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cies;[70] and the economic pressures arising from the necessity of maintaining a large and steady "box-office," which means never seriously offending any significant group or point of view.[71]

Although it is but a first step, the *Miracle* decision promises to do much to bring the law of film censorship into phase with the ideal of substantially complete freedom of expression from all prior restraints, which has increasingly characterized the law of the United States.

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Costs—Attorney Fees as Costs in Taxpayers' Actions

The recent case of *Horner v. Chamber of Commerce*[1] involved a taxpayer's action to recover, for the benefit of a municipality, public moneys which had been unlawfully disbursed.[2] The court held that "where, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, and does actually recover and collect, funds of the municipality which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance from the funds actually

extension of official censorship. INGLIS, FREEDOM OF THE MOVIES 87-96 *et seq.* (1947). The M. P. A. embraces 95% of the producers, distributors, and exhibitors of the nation. Few theaters will rent films lacking the M. P. A. seal of approval, which is borne by 95% of all films released in the United States. Hughes Tool Co. v. Motion Picture Association of America, Inc., 66 F. Supp. 1006 (S. D. N. Y. 1946).

[70] The National Board of Review, pioneer in the field of non-industry film reviewing, was formed in 1909 with the encouragement of certain producers fearful of threatened government control. Working independently of the film industry, and with non-professional viewers, the Board operates in the public interest under the slogan, "Selection Not Censorship." It does not censor films, but views and approves those films which in the opinion of the viewers are neither violative of the obscenity statutes, detrimental to public morality, nor subversive in effect upon the national audience, when evaluated as a whole. Its operations are financed by fees charged producers for reviewing films submitted by them. INGLIS, FREEDOM OF THE MOVIES 74-82 (1947); 49 YALE L. J. 87, 108-109 (1939).

The National Legion of Decency was formed in 1933 at the instance of the Catholic Bishops of the United States, and soon secured for itself a position of great power. Acting as a reviewing agency, the Legion classifies films for the information of all Catholics, a great many of whom take a periodic pledge to respect the group's recommendations. In its "C" or "condemned for Catholics" rating, the Legion holds a weapon the potency of which is much feared by producers. INGLIS, *op. cit. supra* at 120-125 (1947). See Kazan, *Pressure Problem*[;] *Director Discusses Cuts Compelled in "A Streetcar Named Desire,"* in EMERSON AND HABER, EDS., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 722 (1952). There are also several other private organizations which review films in the interest of their members and the public. See 60 YALE L. J. 696, 714 n. 40 (1951).

[71] ERNST, THE FIRST FREEDOM 202-203 (1946).

[1] 236 N. C. 96, 72 S. E. 2d 21 (1952).

[2] See Horner v. Chamber of Commerce, 235 N. C. 77, 68 S. E. 2d 660 (1952); Horner v. Chamber of Commerce, 231 N. C. 440, 57 S. E. 2d 789 (1950) (The case was before the Supreme Court twice on appeal. The background facts may be found in these decisions.)

recovered to be used as compensation for the plaintiff taxpayer's attorney fees."[3]

North Carolina has provided by statutory enactments that court costs in certain types of actions shall include reasonable attorneys' fees.[4] Outside of those instances covered by statute, the court has been very restrictive in allowing recovery of such fees as costs,[5] the theory being that counsel fees are matters to be settled between attorney and client; thereby precluding the courts from being called on to settle such matters.[6]

However, in the principal case the court recognizes the broad doctrine that "while ordinarily attorney fees are taxable as costs only when expressly authorized by statute, nevertheless, the rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him."[7] In support of this doctrine the court cites those North Carolina cases which have allowed recovery of attorney fees

[3] Horner v. Chamber of Commerce, 236 N. C. 96, 101, 72 S. E. 2d 21, 24 (1952).

