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**Pleading—Amendments Changing the Cause of Action—
Limitations of Action—New Statute Proposed**

In a recent West Virginia case¹ the plaintiff, a town employee, sued to recover for personal injuries sustained when he fell from the back of the town garbage truck, alleging the negligence of the town in furnishing defective equipment and the negligence of the driver, also a town employee. A demurrer to the complaint was sustained on the grounds of immunity in the performance of governmental function. The West Virginia Supreme Court affirmed.² Plaintiff amended his complaint to state a cause of action for failure to maintain the streets.³ The defendant moved to strike that portion of the amendment which alleged failure to maintain the streets as it stated a new cause of action, and demurred to the remainder. The motion was granted and the demurrer sustained. On appeal the court followed the West Virginia rule that an amendment stating a new cause of action cannot be allowed. The original complaint stated a cause of action at common law and the amendment stated a cause of action under the statute.

This case raises the questions: (1) What is an admendment that changes the cause of action? and (2) When will an amendment that changes the cause of action be allowed?

A prerequisite to answering the first question is a discussion of the much debated and variously defined term "cause of action." The authorities can be divided into two general categories:

(1) The liberal view—Judge Charles E. Clark says: "The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons."⁴ The essence of this view is that the *facts* of a transaction or occurrence, instead of the right or rights violated, constitute the cause of action and that each cause is limited only by trial convenience, not by the rights involved.

(2) The strict view—Professor John N. Pomeroy says: "The cause of action . . . will . . . always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."⁵ The essence of this view is that the right violated

¹ Hayes v. Town of Cedar Grove, —, W. Va. —, 37 S. E. (2d) 450 (1946).

² 126 W. Va. 828, 30 S. E. (2d) 726, 156 A. L. R. 702 (1944).

³ W. VA. CODE ANN. (1943) §1597 (9). (Makes the town liable for failure to properly maintain the streets.)

⁴ Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 837. Various definitions of the code cause of action are also discussed in CLARK, *CODE PLEADING* (1928) §19. For a critical analysis of Clark's view see Wheaton, *The Code "Cause of Action": Its Definition* (1936) 22 CORN. L. Q. 1.

⁵ POMEROY, *CODE REMEDIES* (5th ed. 1929) §347. In the same section it is said, ". . . the primary right and duty and delict or wrong combined constitute the

constitutes the cause of action and that each cause is limited to one primary right and the violation thereof.

In determining whether or not an amendment states a new cause of action, over the years the North Carolina Supreme Court has repeatedly adopted the liberal view. Dissenting in *Jones v. Mial*⁶ (1878) Chief Justice Smith pointed out, "The complaint which supersedes the declaration is required to contain only a plain and concise statement of the facts constituting a cause of action. . . ." This dissent led to a reversal on rehearing.⁷ In *Lassiter v. Norfolk & C. R. R.*⁸ (1904) Chief Justice Clark said, "The 'cause of action' is the 'statement of facts,' upon the happening or non-happening of which the plaintiff bases his action." In *McLaughlin v. Raleigh, C. & S. Ry.*⁹ (1917) after citing five North Carolina cases Justice Allen said, "These authorities and others also hold that the cause of action is the wrong done—here, the burning of the lumber. . . ." As recently as 1944, in *Nassaney v. Culler*,¹⁰ Justice Seawell said, "But in applying the test [whether an amendment states a new cause of action] we must regard the factual situation and the manner in which it develops rather than technical labels."

The rule that a defective statement of a good cause of action may be cured by amendment,¹¹ and the rule that the original complaint may cause of action in the legal sense of the term, and as it is used in the codes of the several states."

Judge Phillips appears to place the same emphasis on the right-duty relationship. "The formal statement of operative facts showing [plaintiff's] right and [defendant's] delict shows a cause for action on the part of the state and in behalf of the complainant, and is called, in legal phraseology, a cause of action." PHILLIPS, CODE PLEADING (2d ed. 1932) §187.

Prof. McCaskill: "It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded." McCaskill, *Actions and Causes of Actions* (1925) 34 YALE L. J. 614, 638.

⁶ 79 N. C. 164, 168 (1878).

⁷ 82 N. C. 252 (1880). Plaintiff was allowed to plead a special contract and recover on *quantum meruit* without amendment.

