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COMMENTS

Access of Indigents into the Civil Courtroom: The Continuing Saga of Poor Richard

We can trace the gradual evolution of this principle [equality before the law] under the common law into its broad and firmly established modern form. We should expect to find that provisions for speeding the litigation of the needy had correspondingly ripened from mere indulgences into categorical imperatives of common law practice. But that has not occurred.¹

John MacArthur Maguire wrote those condemnatory words in 1923. He would be abashed to find that the same description applies to the problems of the indigent who seeks entrance into today's civil courtroom.² In attempts to solve these problems, the courts, states, and federal government have taken differing routes³ with widely varying results for the indigent.⁴ In some instances, as Maguire noted, there has actually been a retrogression from the common law.⁵ In some cases there has been progress.⁶ In all cases the outcome has been affected by the three interests involved—the legislature, the courts, and the constitution. To date the state legislatures have been the most frequent commentators on the problem.⁷ Until recently the courts have filled the chinks in only minor respects.⁸ The focus of this comment will be on these three interests. While

¹ Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 362 (1923) [hereinafter cited as Maguire].

² See generally AMERICAN BAR FOUNDATION, 2 DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965); AMERICAN BAR FOUNDATION, PUBLIC PROVISION FOR COSTS AND EXPENSES OF CIVIL LITIGATION (1966); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21 (1967); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Note, *Procedure: Suits In Forma Pauperis*, 6 CALIF. L. REV. 226 (1918); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

³ Courts: See, e.g., *McClenahan v. Thomas*, 6 N.C. 247 (1813), States: See, e.g., KAN. STAT. ANN. §§ 23-432 & 60-2001 (a), (b) (1964). Federal Government: See, e.g., proceedings in forma pauperis, 28 U.S.C. § 1915 (1964).

⁴ Compare ARK. STAT. ANN. §§ 27-401 to -406 (1947) with UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1958 version) [hereinafter cited as URESA].

⁵ *Whedbee v. Ruffin*, 191 N.C. 257, 131 S.E. 653 (1926); See generally Annot., 6 A.L.R. 1281 (1920).

⁶ See, e.g., the provisions of the URESA.

⁷ See p. 688 & note 43 *infra*.

⁸ Only six states have held that an indigent may sue in forma pauperis without

each area will be treated separately, the thesis common to all three is that in each an attempt has been made to crack the doors of the civil courtroom to the indigent. Likewise, in each area there is a significant proviso to the thesis—that all of the solutions offered present inherent problems to the indigent, which either have, or may, block effective entrance to the courts.

STATE COURT DECISIONS—WASHINGTON

Basis of Decision

In *O'Connor v. Matzdorff*⁹ the Washington Supreme Court decided that a justice of the peace might accept an action filed without payment of filing fees, in the face of Washington statutes that required the justice to collect the fees.¹⁰

The plaintiff filed an action for replevin and damages against her landlord in the Yakima Justice Court and offered in lieu of filing fees a "motion and affidavit for leave to proceed in forma pauperis."¹¹ The justice of the peace and his clerk refused to accept the complaint on the basis that the three-and-one-half-dollar filing fee required by statute had not been paid.¹² The justice of the peace also denied leave to proceed in forma pauperis.¹³ Plaintiff then petitioned the Washington Supreme Court for a writ of mandamus compelling the justice of the peace to grant the pe-

legislative authority. *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917); *McClenahan v. Thomas*, 6 N.C. 247 (1813); *Jack v. McClure*, 26 Pa. County Ct. 59 (1901); *Spalding v. Bainbridge*, 12 R.I. 244 (1879); *Hickey v. Rhine*, 16 Tex. 576 (1856); *O'Connor v. Matzdorff*, 76 Wash. 2d 589, 458 P.2d 154 (1969). Recently the Supreme Court has decided that a state may not close its divorce courts to indigents. *Boddie v. Connecticut*, 91 S. Ct. 780 (1971).

⁹ 76 Wash. 2d 589, 458 P.2d 154 (1969).

¹⁰ WASH. REV. CODE § 3.16.080 (1961) provides:

[T]he plaintiff may, at the time of such commencement or transfer, pay to such justice the sum of two dollars

WASH. REV. CODE § 3.16.110 (1961) provides:

The justices of the peace . . . shall charge and collect . . . all the fees now or hereafter allowed by law paid or chargeable in all cases

WASH. REV. CODE § 3.16.140 (1961) provides:

Said justices . . . shall not in any case, except for the state or county and other cases provided by law, perform any official services unless the fees prescribed for such services are paid in advance

WASH. REV. CODE § 27.24.070 (1970) provides:

There shall be paid . . . to each justice of the peace in every civil action . . . where the demand or value of the property in controversy is one hundred dollars or more, in addition to other fees required by law the sum of one dollar and fifty cents

¹¹ 76 Wash. 2d at 590, 458 P.2d at 155.