[4] N. C. GEN. STAT. § 6-21 (1943) provides that costs shall include reasonable attorneys' fees in the following instances: (1) upon application for year's support for children or widow, (2) caveats to wills, (3) habeas cropus proceedings, (4) action for divorce or alimony, (5) application for the establishment, alteration or discontinuance of public roads, cartways, or ferries, (6) the compensation of referees and commissioners to take deposition, (7) all costs and expenses incurred in special proceedings under the chapter entitled Partition, (8) in all proceedings under the chapter entitled Drainage, except as therein otherwise provided, and (9) in proceedings for the reallotment of Homestead. See *A Survey of Statutory Changes in North Carolina 1936*, 15 N. C. L. R. 333, 334 (1936). N. C. GEN. STAT. § 19-8 (1943) provides that in any action brought to enjoin certain acts against public morals the court shall tax as part of the costs such fees for the attorney prosecuting the action as may in the court's discretion be reasonable remuneration for the services performed by such attorney. N. C. GEN. STAT. § 40-7 (1943 Recomp. 1950) provides that in Eminent Domain proceedings the court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown or who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to the said attorney for his services, which shall be taxed as costs.

[5] See Trust Co. v. Schneider, 235 N. C. 446, 70 S. E. 2d 578 (1952); *In re* Will of M. T. Howell, 204 N. C. 437, 168 S. E. 671 (1933) (now *contra* by N. C. GEN. STAT. § 6-21 (1943); Ragan v. Ragan, 186 N. C. 461, 119 S. E. 882 (1923); Byrd & Bryan v. Georgia Casualty Co., 184 N. C. 224, 114 S. E. 1 (1922); City of Durham v. Davis, 171 N. C. 305, 88 S. E. 433 (1916); Mordical v. Devereux, 74 N. C. 673 (1876).

[6] Erickson v. Starling, 235 N. C. 643, 71 S. E. 2d 384 (1952); Mordecal v. Devereux, *supra* note 5.

[7] Horner v. Chamber of Commerce, 236 N. C. 96, 97, 72 S. E. 2d 21, 22 (1952).

incurred by fiduciaries or persons appointed by the courts respecting litigation involving either the creation or protection of the funds or property of their trust estates or wards.[8] That is, without statutory authorization, North Carolina has consistently allowed recovery of counsel fees by administrators,[9] trustees,[10] next friends of infants,[11] and receivers[12] on the theory that attorney fees incurred in creating or protecting estates are proper administrative expenses.[13] However, none of these cases in which such allowances have been deemed proper deal with a situation whereby a member of a group has maintained an action for the benefit of himself and other members of the group. Instead, they deal only with situations in which trustees or persons of similar position have protected or recovered funds or property of their trust estates in which they have no personal interest or from which they will derive no personal benefit. It is conceded that a taxpayer suing on behalf of himself and other taxpayers stands in what might be recognized as a position of trust, but those North Carolina cases which have allowed recovery of counsel fees have dealt only with express trusts. Therefore, it appears that North Carolina has given recognition to a new doctrine which allows counsel fees to a litigant who, at his own expense, has maintained a successful action to recover or preserve funds or property in which others may share with him.

A review of decisions from other jurisdictions indicates that this doctrine has been widely accepted, and counsel fees allowed without the aid of statutory authority.[14] In addition to having been applied to taxpayers' actions similar to the one in the principal case,[15] it has been applied to numerous other situations, including action by legatees

[8] Patrick v. Branch Bank & Trust Co., 216 N. C. 525, 5 S. E. 2d 724 (1939) (by implication); Hood v. Cheshire, 211 N. C. 103, 189 S. E. 189 (1937); *In re* Stone, 176 N. C. 336, 97 S. E. 216 (1918); Graham v. Carr, 133 N. C. 449, 45 S. E. 847 (1903); Overman v. Lanier, 157 N. C. 544, 73 S. E. 192 (1911) (by implication); Kelly v. Odum, 139 N. C. 278, 51 S. E. 953 (1905) (by implication); Gay v. Davis, 107 N. C. 269, 12 S. E. 194 (1890).

[9] Overman v. Lanier, *supra* note 8 (by implication).

