucking v. First National Bank—Detroit, 142 F. 2d 528 (C. C. A. 6th 1944) (distinguished the Gully case); Independence Shares Corp. v. Deckart, 108 F. 2d 51 (C. C. A. 3d 1939) (suit under the Securities Act which specifically gives district courts "jurisdiction to enforce liability created by this title"); Fishman v. Marcourse, 32 F. Supp. 460 (E. D. Pa. 1940) (action under the Fair Labor Standards Act in which the court disposed of the jurisdictional question by tersely stating that district courts have jurisdiction of cases under laws regulating commerce); McGoon v. Northern Pac. R. R., 204 Fed. 998 (E. D. N. D. 1913). *But cf.,* Gully v. First National Bank, 299 U. S. 109 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476 (1933); Gold Washing & Water Co v. Keyes, 96 U. S. 199 (1877); Costanzo Coal Mining Co. v. Weirton Steel Co., 150 F. 2d 929 (C. C. A. 4th 1945); Burke v. Union Pacific R. R., 129 F. 2d 844 (C. C. A. 10th 1942) (The last two cases followed the *Gully* case literally.).

The author is not unaware of the force and implications of Mr. Justice Cardozo's opinion in the *Gully* case. It is submitted that the *Gully* case is distinguishable from the *Osborne* case and inapplicable to suits under the Taft-Hartley Act. The *Gully* case interpreted the amount of jurisdiction conferred on the federal courts by the Act of 1875, 18 STAT. 470 (1875), 28 U. S. C. §41(1) (1927), but a suit under the Taft-Hartley Act will not rely on the Act of 1875, because jurisdiction of such suits is expressly conferred upon the federal courts by the Taft-Hartley Act itself: "Suits for violation of contracts . . . may be brought in any district court . . .", 29 U. S. C. A. §185(a) (Supp. 1947).

For a complete discussion of "federal question" jurisdiction, see: Forrester, *Federal Question Jurisdiction and Section 5,* 18 TULANE L. REV. 263 (1943); Chadbourne and Levin, *Original Jurisdiction of Federal Questions,* 90 U. OF PA. L. REV. 639 (1942); Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362 (1942).

sity of citizenship or amount in controversy in any United States district court having jurisdiction of the parties. A district court is deemed to have jurisdiction of a union either in the district where the union maintains its principal office or in any district in which the authorized agents of the union are acting for employee members. Service of any legal process upon an authorized agent is deemed to constitute service on the labor organization. A money judgment is enforceable against the union treasury but not the members.

Actually the foregoing are not drastic changes from the prior procedure. Previously federal courts entertained class suits by and against unions where the requisite diversity of citizenship was present. Theoretically complete diversity of citizenship of all the members had to exist.[11] However, in practice the requisite diversity might readily be obtained by proper selection of representatives, for only the citizenship of the representatives need appear.[12] Furthermore, since suits under the Act will involve a federal question, it was superfluous to waive the necessity of diversity of citizenship. As to not requiring any specified jurisdictional amount, it should suffice to point out that Congress has not established a jurisdictional amount for many types of suits.[13]

Since the *Coronado* case[14] and later by virtue of Federal Rule 17(b), suits to enforce a federal right have been brought in the common name of the unincorporated association. In passing, it is interesting to notice that Mr. Padway, the late general counsel of A. F. of L., testified at a hearing of the Judiciary Committee[15] which adopted the above Federal Rule, to the effect that unions no longer feared being sued in their common name, "because we, too, have to sue . . . to obtain our rights." When a judgment is recovered in a suit against an unincorporated association in its common name, the common property is subject to execution.[16] The Taft-Hartley Act insures against a recurrence similar to the *Danbury Hatters Case,*[17] where individual members of the union had their houses sold at execution to pay the judgment, by exempting the property of the individual members from the judgment. Such a limited liability of union members is similar to that enjoyed by stockholders of a corporation—a natural corollary of allowing the unions to be sued as an entity.

Service of process under the Act seems slightly more liberal than

[11] 2 MOORE'S FEDERAL PRACTICE 2100 (1938).
[12] International Allied Printing Trades Ass'n. v. Master Printers Union of N. J., 34 F. Supp. 178 (D. N. J. 1940).
[13] 25 STAT. 433 (1911), 28 U. S. C. §41 (1927).
[14] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922).
[15] *Hearings before the Judiciary Committee on H. R. 8892,* serial 17, 75th Cong., 3d Sess. (1938).
[16] 1 MOORE'S FEDERAL PRACTICE 314 (1938).
[17] Loewe v. Lawlor, 235 U. S. 522 (1914).

under the Federal Rules. The latter apparently requires valid service to be on a "process agent" by appointment or by law,[18] whereas under the Act any agent is sufficient. The provision with regard to the districts in which suits may be brought is fortunately unequivocal,[19] for, in the absence of a special venue statute, 28 U. S. C. A. §112 requires suits involving a federal question to be brought in the district where the defendant is an "inhabitant." The confusion which has resulted as to where a defending unincorporated association is an "inhabitant"[20] is avoided by the Act's explicit provisions concerning venue.

In 1902, Mr. Justice Brandeis, considered a friend of labor, declared: "The unions should squarely take the position that they are amenable to the law."[21] Mr. Padway testified in 1938 that labor no longer feared being sued as an entity.[22] In 1947, why do unions object to being sued for breach of contract when only the contracting employers or other unions may sue and only the common property of the union is subject to execution?

A partial reason may be that unions still have an inherent fear of lawyers and courts. This fear is not unfounded. In courts, the rights of unions may be determined on technicalities and not on the merits of the labor dispute. This is especially likely because presiding judges are fully equipped to be judges in courts of law but not necessarily statesmen in the field of labor relations.