⁸ 136 N. C. 89, 90, 48 S. E. 642, 643 (1904). Plaintiff's intestate was killed in Virginia. In this action for wrongful death, plaintiff failed to allege the Virginia statute. Trial court denied plaintiff's motion to amend and set forth Virginia statute as such an amendment was a new cause of action. *Held*: Amendment should be allowed to perfect the statement of a good cause of action. *Note*: Since passage of N. C. GEN. STAT. §8-4 in 1931, this problem would not arise. This statute requires the courts to take judicial notice of the laws of other states. 223 N. C. 360, 26 S. E. (2d) 911 (1943).

⁹ 174 N. C. 182, 185, 93 S. E. 748, 749 (1917). The trial court allowed one plaintiff to withdraw and permitted an amendment alleging sole ownership in the remaining plaintiff. *Affirmed*. "The cause of action is the negligence." *Headnote, id.* at 183.

¹⁰ 224 N. C. 323, 327, 30 S. E. (2d) 226, 229 (1944). The trial court allowed amendment setting forth conduct of the defendant subsequent to filing the original complaint. *Affirmed*. "The fact that, if standing alone, it might form the basis of a separate suit, if indeed it had that completeness, is not determinative."

¹¹ 37 C. J., Limitation of Actions §509.

be enlarged, narrowed, amplified, or fortified by amendment without changing the cause of action¹² have been frequently applied by the North Carolina court. Application of the first rule does not require the adoption of the liberal view of cause of action. The results in the cases when the second rule was applied, however, seem to be consistent only with the view that an aggregate of operative facts giving rise to one or more relations of right-duty constitutes the cause of action. Under the first rule the North Carolina Supreme Court allowed the following amendments: (a) to perfect a statement of a cause of action for divorce where the original complaint failed to allege facts beyond the language of the statute;¹³ (b) to perfect a statement of a good cause of action for breach of contract where plaintiff failed to allege readiness and ability to pay;¹⁴ (c) to perfect a statement of a cause of action to recover embezzled money where plaintiff failed to allege clearly that money received by the defendant was from that embezzled;¹⁵ (d) to perfect the statement of a cause of action for wrongful death by alleging the law of another state;¹⁶ (e) to perfect a cause of action under the Federal Employer's Liability Act by alleging that the plaintiff was employed in interstate commerce at time of injury.¹⁷ Under the second rule the North Carolina Supreme Court has held that the following amendments did not change the cause of action: (a) to allege permanent injury to land where plaintiff originally declared for injury to crops;¹⁸ (b) in an action to establish materialmen's liens, to allege an agreement between owner and contractor whereby the owner agreed to pay for materials and labor required to complete the building when the contractor was financially unable to complete his contract after a referee found that the owner had paid the contractor more than was due on the contract price;¹⁹ (c) to allege fraud and deceit where original com-

¹² 41 Am. Jur., Pleading §305.

¹³ Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).

¹⁴ Blalock v. Clark, 133 N. C. 306, 45 S. E. 642 (1903).

¹⁵ Fidelity v. Jordan, 134 N. C. 236, 46 S. E. 496 (1904).

¹⁶ Lassiter v. Norfolk & C. R. R., 136 N. C. 89, 48 S. E. 642 (1904) cited *supra* note 8.

¹⁷ Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915). Two judges dissented, contending that the original complaint stated a cause of action at common law and the amendment stating a new cause of action should not be allowed after the statute of limitations had run. On appeal to U. S. Supreme Court this case was affirmed, holding that the amendment merely expanded or amplified the original cause which was under the act of Congress. 241 U. S. 290, 36 S. Ct. 567, 60 L. ed. 1006 (1916).

¹⁸ Pickett v. Atlantic Coast Line R. R., 153 N. C. 148, 69 S. E. 8 (1910). "We do not think the amendment added a new cause of action, but related to quantum of damages. The cause of action was the injury to the land, and the consequent damages." *Id.* at 149, 69 S. E. at 9.