¹² *Id.*

¹³ *Id.* at 591, 458 P.2d at 155.

tition and accept the complaint. The court issued the writ and held that given an impoverished suitor and a nonfrivolous claim, it had the inherent power to waive fees even in the face of a contrary statute.¹⁴

The court declared that in interpreting a statute it must presume (1) that the legislature did not intend to remove by statute a power inherently held by a court at common law¹⁵ and (2) that the legislature did not intend to take away from a court the duty and the right to do substantial justice to the parties before it.¹⁶

Although some courts have held otherwise,¹⁷ apparently the English common law courts had the power to waive fees or costs of an indigent plaintiff.¹⁸ After establishing this common law power, the Washington court turned to a series of California decisions beginning with *Martin v. Superior Court*¹⁹ for applications of principles of waiver of costs and fees to civil cases in the United States.²⁰ The court in *Martin* held that the judiciary might disregard statutory direction for collection of fees on the basis of the English common law.²¹

In re Bruen,²² a 1918 Washington case, was used in *O'Connor* to support the second argument that the court must do substantial justice between the litigants. The court in *Bruen* said that "[t]he inherent power of the court is the power to protect itself . . . [and] the power to administer justice whether any previous form of remedy had been granted or not"²³

Problems with the Decision

Inherent in any solution offered to expedite entrance of the indigent into the civil courtroom are several problems that must be solved if the entrance is to be an effective one. These problems are not necessarily

¹⁴ *Id.* at 600, 458 P.2d at 160.

¹⁵ *Id.* at 597, 458 P.2d at 158.

¹⁶ *Id.* at 602, 458 P.2d at 162.

¹⁷ See, e.g., *Roy v. Louisville N.O. & T.R.R.*, 34 F. 276 (C.C.W.D. Tenn. 1888); *Howe v. Federal Sur. Co.*, 161 Okla. 144, 17 P.2d 404 (1932); *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80, 72 P. 1027 (1903).

¹⁸ See generally Maguire. See also Annot., 6 A.L.R. 1281 (1920).

¹⁹ 176 Cal. 289, 168 P. 135 (1917).

²⁰ The weight of authority seems to be against the California decisions. See, e.g., *Howe v. Federal Sur. Co.*, 161 Okla. 144, 17 P.2d 404 (1932).

²¹ 176 Cal. at 294, 168 P. at 137. California had adopted the English common law by statute "so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state." CAL. CIV. CODE § 22.2 (West 1954). The Washington Supreme Court did not refer to any similar authority, and Washington apparently has no similar statute.

²² 102 Wash. 472, 172 P. 1152 (1918).

²³ *Id.* at 476, 172 P. at 1153.

common only to the judicial scheme offered by the Washington court—some can and will arise in the constitutional and statutory contexts.

The first of these problems facing the indigent is the attitude of the judiciary toward him and to anything "given" to him. Especially noticeable is the attitude of the justice of the peace court.²⁴ Generally these courts are "the weakest part of the judicial system: 'staffed by the poorest trained, least experienced and least competent judges and . . . served by the lowest ranking, least competent and least responsible attorneys.'"²⁵ Interviews of Office of Economic Opportunity program directors have revealed that these same judges are generally nonsympathetic to the indigent and tend toward "[c]lose questioning of litigants as to their eligibility for legal services, refusal to approve in forma pauperis proceedings, and irritation with the OEO attorney for pressing heretofore minute points of law."²⁶ Yet these hostilities are not necessarily restricted to the judges in the smaller claims courts. A United States Court of Appeals judge in discussing the federal statute²⁷ remarked:

One might have expected that the courts would fill the gaps and resolve the ambiguities in the act in a manner favorable to the poor litigant, but they have not. On the contrary, from the beginning they have approached the Act of 1892 with hostility and . . . have shown a penurious attitude toward the expenditure of public funds.²⁸

The hostility noted by these authors and its sometimes accompanying lack of competence bear import for the indigent, for even should he be granted an absolute right to freedom from court "expenses," active judicial hostility could make the grant worthless.

Another area where judicial hostility may bring striking results is in deciding the scope of the term "pauper." The Washington Supreme Court defined the term by way of dictum, pointing out that

the term does not and cannot, in keeping with the concept of equal justice to every man, mean absolute destitution or total insolvency.

²⁴ This term is used to denote those courts handling the small claims of the poor. In North Carolina the function is performed by either the magistrate or the district judge.

²⁵ Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694, 718, quoting address by J. Carlin, Annual Meeting of American Political Science Association, Sept. 6-19, 1966.