Liability for damages resulting from wildcat strikes in breach of "no-strike" clauses has been attacked by the unions on the grounds that it imposes liability for acts beyond union control. It is a well known fact that unions have not always been successful in controlling the rank and file of their members. Moreover, it may be more difficult to obtain discipline in light of the provisions in the Taft-Hartley Act insuring the rights of individual employees[23] and discouraging union security agreements.[24] Although the Act expressly states that a union is "bound by the acts of its agent"[25] and that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling,"[26] the Act does not transform unions into insurers.

[18] FED. R. CIV. P., 4(d)(3).

[19] 61 STAT. ——, 29 U. S. C. A. §185(c) (Supp. 1947) (Suits may be brought in any district court having jurisdiction of the parties. Courts shall be deemed to have jurisdiction of unions either in the district in which it maintains its principal office or in any district where its agents are engaged in representing employee members.).

[20] United States v. Sutherland, 74 F. 2d 89 (C. C. A. 8th 1934).

[21] Address before the Economics Club of Boston, December 4, 1902.

[22] See note 16, *supra*.

[23] 61 STAT. ——, 29 U. S. C. A. §§141(b), 157, 158(a)(1), 158(a)(3), 158(b)(1), 158(b)(2), 158(b)(5), 159(a), 159(c)(1)(A).

[24] *Id.* §§158(a)(3), 158(b)(2), 158(b)(5), 159(e through h), 186(c)(4).

[25] *Id.* §185(b).

[26] *Id.* §§152(13), 185(e). These sections render inapplicable the test of union

Instead, unions, like employers, are subject to the common law rules of agency—"scope of employment, etc." A union member is not an "agent" solely by virtue of his membership.[27]

In former agreements the "no-strike" provisions have been so loosely drafted, *e.g.*, "The Union . . . agrees . . . there shall be no strikes, walk-outs, slow-downs or other interference with normal operation . . . ," that unions have apparently assumed the role of insurers. In the future such a consequence may be avoided by precisely defining in just which cases the union assumes responsibility.

Some unions have advocated refusing "no-strike" clauses, but others, like the Boilermakers—A. F. of L., say the presence or absence of no-strike clauses is immaterial, for arbitration machinery implies an obligation not to strike. On the question of the legality of refusing to insert a "no-strike" clause, the Senate Committee reported such a clause was a point to be bargained for.[28]

Unions are currently attempting to obtain a waiver of damage liability for breach of contract from employers. The availability of such waivers as valid defenses to damage suits is open to question. In other fields of litigation, although some courts have upheld waivers not to sue,[29] federal courts have held such waivers to be contrary to public policy and void.[30]

The clauses for waiver of damage liability which unions are currently attempting to secure may possibly be distinguished from the usual exculpation clause which confronts courts. In the first place, these waivers by employers are of unions' contractual liability, in contrast with the usual exculpation clauses which waive liability for negligence. The greatest distinction is that the parties are roughly equal in bargaining power.[31] According to press reports, in the Murray, the Ford and the International Harvester agreements with the UAW—CIO, the employers agreed to a partial waiver of damage liability in consideration of prompt specified action by the union to get wildcat strikers back on the job plus the right to fire the strikers through an impartial umpire. Thus the employer has traded his action for damages for uninterrupted production.

"agents" set forth in Section 6 of the Norris-LaGuardia Act. See Mr. Justice Frankfurter's dissent in United Brotherhood of Carpenters and Joiners of America v. United States, 67 Sup. Ct. 775 (March 10, 1947).

[27] 93 CONG. REC. 4561 (May 2, 1947).

[28] SEN. REP. No. 105, 80th Cong., 1st Sess. 18 (1947).

[29] Smith v. MacDonald, 37 Cal. App. 503, 174 Pac. 80 (1918); Kennon v. Sheppard, 236 Mass. 57, 127 N. E. 426 (1926).

[30] Gatliff Coal Co. v. Cox, 142 F. 2d 876 (C. C. A. 6th 1944); American Sugar Refining Co. v. Anaconda, 138 F. 2d 765 (C. C. A. 5th 1943). *See* Tobin Quarries v. Central Neb. Public Power and Irrigation Dist., 64 F. Supp. 200, 208 (D. C. Neb. 1946).

[31] Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COL. L. REV. 249 (1937).

Furthermore, the Conference Committee deleted a provision which made the breach of collective bargaining agreements an unfair labor practice.[32] From this action it might be inferred that Congress intended redress for breach of contract to be a personal privilege rather than an unwaivable enforcement device. Contrast the silence of the Taft-Hartley Act on this point with the Federal Employers' Liability Act wherein Congress expressly declared "any contract . . . to exempt [an employer] from any liability created by this chapter . . . shall be void."[33]

Limitation of the amount of damages may be another mode by which labor may protect itself against the ravages of damage liability. Nothing in the Act seems to prohibit bargaining for such a clause.

In contrast with contractual liability which may be minimized or totally avoided through bargaining, damage liability for "unlawful" strikes and boycotts (also unfair labor practices)[34] may be an unwaivable enforcement device. "Whoever shall be injured in his business or property" by an "unlawful" strike or boycott may sue the union in either the federal courts or the state courts. The language is comparable with the Sherman Act's provision for actions for treble damages. Although the actual damages are not augmented in the Taft-Hartley Act, damage liability, along with administrative cease and desist orders and court injunctions, will provide an important sanction for policing those outlawed labor practices.

This liability may prove detrimental to labor-management relations, if time and experience prove Congress went too far in outlawing all secondary strikes and boycotts without attempting to distinguish those which are unjustified from those justified by the union's "interest in a reasonable area of economic conflict."[35]

Like so many features of the Taft-Hartley Act, liability for "unlawful" strikes and boycotts is open to abuse. It may lead to a plethora of suits against unions. An ever present and potential culprit is the anti-union employer. He will hesitate before bringing a breach of contract suit against the union with which he bargains,[36] but he may have no qualms about bringing vexatious suits against a union with which he has no collective bargaining relations.