¹⁹ Carolina Hardware Co. v. Raleigh Banking & Trust Co., 169 N. C. 744, 86 S. E. 706 (1915), "The policy of code procedure as to the allowance of amendments is very liberal, the leading purpose being to have actions tried upon their merit and avert a failure of justice." *Id.* at 747, 86 S. E. at 708.

plaint was to recover purchase price of land because of defective title;²⁰ (d) to allege facts raising an estoppel after referee found defendants not liable in an action to collect on defendants' notes;²¹ (e) in an action for claim and delivery, to allege title by gift *inter vivos* where in the original complaint plaintiff alleged title by virtue of an allotment in her year's allowance as widow.²²

On the grounds that a new cause of action would be stated the court refused the following amendments: (a) to allege facts to recover the penalty for usury where original action was to recover an overpayment of interest made by mistake and ignorance;²³ (b) in an action for wrongful arrest and malicious prosecution in a court of the justice of the peace, to allege that the defendant influenced and procured a bill sent to the grand jury.²⁴ On the same grounds the court refused to allow the following amendments to relate back to the beginning of the action: (a) to allege a contract between defendant and a third party for the sale of logs, plaintiff to be paid a certain amount from the sale of the timber sawed therefrom, where original action was based on a sale and delivery of sawed timber;²⁵ (b) to allege a cause of action for wrongful death under the statute of another state where the original action was brought under the Federal Employers Liability Act;²⁶ (c) to allege facts constituting negligence of defendant railroad where original complaint stated facts showing co-defendant only was negligent.²⁷ Many other illustrations could be cited, but these will suffice to demonstrate the difficulty of determining the status the amendment will be given.

Is it practicable to devise some tests to determine when an amendment states a new cause of action? In *Lumberman's Mutual Insurance Co. v. Southern Ry.*²⁸ the court expressed approval of two such tests: (1) inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, or (2) whether the amendment could have been cumulated with the original allegations. Other tests have been devised, including: (1) Would the same evidence

²⁰ *Currie v. Malloy*, 185 N. C. 206, 116 S. E. 564 (1923); *Dockery v. Fairbanks*, 172 N. C. 529, 90 S. E. 501 (1916).

²¹ *Bank of Ash v. Sturgill*, 223 N. C. 825, 28 S. E. (2d) 511 (1943).

²² *James v. James*, 226 N. C. 399, 38 S. E. (2d) 168 (1946). There can be no question that the court properly sustained the amendment. It seems, however, that the court adopted the strict view of "cause of action" to achieve the usual result of the liberal view. Here the court allowed a change in the statement of facts.

²³ *Gillam v. Life Ins. Co. of Va.*, 121 N. C. 369, 28 S. E. 470 (1897).

²⁴ *Cooper v. Southern Ry.*, 165 N. C. 578, 581, 81 S. E. 761, 763 (1914), "The trial judge cannot, without consent of parties, so amend, change, or modify the pleadings in a pending action as to substantially make it a new one."

²⁵ *Sams v. Price*, 121 N. C. 392, 28 S. E. 486 (1897).

²⁶ *Capps v. Atlantic Coast Line R. R.*, 183 N. C. 181, 111 S. E. 533 (1922).

²⁷ *George v. Atlanta & C. A. L. Ry.*, 210 N. C. 58, 185 S. E. 431 (1936).

²⁸ 179 N. C. 255, 260, 102 S. E. 417, 420 (1920).

support both of the pleadings? (2) Is the measure of damages the same in each case? (3) Are the allegations of each subject to the same defenses?²⁹ The desirability of such a simple solution is appreciated, but even a cursory examination of the cases reveals that no such solution is readily attainable and that attempts to apply the suggested tests give diverse results.³⁰ The question so frequently boils down to one of degree that each case must be considered on its own merits. Adopting the definition that an amendment which changes the cause of action is one which alleges facts involving a transaction or situation other than the one originally declared on, this test can be established: does the amendment state facts involving a transaction or situation other than the one in the original complaint? Such a test is necessarily general. A similar determination, however, is required in applying the statute on joinder of causes,³¹ and in joinder of parties and causes questions.³² The North Carolina court actually applied this test in at least one case involving amendments.³³

The second question raised by the principal case is when will an amendment that changes the cause of action be allowed. Allowance of amendments has been a subject of legislation since the fourteenth century.³⁴ The codes and statutes of the various jurisdictions have their own particular rules.

While the North Carolina statute adopts a strict practice of amending by right,³⁵ it adopts a very liberal practice of allowing amendments at the discretion of the trial court,³⁶ having only two restrictions: (1) the amendment will not be allowed if it is for the purpose of delay,³⁷ and (2) if the amendment is for the purpose of conforming the pleading to

²⁹ 37 C. J., Limitations of Acts §512.