[10] Patrick v. Bank & Trust Co., 216 N. C. 525, 5 S. E. 2d 724 (1939) (by implication); Hood v. Cheshire, 211 N. C. 103, 189 S. E. 189 (1939); Kelly v. Odum, 139 N. C. 278, 51 S. E. 953 (1905) (by implication).

[11] *In re* Stone, 176 N. C. 336, 97 S. E. 216 (1918).

[12] Graham v. Carr, 133 N. C. 449, 45 S. E. 847 (1903).

[13] Gay v. Davis, 107 N. C. 269, 12 S. E. 194 (1890).

[14] See Trustees v. Greenough, 105 U. S. 527 (1881); Buford v. Tobacco Growers Co-op Ass'n, 42 F. 2d 791 (4th Cir. 1930); Marine Cooks' & Stewards' Ass'n v. Weber, 93 Cal. 2d 327, 208 P. 2d 1009 (1949); Winslow v. Harold G. Ferguson Corp., 25 Cal. 2d 724, 153 P. 2d 714 (1944); *In re* Linch's Estate, 139 Neb. 761, 298 N. W. 697 (1941); Johnson v. Williams, 196 S. C. 528, 14 S. E. 2d 21 (1941). For compilation of cases see Note, 49 A. L. R. 1150 (1927).

[15] Russell v. Tate, 52 Ark. 541, 13 S. W. 130 (1890); Universal Construction Co. v. Gore, ... Fla. ...., 51 So. 2d 429 (1951); Tenny v. City of Miami Beach, 152 Fla. 126, 11 So. 2d 188 (1942); Kimble v. Board of Comm'rs of Franklin County, 32 Ind. App. 377, 66 N. E. 1023 (1903); Shillito v. City of Spartanburg, 214 S. C. 11, 51 S. E. 2d 95 (1948).

under a will;[16] action by bondholders to preserve a bond fund;[17] action by beneficiaries of a trust estate to recover funds of the estate;[18] and action by members of a labor union to restore funds to the benefit of the union and its members.[19]

Since North Carolina has given recognition to this broad doctrine, will it follow the lead of other jurisdictions and apply the doctrine to situations other than taxpayers' actions? The answer is clearly uncertain. The court in the principal case expresses no inclination to have its decision embrace cases other than taxpayers' actions; however, this does not affect the real significance of the case. The mere recognition of a doctrine which allows recovery of counsel fees as costs without statutory authorization indicates a tendency by the court to relax its heretofore strict attitude against such allowances. It is suggested that this tendency be extended so as to allow recovery of counsel fees as costs in situations other than taxpayers' actions where substantial justice requires such allowances; thereby bringing North Carolina into accord with other jurisdictions.

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Covenants—Building Restrictions—Violation of a Restriction Against the Erection of a Duplex

Defendants owned a lot subject to the following restrictions contained in the deed: "Said property shall be used only for residential purposes with the understanding that no duplex or apartment house be erected thereon, and shall not be used for cemetery, hospital, sanitorium, or any business purposes." The house upon the lot, as originally constructed, was not a duplex and was used as a single-family residence. Subsequently, defendants installed a second kitchen in a basement playroom, rented out three rooms and bath (the newly created kitchen included) to another family, and occupied the balance of the house as their own home. Plaintiffs, who owned lots in the same division, subject to the same restrictions, brought an action to enforce the restrictions in defendants' deed, alleging that defendants' house, as converted, constituted a duplex in violation of said covenant. At the close of plaintiffs' evidence defendants' motion for a nonsuit was granted by the Superior Court on the ground that the evidence failed to show the construction of a duplex. Affirming this judgment, the Supreme Court of Georgia held that the conversion of a playroom into a second

[16] Johnson v. Williams, 196 S. C. 528, 14 S. E. 2d 21 (1941).
[17] Trustees v. Greenough, 105 U. S. 527 (1881).
[18] *In re* Linch's Estate, 139 Neb. 761, 298 N. W. 697 (1941).
[19] Marine Cooks' & Stewards' Ass'n v. Weber, 93 Cal. 2d 327, 208 P. 2d 1009 (1949).