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[32] H. R. REP. No. 510, 80th Cong., 1st Sess. 41 (1947).
[33] 35 STAT. 66 (1908), 45 U. S. C. §55 (1943).
[34] 61 STAT. ——, 29 U. S. C. A. §158(b)(4) (Supp. 1947).
[35] It is submitted that the following cases involve boycotts of the latter type: Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th 1908); State v. Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904).
[36] The fact that no suits have been prosecuted under N. C. GEN. STAT. (1943) §1-97(6), which apparently authorizes suits against unions, during the four years since its enactment is indicative that employers do not lust to sue unions.

North Carolina's Archaic Coroner System

One of the most ancient of the common law offices to be transplanted to America from England was that of coroner.[1] As the office exists in North Carolina today there have been few changes in its functions since its introduction in spite of the fact that it has become antiquated and outmoded. Some American jurisdictions, having found themselves in a similar situation, and recognizing the inefficiency and the attendant dangers therein, have abolished the office of coroner and have replaced it with that of medical examiner. A brief survey of our present system as compared with the medical examiner system will, it is felt, reveal the desirability of making the change in North Carolina.

Origin and Development

The name coroner is derived from the Latin word "a corona," which being liberally interpreted means "for the crown," thus readily implying the early purposes of the office.[2] Its origin is usually traced to an ordinance of 1194,[3] but the office as we know it today came into being in 1275 when the Statute of 4 Edward I was enacted.[4] By this statute the coroner's duties were well defined and it was recognized that he had power to inquire into the death of any person, *super visum corporis;* to investigate treasure trove, deodans, and wrecks of the sea; to pronounce judgment of outlawries; and to act for the sheriff when there was just exception taken to that officer.[5]

The first law concerning coroners to be passed in the Carolina colony was in 1715 when the General Assembly declared the Statute of 4 Edward I to be in effect within the colony.[6] Then in 1776 the office was made a constitutional one[7] and in 1792 the provisions of the Statute of 4 Edward I were again declared to be the law of North Carolina.[8] The North Carolina Constitution of 1868 provided for the office as it exists, with statutory ramifications, today.[9] The specific provisions of our present statutory expression will be discussed on the following pages, but let it be pointed out here that other than to remove treasure trove from the coroner's jurisdiction,[10] and to transfer outlawry to the justice of the peace,[11] the functions of the office have changed but little since 1275.

[1] 18 C. J. S. 288, §2.
[2] 1 Co. Inst. 30.
[3] 1 Pollock and Maitland, Hist. Eng. Law 534 (2nd ed.).
[4] 2 Bacon Abr. 425.
[5] 4 Co. Inst. 271.
[6] Laws of 1715, c. XI.
[7] N. C. Const. (1776) §38.
[8] Martin's Collected Statutes (1792) c. 49, p. 13.
[9] N. C. Const. Art. IV, §24.
[10] See N. C. Gen. Stat. (1943) c. 82, giving authority over wrecks of the sea to the commissioner of wrecks.
[11] N. C. Gen. Stat. (1943) §15-48.

ELECTION, TERM OF OFFICE, QUALIFICATION

The coroner is elected every four years and serves until a successor is elected and qualified.[12] He may succeed himself. Vacancies in the office are filled by the board of county commissioners and the person so appointed, upon qualification, holds office until his successor is elected and qualified.[13] He is a county official whose jurisdiction is limited to the boundaries of the county in which he is elected,[14] and he may be required at any time by the county commissioners of that county to give a report, under oath, on any matters connected with his duties.[15]

The coroner is not required to demonstrate any special qualifications for election to office. There is no limitation regarding color, sex, or occupation of candidates for the office. It is only required that he be a voter and not fall within the disqualifications prescribed by the Constitution.[16]

Before entering on the duties of the office, the coroner must take an oath to support the Constitution of the United States,[17] the Constitution and laws of North Carolina,[18] and to demean himself faithfully to the duties of his office.[19] Should the coroner fail to take the oaths prescribed he is subject to a penalty of five hundred dollars and may be rejected from office by proper proceedings for that purpose.[20]

In North Carolina, as in all other American jurisdictions, the common law property qualification for holding office is now unknown. The public, however, is protected by the requirement that the coroner-elect file a bond for the faithful performance of his duties.[21] The statute requires that the coroner give a bond, with surety, in the sum of two thousand dollars payable to the state and approved by the board of county commissioners.[22] This statute, however, is considered directive rather than mandatory, and the failure of a coroner to file a bond does

[12] N. C. GEN. STAT. (1943) §152-1.
[13] N. C. GEN. STAT. (1943) §§152-1, 153-9(12).
[14] N. C. CONST. Art. IV, §24; N. C. GEN. STAT. (1943) §152-1.
[15] N. C. GEN. STAT. (1943) §153-9(10).
[16] See N. C. CONST. Art VI, §§7 and 8; and Art. XIV, §2. The constitution disqualifies from holding office all persons who deny the being of almighty God; all who have been convicted or have confessed their guilt under indictment of treason or felony, unless their citizenship has been restored; and all who have participated in a duel or a challenge thereto.
[17] See N. C. GEN. STAT. (1943) §11-6, as to form of oath to support the Constitution of the United States.
[18] See N. C. GEN. STAT. (1943) §11-7, as to form of oath to support the Constitution of North Carolina.
[19] N. C. CONST. Art. VI; N. C. GEN. STAT. (1943) §152-2. See N. C. GEN. STAT. (1943) §11-11 as to form of oath to faithfully execute duties of office.
[20] N. C. GEN. STAT. (1943) §128-5. However, it has been held that the taking of the oath of office is not an indispensable criterion, for the office may exist without it. See State v. Stanley, 66 N. C. 60 (1872); State v. Patrick, 124 N. C. 651, 33 S. E. 151 (1899).
[21] N. C. GEN. STAT. (1943) §152-3.
[22] For local modification in Yancy County reducing the required bond to 500 dollars see Session Laws of N. C. 1945, c. 271.