³⁰ After carefully appraising the suggested tests, one writer concludes: "The result of these cases leads to the conclusion that no one rule can be set forth as a general criterion; it is submitted, however, that a more nearly applicable test would be: Does the amendment institute a matter materially different in substance or historical form, thereby appreciably altering the primary rights and obligations of the parties to the prejudice of the defendant?" Note (1928-29) 7 TEX. L. REV. 144, 150.

³¹ N. C. GEN. STAT. (1943) §1-123, "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction or transaction connected with the same subject of action."

³² *Atkins v. Steed*, 208 N. C. 245, 179 S. E. 889 (1935); *Trust Co. v. Pierce*, 195 N. C. 717, 143 S. E. 524 (1928).

³³ See note 43 *infra*.

³⁴ 14 Edw. III, c. 6 (1327-77); SHIPMAN, COMMON-LAW PLEADING (Ballantine, 3rd ed. 1923) §163.

³⁵ N. C. GEN. STAT. (1943) §1-161; see also §1-129.

³⁶ From an examination of the cases, it has been found that the trial courts are very liberal in their exercises of discretion. The few occasions where the court refused the amendment was for the reason that the court believed it to be beyond his discretionary powers.

³⁷ N. C. GEN. STAT. (1943) §1-161; see *Biggs v. Moffitt*, 218 N. C. 601, 11 S. E. (2d) 870 (1940).

the facts proved, it must not change substantially the claim or defense.³⁸ Even though the statute clearly avoids using the term "cause of action," the court has generally construed the word "claim" to mean "cause of action."³⁹ A confusion of the rule was observed by Professor McIntosh: "The statute permits an amendment in the discretion of the court—'when the amendment does not change substantially the claim or defense.' This is found in connection with the amendment to make the pleading conform to the proof, but it has been applied generally to all amendments made under order of court."⁴⁰ More recently, however, a more liberal rule has been adopted which allows amendments stating a new cause of action with the limitation that such amendments cannot relate back to defeat the statute of limitations.⁴¹ Such a new cause would necessarily have to comply with the joinder of causes statute,⁴² and there is some suggestion that this is true where the plaintiff attempts a substitution.⁴³ Even before this more liberal rule was established, the court, on the theory that the cause of action was not changed, allowed

³⁸ N. C. GEN. STAT. (1943) §1-163. For power of Supreme Court to amend see §7-13, discussed in *Deligny v. Furniture Co.*, 170 N. C. 189, 86 S. E. 980 (1914).

³⁹ *Lefter v. Lane*, 170 N. C. 181, 183; 86 S. E. 1022, 1023 (1915), ". . . the power of amendment has been very broadly conferred and may and ordinarily should be exercised in 'furtherance of justice,' unless the effect is to add a new cause of action or change the subject matter thereof. . . ." See also *Hardware Co. v. Banking Co.*, cited *supra* note 19. "It is well settled that the court cannot, except by consent, allow an amendment which changes the pleadings so as to make substantially a new action, . . ." citing *Ely v. Early*, 94 N. C. 1; *Craven v. Russell*, 118 N. C. 564.

⁴⁰ MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §487.

⁴¹ *Capps v. Atlantic Coast Line R. R.*, 183 N. C. 181, 187; 111 S. E. 533 (1922). "It is the general rule, and consistently held with us, that a new cause of action may be introduced by way of amendment to the original pleading; but established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduce a new matter, or cause of action different from the one propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit."

Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944) quotes the above with approval and then distinguishes the amendment in this case as being not a new and distinct cause of action.

By the language used in G. S. §1-164, the legislature clearly intended not to forbid the introduction of a new cause of action by amendment. The section begins: "When the complaint is so amended as to change the nature of the action and the character of the relief demanded. . . ." It seems that the court had frequently overlooked the implication of this language.

⁴² N. C. GEN. STAT. (1943) §1-123. *Hatcher v. Williams*, 225 N. C. 112, 114, 33 S. E. (2d) 617, 618 (1945). Action for an accounting. Plaintiff allowed to allege fraud. "To say the amendment undertakes to join an action in tort with one on contract in the same complaint is to regard the proceeding strictly as an action at law rather than a suit in equity. Even so, they [the tort and contract] both arise out of the same transaction, or transactions connected with the same subject of action; G. S. 1-123. Where such is true, they may be joined in the same complaint."