²⁶ *Id.* at 719.

²⁷ Proceedings in forma pauperis, 28 U.S.C. § 1915 (1964).

²⁸ Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1277 (1966) [hereinafter cited as Duniway].

Rather it connotes a state of impoverishment or lack of resources on the part of the defendant which, when realistically reviewed in the light of everyday practicalities, substantially and effectively impairs or prevents his pursuit of his remedy.²⁹

As the Washington court noted, the standard for qualification must be reasonably flexible or there will be an almost insurmountable equal protection problem.³⁰ Yet the flexible standard has its own pitfalls, one being the large amount of discretion left in the hands of the trial judge.³¹ This discretion in the past has led to disparate opinions as to who may proceed in forma pauperis.³² This variance in result is tolerated by holdings of higher courts that it takes a "manifest" abuse of discretion to overturn a determination by the trier of facts that the indigent in question is not entitled to sue in forma pauperis.³³ Should the appellate courts make it clear that the standard is a liberal one, designed to favor the applicant,³⁴ and that *absolute* discretion is not vested in the trier of facts, then the effects of the hostility could be counteracted, and eventually the number of appeals on this issue reduced.³⁵ This liberality and limited discretion seem to be incorporated in the Washington opinion, although some reiteration may be necessary before these points filter down to the lower courts.

Closely related to the question of the acceptable level of indigency is the issue of frivolity. The Washington Supreme Court indicated that a preliminary discretionary judgment as to the merits of the action would have to be made.³⁶ This approach contains all of the limitations noted above. The dilemma is aptly posed by Maguire:

Take another administrative matter: the winnowing out of sound claims from unsound ones. If this is not done at all, the courts will be clogged. If the test is made too strict, the poor are likely to lose most

²⁹ O'Connor v. Matzdorff, 76 Wash. 2d 589, 594, 458 P.2d 154, 156-57 (1969).

³⁰ For an inflexible standard *see, e.g.*, ARK. STAT. ANN. § 27-402 (1947).

³¹ The Washington court implied that the justice of the peace has discretion regarding this matter. 76 Wash. 2d at 606-07, 458 P.2d at 164.

³² *See, e.g.*, Fuller v. State, 1 Cal. App. 3d 664, 82 Cal. Rptr. 78 (1969) (must prove prima facie inability to furnish security, even if on welfare); Severa v. Severa, 22 N.J. Super. 267, 91 A.2d 895 (1952). *But see* O'Connor v. Matzdorff, 76 Wash. 2d 589, 458 P.2d 154 (1969).

³³ *See, e.g.*, Hollier v. Broussard, 220 So. 2d 175 (La. App. 1969).

³⁴ *See* Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948), for an example of such a liberal standard.

³⁵ If Washington does not require that the justice of the peace write an opinion stating his reasons for the denial, review may be extremely difficult.

³⁶ 76 Wash. 2d at 600-01, 458 P.2d at 160 (1969).

of the benefits [intended for them] [If the judge is left with the initial inquiry] either . . . the inquiries are superficial or . . . the court is burdened with a duty stealing much time from true judicial work.³⁷

Clearly, the opinion in *O'Connor* is susceptible to Maguire's analysis. But why should any judge have to make an initial determination as to frivolity or maliciousness of an indigent's suit? The courts "never bother with the question at that stage if a litigant can pay the fees. These matters can best be determined through discovery, motions for summary judgment, and trial."³⁸

It is ironic that the solution offered to stop frivolous suits and assuage the courts' fears of clogging will only tend to increase the problem. One possible solution may be to determine the level of poverty at the outset and then dismiss the claim later if it should prove frivolous,³⁹ adding some penalty to discourage similar occurrences. A second possibility is to require both reasonable proof of indigence and a *minimal* statement that the party has a cause of action or a defense.⁴⁰ The affidavit should contain no more than a bare statement of an attorney or witness that he has reviewed the facts as presented by the petitioner and in his opinion they constitute a proper claim or defense.⁴¹ By following this procedure, the court would be relieved of the burden of making an independent examination of the facts before adjudication of the case. Likewise such a provision should eliminate clogging of the courts, for the affiant or the claimant would be sanctioned later if the claim proved frivolous.⁴²

THE NORTH CAROLINA STATUTORY SOLUTION

In North Carolina, as in many other states,⁴³ waiver of costs in the institution or defense⁴⁴ of a suit and its appeal are governed by statute. The applicable statutes are North Carolina General Statutes sections

³⁷ Maguire 389.

³⁸ Duniway 1286.

³⁹ *Id.*

⁴⁰ *See, e.g.,* N.C. GEN. STAT. § 1-110 (1969).

⁴¹ *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) (affidavit to establish poverty).