not impair the validity of his official act as *de facto* coroner, in reference at least to third persons.[23] It is also provided that if the coroner presumes to discharge any duty of his office before executing the required bond, he is liable to a forfeiture of five hundred dollars, to the use of the state, for each attempt so to exercise his office.[24] It is required that the bond be approved, certified, registered, and filed as are sheriffs' bonds.[25] Any person injured by the neglect, misconduct, or misbehavior in office of the coroner may bring suit against him and his sureties upon his bond without any assignment thereof; and the coroner and his sureties are liable to the person injured for all acts done by virtue of, or under color of his office.[26]

A special coroner is an officer of comparatively recent origin, apparently being unknown to the common law. In North Carolina it is now provided by statute that the clerks of the superior court have certain emergency appointive power whenever there is a temporary or permanent vacancy in the office of coroner.[27] This emergency appointive power may be exercised only when the coroner is absent from the county, or is for any reason unable to hold an inquest when necessary, or when a vacancy in the office of coroner has not been filled by action of the county commissioners, and, it is made to appear to the clerk that a deceased person whose body has been found within the county probably came to his death by criminal act or default of some person. Whenever the clerk appoints a special coroner under any of the aforedescribed conditions the appointee is merely required to be a "suitable person,"[28] but he is vested with all the powers and duties conferred upon the regular coroner in respect to holding inquests over dead bodies, and is subject to the penalties and liabilities imposed upon the regular coroner in that respect.[29]

Powers and Duties

The coroner's office is partly ministerial,[30] and partly judicial in character.[31] His principal duty is to make an investigation into every "sudden or unnatural death" occurring within the county.[32] It is specifically provided by statute that whenever it appears that any deceased person came to his death by the criminal act or default of some person,

[23] Mabry v. Turrentine, 30 N. C. 201 (1847).
[24] N. C. Gen. Stat. (1943) §109-2.
[25] N. C. Gen. Stat. (1943) §152-4; see N. C. Gen. Stat. (1943) §153-9 (11) as to procedure for approving bonds of county officers.
[26] N. C. Gen. Stat. (1943) §109-34; McRae v. Evans, 13 N. C. 383 (1830).
[27] N. C. Gen. Stat. (1943) §§152-1, 153-9(12).
[28] *Ibid.*
[29] N. C. Gen. Stat. (1943) §152-6.
[30] Yeargin v. Siler, 83 N. C. 348 (1880).
[31] State v. Knight, 84 N. C. 790 (1881).
[32] *Ibid.* The court cited as its precedent the ancient English case of *Rex. v. Ferrand,* 3 B & A 260.

the coroner must go to the body and make an investigation as to: (1) when and how the deceased came to his death; (2) the name of the deceased; and (3) all the material circumstances attending the death.[33] In this respect it is a curious fact to notice that, although the statute requires the coroner to make an investigation whenever it *appears* that there has been a death by criminal act or default, there is only one[34] specific directive in the statutes requiring any individual, public or private, or any organization, to notify the coroner of that death. This lack of requirement of notification coupled with the fact that there is no restriction in North Carolina on removing dead bodies[35] is obviously a serious handicap to the efficient execution of the coroner's most important function.

If, upon making his personal investigation, the coroner is not satisfied that death resulted from natural causes, or that no person is blamable in any respect in connection with the death, he may call a jury and proceed to hold an inquest.[36] He is required to hold an inquest, regardless of his personal investigation, if an affidavit is filed with him indicating blame in connection with the death of the deceased.[37] The jury for the inquest must be composed "of six good and lawful men, freeholders, who are otherwise qualified to act as jurors, who shall not be related to the deceased by blood or marriage, nor to any person suspected of guilt in connection with such death."[38] The jurors are summoned by the sheriff,[39] and are sworn in the presence of the body.[40] After the oath has been given, and the jury has had a view of the body, the hearing may be adjourned to other times and places and the body of the deceased need not be present at such further hearing.[41] It is within the power of the coroner,[42] or of any juror,[43] whenever he deems it necessary to the better investigation of the cause or manner of death, to summon a physician or surgeon to make whatever examination as appears proper. The coroner must summon a physician even though he does not deem it necessary if requested to do so by the solicitor of his district, or by any member of the family of the deceased, or by counsel for the accused.[44] In any event, when the coroner is called

[33] N. C. GEN. STAT. (1943) §152-7(1).
[34] N. C. GEN. STAT. (1943) §130-80 requires the county registrar of statistics to refer to the coroner notice of any death which has occurred without medical attention and which he has reason to believe was due to unlawful act or neglect.
[35] OP. ATTY. GEN. OF N. C. (March 1946).
[36] N. C. GEN. STAT. (1943) §152-7(1).
[37] *Ibid.*
[38] N. C. GEN. STAT. (1943) §152-7(2).
[39] N. C. GEN. STAT. (1943) §152-11.
[40] State v. Knight, 84 N. C. 790 (1881).
[41] N. C. GEN. STAT. (1943) §152-8(9).
[42] N. C. GEN. STAT. (1943) §§152-5, 152-7(6); Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938).
[43] N. C. GEN. STAT. (1943) §152-5.
[44] N. C. GEN. STAT. (1943) §152-7(6).

on to summon a physician, he need not do so if he is a physician or surgeon himself, but may make the examination personally.[45]

The right to order an autopsy is an important incident to the coroner's duty of holding an inquest[46] and may be exercised by him whenever either he or a majority of the coroner's jury deem it necessary to aid them in discovering the cause of death.[47] Although it is a general rule that the autopsy of a dead body without the consent of those entitled to its custody is a tort, the rule is inapplicable to the coroner and his inquest.[48] However, the right to order an autopsy is subject to certain limitations and the North Carolina statute has been interpreted as not authorizing the coroner to order an autopsy where there is no suspicion of foul play.[49] He becomes civilly liable when he does so.[50]