⁴³ *Reynolds v. Mt. Airy & Eastern Ry.*, 136 N. C. 345, 347, 48 S. E. 765, 766 (1904). "If the plaintiff could have added to his present cause of action another one sounding in tort, why should he not be allowed to substitute the latter for the former, as it will not be a new cause of action in any sense if it is one based upon the same transaction or connected with the subject of the action."

amendments to change the action from contract to tort,⁴⁴ and from law to equity.⁴⁵ Very soon after the code was adopted, the court recognized that the test to determine a change in the cause of action was not the test applied at common law to determine a change in the form of action.⁴⁶

Since one of the primary advantages plaintiffs seek in amending the complaint is to avoid the statute of limitations, the liberality of the court in allowing amendments is governed primarily by the determination of whether the amendment states a new cause of action. The North Carolina court has generally regarded one wrongful act as creating one cause of action and even in the face of a plea of the statute of limitations has allowed plaintiff to amend to allege permanent injury to land where the complaint alleged damages to crops⁴⁷ and to allege that the injury occurred in interstate commerce where the complaint declared only on negligence.⁴⁸ The court clearly rejected the argument that one wrongful act causing damage to person and property of plaintiff creates two causes of action, saying that the plaintiff cannot split his cause of action exposing the defendant to the vexation of multiple suits.⁴⁹ These decisions are illustrative of the liberal policy of the court and demonstrate the court's determination to have cases justly determined on their merits. With its liberality, however, the court refused to allow the plaintiff to amend and recover under a state statute when the complaint declared on a federal statute because the amendment stated a new cause of action which was barred by the statute of limitations, even though the injury was caused by one wrongful act.⁵⁰ If the statute of limitations has run, the North Carolina court would probably reach the same result the West Virginia court reached in the principal case, even though the amendment was offered in the pleading stage. Such a ruling would seem, however, to be reverting back to the old days when changes in the form of the action were forbidden. Whether plaintiff's injury is due to defendant's common law negligence or to its breach of statutory

⁴⁴ *Id.*

⁴⁵ *Woodcock v. Bostic*, 128 N. C. 244; 38 S. E. 881 (1901).

⁴⁶ *Oates, etc. Co. v. Kendall*, 67 N. C. 241 (1872).

⁴⁷ *Pickett v. Atlantic Coast Line R. R.*, 153 N. C. 148, 69 S. E. 8 (1910), cited *supra* note 18.

⁴⁸ *Renn v. Seaboard Air Line Ry.*, 170 N. C. 128, 86 S. E. 964 (1915), cited *supra* note 17.

⁴⁹ *Eller v. Carolina & N. Ry.*, 140 N. C. 140, 52 S. E. 305 (1905); *cf.* *Underwood v. Dooley*, 197 N. C. 100, 147 S. E. 686 (1929).

⁵⁰ *Capps v. Atlantic Coast Line R. R.*, 183 N. C. 181, 111 S. E. 533 (1922), Chief Justice Clark wrote a very strong dissent. In *Fuquay v. Atlantic & W. Ry.*, 199 N. C. 499, 155 S. E. 167 (1930) the same theory of two causes of action was followed to plaintiff's advantage. Here the court held that a previous trial resulting in judgment of non-suit for failure to prove that the injury occurred in interstate commerce as alleged was not *res judicata* against a second suit alleging intrastate commerce. It would seem that the same result would be reached even under the theory of one cause of action, the issue of negligence having not been determined.

duty in failing to properly maintain its streets, there has been one occurrence resulting in plaintiff's damage. Defendant's victory is not based on a result of a determination of the case on its merits nor on the delay of plaintiff in prosecuting his claim. It is based on plaintiff's failure to select his proper remedy—strongly analogous to suing in trespass instead of case.

The North Carolina amendment statutes are liberal. They are designed to facilitate and expedite trials and at the same time preserve the rights of the defendant. The rights of the defendant, however, should not include technicalities giving the defendant an advantage. The purpose of the statute of limitations is to prevent a plaintiff from taking advantage of a defendant by instigating a claim arising out of a transaction or conduct which occurred so long before as to place the defendant at a disadvantage in defeating the claim or defending himself. The statute can be tolled by a summons sketchily defining the transaction or conduct complained of.⁵¹ It would seem that the greatest liberality in amending the pleading would be called for in this situation for the sake of fairness to all parties. In speaking to this very point Mr. Justice Holmes said, "Of course an argument can be made on the other side, but when the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."⁵²

It has been suggested that the desired liberality may be attained by changing the rule rather than liberally defining the term "cause of action."⁵³ Several states and the federal courts have done so.⁵⁴ The

⁵¹ Webster v. Sharpe, 116 N. C. 466, 21 S. E. 912 (1895).