When an inquest is held, if it appears that any person is guilty of any crime in connection with the death, the coroner must try to ascertain who was guilty, either as principal or accessory, as well as the cause and manner of the death,[51] and has the power to have summoned any persons necessary to complete the inquiry,[52] as well as to issue a warrant for all culpable persons.[53] The warrant is served by the sheriff or other lawful officer of the county in which the dead body is found.[54] If it becomes necessary to arrest persons in another county, the coroner of the county in which the body was found may issue his process, under seal, to the sheriff or other lawful officer of the other county, for service.[55] When the accused has been brought before the coroner the inquiry proceeds as in the case of preliminary hearings before justices of the peace.[56] If it appears to the coroner and the jury that the accused is probably guilty of a capital crime he is committd to jail.[57] If it appears that he is guilty of a lesser crime the coroner may fix his bail.[58] All persons found probably guilty in such a hearing, and who are denied bail by the coroner, are delivered to the keeper of the common jail by the sheriff or other lawful officer acting at the inquest.[59]

This hearing by the coroner and his jury is held to be in lieu of

[45] *Ibid.*
[46] See 18 C. J. S. 297.
[47] N. C. GEN. STAT. (1943) §90-217.
[48] WEINMAN, LAW OF CORONERS AND MEDICAL EXAMINERS (Bull. Nat. Research Council, No. 83, 1931) 111.
[49] Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938).
[50] *Id.* at 616, 197 S. E. at 164.
[51] N. C. GEN. STAT. (1943) §152-7(3).
[52] N. C. GEN. STAT. (1943) §152-7(2).
[53] N. C. GEN. STAT. (1943) §152-7(4).
[54] N. C. GEN. STAT. (1943) §152-11.
[55] *Ibid.*
[56] See note 53 *supra.*
[57] See N. C. GEN. STAT. (1943) §§15-125 through 15-127 for order of commitment.
[58] See note 53 *supra.*
[59] *Ibid.*

any other preliminary hearing and the case is immediately docketed by the clerk of the superior court.[60] The accused, however, is not denied the right of habeas corpus.[61] The coroner has power to require all material witnesses, who are not themselves culpable, to enter into recognizances, with sufficient surety, to appear at the next term of the superior court and give evidence; and he may commit to jail such witnesses who refuse to recognize as directed.[62]

Immediately upon information of a death within his county under such circumstances as may in his own opinion necessitate an investigation, the coroner is required to notify the solicitor of his district and to make such additional investigation as he may be directed to do by the solicitor;[63] and to permit the solicitor or any one designated by the latter to be present at the inquest to examine and cross-examine the witnesses.[64] The family of the deceased and the accused person may also have counsel present who may examine and cross-examine the witnesses.[65] However, neither the solicitor, counsel for the accused, nor counsel for the family of the deceased may argue the case to the coroner's jury.[66] The coroner may, within his discretion, exclude the public from the hearing.[67]

The statute directs the coroner to reduce to writing all the testimony and to have each witness sign his own testimony; the coroner then attests it with his seal.[68] If the solicitor so directs, the testimony must be taken stenographically.[69] Here again the witnesses are required to sign their testimony and the coroner attests their signature with his seal.[70] However, in practice these directions are seldom carried out.[70a]

As a general rule the proceedings before the coroner are not admissible evidence on a trial for homicide in North Carolina.[71] However, it has been indicated by a dictum of the North Carolina Supreme Court that the examination of a witness taken at a coroner's inquest would be admissible evidence if there was proof at the trial that the witness had died since the inquest but prior to the trial.[72] This seems to indi-

[60] N. C. GEN. STAT. (1943) §152-10. This is but a statutory restatement of the common law. See CLARK, CRIMINAL PROCEDURE 88 (2nd ed. 1918).
[61] N. C. GEN. STAT. (1943) §152-10.
[62] N. C. GEN. STAT. (1943) §152-7(5).
[63] N. C. GEN. STAT. (1943) §152-7(7).
[64] *Ibid.*
[65] *Ibid.*
[66] OP. ATTY. GEN. OF N. C. (May 1935).
[67] OP. ATTY. GEN. OF N. C. (September 1932).
[68] N. C. GEN. STAT. (1943) §152-7(10).
[69] *Ibid.*
[70] *Ibid.*
[70a] See note 92 *infra.*
[71] State v. Pritchett, 106 N. C. 667, 11 S. E. 357 (1890); State v. Taylor, 61 N. C. 508 (1868); State v. Young, 60 N. C. 126 (1863).
[72] State v. Taylor, 61 N. C. 508 (1868).

cate that since the coroner acts as an examining magistrate[73] his proceedings may be certified to the court and the testimony of a witness taken at the inquest be used as substantive evidence, as provided by statute,[74] where the witness has since become incapacitated by insanity or illness, or has died, or by connivance of the defendant has removed from the jurisdiction, and if the defendant was present at the inquest and had an opportunity to cross-examine the disposing witness.[75] However, the North Carolina court takes the minority view[76] in holding inadmissible the examination, even though in writing, of a witness taken at a coroner's inquest when the witness is merely temporarily absent from the county at the time of the subsequent trial.[77] The court has also held inadmissible, as hearsay, testimony of an agent of a railroad company given at a coroner's inquest because given after having completed the acts within the scope of his agency and therefore not part of the *res gestae*.[78] However, it is provided by statute that testimony taken at a coroner's inquest, if signed and attested under seal, may be received as competent evidence in all courts for the purpose of contradiction or corroboration of the witness who made it.[79]

During the inquest the accused himself may be examined, but the examination must not be upon oath, and before it is commenced the accused must be informed by the coroner of the charge against him and that he is at liberty to refuse to answer questions that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.[80] If the accused is sworn[81] or is not properly cautioned, his answer on the examination cannot be used against him.[82] The statute does not apply when the accused testifies at his own request,[83] or when his statements are made voluntarily before the examination begins.[84]

The coroner also possesses certain police powers which he may exercise in a limited way. Thus he may act to preserve the peace by assuming the duties of the sheriff if at any time there is no person qualified

[73] State v. Matthews, 66 N. C. 106 (1872).
[74] N. C. GEN. STAT. (1943) §15-100.
[75] For elaboration of this point see STANSBURY, NORTH CAROLINA EVIDENCE 145 (1st ed. 1946).
[76] 40 C. J. S. 1289, §309.
[77] State v. Grady, 83 N. C. 643 (1880).
[78] Southerland v. Wilmington and Southern R. R., 106 N. C. 100 (1890); Henderson v. Atlantic C. L. R. R., 159 N. C. 581, 75 S. E. 1092 (1912).
[79] N. C. GEN. STAT. (1943) §152-8.
[80] N. C. GEN. STAT. (1943) §15-89. Although this section as written refers only to magistrates and makes no specific mention of coroners, the Court, in State v. Matthews, 66 N. C. 106 (1872), construed it as extending to coroner's inquests since the coroner acts as examining magistrate.
[81] State v. Parker, 132 N. C. 1014, 43 S. E. 830 (1903); State v. Vaughan, 156 N. C. 615, 71 S. E. 1089 (1911).
[82] State v. Matthews, 66 N. C. 106 (1872).
[83] State v. Hawkins, 115 N. C. 712, 20 S. E. 623 (1894).
[84] State v. Conrad, 95 N. C. 666 (1886).

to act in that capacity in the county, and until some person is appointed sheriff the coroner is vested with all the powers, penalties, and liabilities of the office of sheriff.[85] Or, if at any time the sheriff of a county is interested in or a party to any court proceeding, it is proper that the summons be addressed to and served by the coroner.[86] Conversely, if the coroner is interested in or a party to any proceeding and there is no sheriff, then the clerk of the court from which the proceeding issues is directed, by statute, to appoint some suitable person to act as special coroner to execute the process.[87] The words, "any proceedings in any court," contained in the statutory provision for deputizing special officers where the coroner and/or sheriff is interested have been given literal interpretation and is held applicable even to courts of justices of the peace as well as to the higher courts.[88]

CRITICISM

It is believed that the ancient and honorable office of coroner, which has undergone so little change in this jurisdiction since the very birth of our state, has become antiquated and outmoded by advances in both the fields of medical science and administration of justice—advances with which the very structure of the office has prevented it from keeping step. This has happened in spite of legislative attempts to the contrary, and largely because those legislative attempts have not been far reaching enough in consequence.

The most important duty of the coroner, the investigation of deaths in which an element of violence or criminal neglect is suspected, is medical in character. In medico-legal cases the necropsy, as a rule, requires greater attention to detail than in other cases of death. In many cases it requires a thorough knowledge of anatomy, toxicology, *materia medica,* chemistry, and in some cases microscopic or immunological studies. Pathology is especially necessary in those cases where a considerable length of time has elapsed between the primary injury and the fatal result. In a criticism of the office of coroner as it existed in Texas in 1941, where many of the office's functions were similar to those in North Carolina today, the author[88a] used as a specific example of the need for scientifically trained medical examiners to take over the medical functions of the office of coroner, those cases in which the unexplained death is a result of poisoning. In pointing out the exceedingly

[85] N. C. GEN. STAT. (1943) §§152-8, 162-5. However, it has been held that the failure of the county commissioners to declare the office of sheriff vacant upon the insanity of the occupant only authorized the coroner to perform the duties of sheriff proper and did not cast upon him the right to collect taxes. See Somers v. Commissioners, 123 N. C. 582, 31 S. E. 873, 68 ASR 834 (1898).

[86] N. C. GEN. STAT. (1943) §152-8; State v. Baird, 118 N. C. 854, 24 S. E. 668 (1896); Bowen v. Jones, 35 N. C. 25, 55 Am. Dec. 426 (1851).

[87] N. C. GEN. STAT. (1943) §152-8.

[88] Baker v. Brem, 127 N. C. 322, 37 S. E. 454 (1900).

[88a] Lockhart, *The Antiquated Office of Coroner,* 4 TEX. B. J. 233 (1941).

difficult task of diagnosing poisoning he explains: "This arises from the fact that, with the exception in most cases of corrosives (as a class) and of strychnine, the symptoms produced by poisons are not clearly characteristic. Even the most experienced observer cannot always with absolute certainty distinguish the symptoms of poisoning from the symptoms of disease, and to the layman they may appear identical. There are authentic cases where real poisoning has occurred in which the poison given produced much the same symptomatology as a natural disease which was epidemic at the time."[89] Poisoning as a cause of death is not alone in surrounding itself with misleading external appearances. Others include contusions, abortions, concussions, blows to the viscera, asphyxiation, and suffocation. Numerous more will readily occur to the scientifically trained medical mind. Still other types of death, the anatomical evidences of which are frequently misleading, include suspended bodies and drowning. Professor Steward in cautioning physicians assisting in post-mortems quotes a case where it was claimed that the deceased was drowned, but where on the third post-mortem, a bullet which had entered the head through the opening in one of the ears, was found in the brain, and the murderer subsequently convicted and executed.[90] The external appearances of shock are also deceiving, as are wounds received after death has already occured. The difficulties facing the coroner in the exercise of his medico-legal function are by no means confined to the situations set out above; those are but examples of his most frequently occurring problems.

It will doubtless be argued that those difficulties have been palliated by the statutes[91] in extending to the coroner and his jury the privilege of soliciting medical assistance whenever it is deemed necessary. But, the statute is in effect a legislative recognition of the inefficiency of the present system. It must be remembered that the privilege is an optional one, the use of which is exercised only after an investigation of the external appearances of the deceased and the surrounding circumstances of the death—factors which, as has already been pointed out, are misleading and deceptive. The privilege of medical assistance then, even when utilized, is an inversion of the proper order of inquiry. Instead of first inquiring into the death by scientific medical approach and from the discoveries thus made, interpreting the surrounding circumstances, the coroner examines first the surrounding circumstances and from his layman's point of view attempts to pronounce the cause of death. Even when a physician is called in he is all too frequently handicapped by inadequate facilities to properly conduct a post-mortem. The fact still remains that the first question to be answered by the coroner's inquiry

[89] *Ibid.*
[90] STEWARD, LEGAL MEDICINE 84 (1st ed. 1910).
[91] N. C. GEN. STAT. (1943) §§152-7(6), 152-5.

is: What was the cause of death? It is obvious that consistent accuracy can be obtained only when the answer is given by competent, scientifically trained medical examiners, supported by all the facilities of the medical profession.