⁵² N. Y. Cent. R. R. v. Kinney, 260 U. S. 340, 346, 43 S. Ct. 122, 123, 67 L. ed. 294, 296 (1922). The court allowed an amendment changing from state statute to federal statute. Followed without opinion in *McCabe v. Boston Terminal Co.*, 309 U. S. 624; 60 S. Ct. 725; 84 L. ed. 986 (1939).

⁵³ Gavit, *The Code Cause of Action* (1930) 30 COL. L. REV. 802, 819, "The obvious remedy is not to change the definition of the 'cause of action,' but it is to change the rule."

⁵⁴ FED. RULES CIV. PROC. (1938), Rule 15. Amendments and Supplemental Pleadings.

ALA. CODE ANN. (Michie, 1928) §9513.

ILL. ANN. STAT. (Smith-Hurd, 1936) c. 110, §170(2). "The cause of action . . . set up in any amended pleading shall not be barred . . . under any statute or contract prescribing or limiting the time within which any action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed and if it shall appear from the original and amended pleading that the cause of action asserted . . . in the amended pleading grew out of the same transaction or occurrence set up in the original pleading . . . any such amendment to any such pleading shall be held to relate back to the date of the filing of the original pleading so amended." Illinois followed a very strict rule prior to this statute. See 240 Ill. 259, 88 N. E. 651, commented on in (1927) 76 U. PA. L. REV. 756.

2 WASH. REV. STAT. ANN. (Remington, 1932) §308-3. "A cause of action which would not have been barred by the statute of limitations if stated in the original complaint or counterclaim shall not be so barred if introduced by amend-

North Carolina amendment statutes are closely in accord with the Federal Rules⁵⁵ except in connection with the all important matter of relation back. The relation back provision of the Federal Rules is as follows:

"15(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."⁵⁶

This rule does not defeat the legitimate use of the statute of limitations. It does, however, prevent the defendant from defeating the plaintiff's claim on a technicality in the pleading. This is the desired result and avowed purpose of modern pleading. The adoption of the above provision from the Federal Rules by the North Carolina legislature would clarify the present confusion on this issue and place the North Carolina rules of pleading in accord with the liberal and just practice of modern pleading.

WILLIAM A. DEES, JR.

Survival of Personal Injury Actions in North Carolina

In a recent case,¹ the North Carolina Supreme Court held that where a person is injured by the actionable negligence of another, and later dies as the result of such injuries, a cause of action for consequential damages sustained by the injured person between the date of the injury and the date of the death survives to the personal representative of such deceased person. Prior to 1915, it was the unquestioned² law of this jurisdiction that such causes of action did not survive. Causes of action for personal injury not causing death were expressly denied survival by the statute.³ It was held that the legislature, in denying survival to causes of action where the injury did not cause the death

ment at any later stage of the action, if the adverse party was fairly apprised of its nature by the original pleading, and that the plaintiff was claiming thereunder, provided no new party is added thereby."

⁵⁵ Compare N. C. GEN. STAT. §1-161 with Fed. Rule 15(a); compare N. C. GEN. STAT. §1-163 with Fed. Rule 15(b); compare N. C. GEN. STAT. §1-167 with Fed. Rule 15(d); see *Nassaney v. Culler*, 224 N. C. 323, 30 S. E. (2d) 226 (1944); cited *supra* note 10.

⁵⁶ Applied with approval in *Tiller v. Atlantic Coast Line R. R.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. ed. 465 (1944). See also MOORE, FEDERAL PRACTICE §15.08; Notes (1944) 23 N. C. L. REV. 141, 145; (1930) 40 YALE L. J. 311.

¹ *Hoke v. Atlantic Greyhound Corp. et al.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

² *But cf. Peebles v. N. C. R. R.*, 63 N. C. 238 (1869). Prior to enactment of survival statute, causes of action for personal injury were held to survive under REVISED CODE (1868), c. 1, §1; now N. C. GEN. STAT. (1943) §1-22.

³ N. C. REVISAL (1905) §157(2); now, as amended, N. C. GEN. STAT. (1943) §28-175.