Look now at the coroner as an administrator of justice. Once the cause of death has been ascertained, his function becomes judicial and with the crude machinery of his court he must decide what person, if any, is responsible for the death. In so doing he attempts to act as a criminal investigator, a position for which he has slight capacity due to his inadequate skill, training, and equipment. In initiating steps for the apprehension of the accused and in making commitments he acts as a magistrate. All these are functions which, pertaining to the serious matter of homicide, could best be executed by a skilled and practiced trial lawyer. It logically follows then that the county prosecutor, whose purpose it is to protect society against crime by the prosecution of offenders, is the proper officer for such duties.

As the office now exists there are few of the coroner's official acts which do not have to be done over again or which can be done at all without the assistance of the police and the district solicitor or his representative. It is significant that the coroner is required to notify the solicitor whenever it appears necessary to hold an investigation; a provision apparently intended to insure that the state be represented at the inquest by qualified legal counsel. This too is legislative recognition of the present inefficiency of the coroner system.

The coroner's investigation is of comparatively small value in further handling of the case other than to provide proof of death and to allow the coroner to act as commiting magistrate. The slight use of evidence taken at the inquest has already been indicated. Even when allowed, although preservation of the records of each investigation is required by statute, practice has proved them to vary from detailed reports to mere notations and they are nowhere collected or correlated.[92]

Many important steps in the process of investigating a homicide are left entirely to the coroner's discretion. In his discretion rests the decision as to whether an inquest is necessary or not and so there is little to impede a coroner with improper motives from declaring an inquest unnecessary and authorizing a speedy burial. The selection of the jurors is left almost entirely to his discretion. As has already been seen, the only limitations imposed on his selections are that they be freeholders, unrelated by blood or marriage to the accused and otherwise qualified as jurors. This gives the coroner practically a free hand and he may "pack" his jury so that the verdict will be just as he wants it to be. This situation is certainly incongruous for it will be recalled

[92] Coates, *Accounting for Crime,* 16 N. C. L. Rev. 364 (1938).

that the jury is regarded by law as an essential part of the inquest. Such uncontrolled authority in the hands of any officer or office is conducive of abuse.

It is also a regrettable fact that the coroner system, as effected in North Carolina today, is often the victim of the less desirable features of the American political system. In the transplantation of the English coroner system to America its essential redeeming feature was lost when the office was made elective and thus made subject to the whims of politics and to the importunities of the office seeker. Professional qualifications are frequently brushed aside for political expediency, and to the faults inherent to an anachronistic institution are added those of an inefficient official. That the results are subversive of justice can be denied by no one.

CONCLUSION

That the above described defects and inefficiency of the present coroner system are widely recognized wherever it is found is evidenced by the numerous studies and criticisms that have been made throughout the United States by both the medical and legal professions.[93] This survey of the North Carolina coroner system, as well as those just cited, have all led to the inevitable conclusion that the present coroner system as an institution of government is wholly unsuited to the needs of the present day. That reform is readily available by abolition of the present system and the adoption of a medical examiner plan, which would transfer the legal functions of the office to already existing agencies, has been recognized in several progressive jurisdictions.[94]

The advantages of similar action in North Carolina are apparent. The judicial duties should be vested in the county prosecutor and the medical duties in a medical examiner who would operate as a part of the county health office. In this manner the best of equipment, training and skill of both the legal and medical professions could be concentrated on solving those problems which today are too frequently muddled be-

[93] See Schultz and Morgan, *The Coroner and the Medical Examiner* (BULL. NAT. RESEARCH COUNCIL, No. 64, 1928); Weinnman, *op. cit. supra* note 48; Lockhart, *op. cit. supra* note 88a; Breyfogle, *Law of Missouri Relating to Inquests and Coroners;* 10 Mo. L. REV. 34 (1945); Wickersham, *Should the Office of Coroner be Abolished,* 1 MINN. L. REV. 197 (1917); STEWART, LEGAL MEDICINE, c. V. (1st ed. 1910).

[94] Massachusetts as early as 1877 abolished the office of coroner and created that of medical examiner. For present status of the office in that jurisdiction see MASS. ANN. LAWS (1944) c. 38 §§1 through 22.

The office of coroner was abolished in New York City in 1915 and the characteristic features and powers of the office were omitted by the same act in establishing the office of medical examiner. See N. Y. LAWS 1915, c. 284. Statute upheld in *In re* Senior, 221 N. Y. 414, 117 N. E. 618 (1917).

Other leaders in reforming the coroner system include Maryland (see MD. ANN. CODE GEN. LAWS [Flack, 1939] Art. 22, §§1 through 8); and Connecticut (see CONN. GEN. STAT. [1930] §§240 through 263).

yond solution by an institution which is fatally handicapped by its own antiquity.

The medical examiner should be appointed by the board of county commissioners and only physicians in good standing should be eligible for the office. As part of the county health department he would be assured of readily accessible medical facilities, such as equipment for microscopic examinations and chemical analysis, to assist him in his medical examinations. In cases requiring more extended facilities, which may not be provided by the county health office, then he should have resort to the laboratory and clinical facilities of the departmental and educational institutions of the state. In the thickly settled communities of the state, where deaths and homicides are more frequent, a permanent medical examiner would be necessary, but in the more sparsely settled counties the county health officer himself should act as medical examiner. Every death which occurs unattended by a physician or under suspicious circumstances should be investigated immediately by the medical examiner. His notification of death should be contemporaneous with that of the police, so far as is practical, and his investigation and report made before the police investigation is begun. This delay in the commencement of the police investigation must of course be confined to practical limits.

As soon as the medical examiner has completed his examination of the corpse and made his report, the office of the county prosecutor should be ready to throw all of its training, experience and professional ability into the criminal investigation of the death, if and when the medical examiner's report indicates that such an investigation is necessary. The investigation in such hands would be pertinent and not subject to the suggested inadequacies of the coroner's inquest. The coroner's jury would be no longer necessary. The naïve layman would be replaced by expert technicians in the observation of places and persons, in discovery, preservation and interpretation of fingerprints and other traces of human activity, in specialized photography and in general criminal investigation. Further, these technicians would be armed with adequate equipment for the examination and analysis of evidences of crime such as scientific analysis of projectiles and of ballistic imprints. Such facilities are all now available in the State Bureau of Investigation and under the present statute may be obtained upon request to the governor of the state.[95] But a slight modification of the present statute would be required to make these facilities available to the county prosecutor in cases of homicide. Such a move would open another avenue to the detection and restraint of crime.

The comparison of the coroner system with the medical examiner

[95] N. C. GEN. STAT. (1943) §§114-12 through 114-18.

plan is so greatly to the advantage of the latter that it is surprising that the medical examiner plan has not already been adopted in North Carolina, the state which has been the Southern leader in so much progressive legislation. The explanation probably lies in the fact that the coroner is a part of our well established political scheme; that the entire subject of forensic medicine is so highly technical that the layman does not have the proper conception of its importance; and in the public inertia toward constitutional changes. It should be remembered that not only is the medical examiner plan overwhelmingly more efficient than the coroner system, but that it has proven more economical financially.[96]

That the change be made cannot be too strongly urged. The North Carolina public health program already covers ninety-two of its one hundred counties. Part of this public health program is supported by federal appropriations, it is true, but it is the opinion of the public health authorities that the federal government will voice no objection to the installation of the medical examiner plan as a part of the North Carolina public health system. Seventy counties already have county prosecutors.[97] Sixty-six of these seventy counties have a public health program. It is suggested that the medical examiner plan be put into effect in these counties as soon as the necessary constitutional amendment can be made and that the present coroner system be continued in the remaining thirty-four counties until adequate local provision has been made for a change.

Summary of Recommendations

It is recommended:

(1) That the North Carolina Constitution be amended to abolish the office of coroner.

(2) That the medical functions of the present coroner's office be vested in the office of medical examiner.

(3) That the office of medical examiner be a part of the county health organization and be compensated by a salary which will attract men of genuine scientific training and ability.

[96] See survey of comparative costs of the two systems by Schultz and Morgan, *supra* note 93.

[97] The counties are: Alamance, Anson, Beaufort, Bertie, Bladen, Cabarrus, Caldwell, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Iredell, Johnston, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Surry, Tyrrell, Union, Vance, Wake, Warren, Washington, Wayne, Wilson.

(4) That in addition to the facilities of the county health department, all the laboratory and clinical facilities of the educational and departmental institutions of the state be made available to the medical examiner.

(5) That the non-medical duties of the coroner's office be vested in the office of county prosecutor, and that the full facilities of the State Bureau of Investigation be made available to him, when necessary, in investigating a homicide.

JOHN R. JORDAN, JR.

LEGISLATION 1947—ESCHEATS

After the legislative summary in the June issue[1] of the REVIEW was in press the position of the Comptroller of the Currency with reference to the new North Carolina statute was clarified in letters from his office. The following excerpts are of interest:

> "We think that this North Carolina statute is inapplicable to funds held by the United States in trust in the District of Columbia under the provisions of the National Bank Act, a code by itself for winding up insolvent National banks. Such funds respond for Federal Government obligations incurred in and to be performed in the District of Columbia and not for debtor obligations of National banks incurred in and to be performed in the State where the bank was located. The Government's obligation is evidenced in substantial part by its outstanding negotiable instruments that may be in the hands of holders for value located in or out of North Carolina. All recognized claims are assignable. The receiverships of National banks that became insolvent in North Carolina have long since been closed and no funds remain for administrative or other expenses."[2]
>
> ". . . the funds necessary to respond for all claims proved to the Comptroller's satisfaction under Title 12 U. S. C. 194 and for delivered and undelivered dividend checks thereon are retained by the Comptroller indefinitely. Such funds cannot be used to enlarge payments to other claimants and cannot be paid to shareholders."[3]

Of the above two things may be said: (1) So far as I can learn the practice has been to deposit funds realized from insolvent national banks in another bank in the same city or vicinity and to draw them out to claimants by the receiver's check on such local depository (although at the termination of the receivership years later the remaining undisbursed funds may be transferred to the Comptroller's credit with the U. S. Treasury, with a Federal Reserve Bank or with some bank in the District of Columbia). It seems to me, therefore, a novel idea that the "funds (are) held by the United States in trust in the District of Columbia," (though that might be considered as the domicile of the United States). It is also a surprising view that the obligations to claimants are incurred in the District, whatever may be thought as to the place of

[1] Survey of statutory changes, 25 N. C. L. REV. 421 (1947).

[2] Letter of C. B. Upham, Deputy Comptroller, to L. P. McLendon, Chairman of the Escheats Committee of the Board of Trustees of the University, May 21, 1947.

[3] Letter of R. B. McCandless, Deputy Comptroller, to M. S. Breckenridge, June 5, 1947.

performance. (2) Since the Comptroller does not recognize the tontine theory referred to in the note[4] appearing in the June, 1947 REVIEW to the full extent but retains the unpaid funds "indefinitely," the administrative practice is in effect a limited escheat to the Federal Government without specific statutory basis.

[4] Survey of statutory changes, 25 N. C. L. REV. 421, 423, footnote 13 (1947).