⁴² An attorney is unlikely to associate his name with a frivolous claim or defense. Duniway 1285.

⁴³ Twenty-nine states now have statutes governing in forma pauperis actions and appeals. Brief for National Legal Aid and Defender Association as Amicus Curiae, App. A, at 1a, *Boddie v. Connecticut*, 91 S. Ct. 780 (1971) [hereinafter cited as NLADA Survey].

⁴⁴ Fees and costs in North Carolina may be waived for a defendant only in a suit "for land." *See* N. C. GEN. STAT. §§ 1-112, -113 (1969).

1-109(3) and 1-110 (governing bond at the institution of suit);⁴⁵ section 1-112 (waiver of bond for defendant in action "for land");⁴⁶ section 1-228 (waiver of bond and transcript fees for appeal);⁴⁷ section 6-24 (fees and costs waived at trial);⁴⁸ section 109-29 (allowance of mortgage instead of bond);⁴⁹ and section 52A-11.1 (Uniform Reciprocal Enforce-

⁴⁵ N.C. GEN. STAT. § 1-109(3) (1969) provides that should plaintiff not post bond or "[f]ile with . . . [the clerk] a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper" then plaintiff's suit shall be subject to dismissal.

N.C. GEN. STAT. § 1-110 (1969) provides:

Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section [§ 1-109]. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action.

⁴⁶ N.C. GEN. STAT. § 1-112 (1969) provides:

The undertaking prescribed in the preceding section [§ 1-111] is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also filed an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever.

⁴⁷ N.C. GEN. STAT. § 1-288 (1969) provides:

When any party to a civil action tried . . . in the superior court at the time of trial desires an appeal . . . and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal . . . without giving security therefor. The party desiring to appeal . . . shall . . . make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error . . . in the decision of the superior court The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court . . . is contrary to law. The request for appeal shall be passed upon and granted or denied by the clerk The clerk of the superior court cannot demand his fees for the transcript of the record for the appellate division of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge . . . or the clerk . . . has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the appellate division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission.

⁴⁸ N.C. GEN. STAT. § 6-24 (1969) provides: "When any person sues as a pauper no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him."

⁴⁹ N.C. GEN. STAT. § 109-29 (1966) provides:

It is lawful for any person desiring to commence any civil action or special proceeding, or to defend the same . . . to execute a mortgage on real estate of

ment of Support Act).⁵⁰ Presumably the intent of the legislature was that these statutes should form a comprehensive scheme giving the right of judicial hearing to any man, be he rich or poor. Unfortunately the statutes have not worked in such a manner. Their sometimes narrow and confusing language often works to the detriment of the indigent, while the judiciary has worsened the problem by allowing only the narrowest construction possible and by requiring strict compliance with the statutes.

There have been, however, some North Carolina Supreme Court decisions which abandon the line of narrow statutory interpretation and seek to give positive aid to the indigent. A notable, but probably vitiated, one is an 1813 decision, *McClenahan v. Thomas*,⁵¹ in which the court held that the 1787 statute requiring security for "taking out a writ" and payment of costs "in the event of failing in the suit" did not apply to indigents.⁵² The court based its decision on English statutory law⁵³ and concluded that

a law founded upon principles of such obvious justice ought to be repealed by express words or necessary implication before the court hastens [to conclude that a pauper has no relief]. For, indeed, the two statutes are perfectly compatible, and being *in pari materia*, should both have operation, and may be construed together. On this ground we think that persons may sue in this State *in forma pauperis* upon satisfying the court that they have a reasonable ground of action, and from their extreme poverty are unable to procure security.⁵⁴

Properly used, the decision in *McClenahan* could open the way for court-made cure of a number of problems. It is entirely possible, however, that

the value of the bond or undertaking required to be given . . . to the party to whom the bond or undertaking would be required to be made

⁵⁰ N.C. GEN. STAT. § 52A-11.1 (1966) provides:

A court of this State acting as a responding state may in its discretion direct that any part of all fees and costs incurred in this State, including without limitation by enumeration, fees for filing, service of process, and seizure of property, shall be paid by the county, but when an order of support is entered against a defendant, he shall be taxed with the costs. The clerk of court, when this State is the initiating state, may upon a certification by the county director of public welfare of the indigency of the plaintiff, waive all fees and costs incurred in filing a petition hereunder.

⁵¹ 6 N.C. 247 (1813).

⁵² *Id.* at 248.

⁵³ The court in *McClenahan* cites 23 Hen. VII, c. 15, as authority that paupers were to be excluded from payment of costs. There is no such statute, but the court probably was referring to 23 Hen. VIII, c. 15, § 2 (1531), which excludes pauper plaintiffs from payments of costs after suffering a nonsuit, but directs that they shall be punished in a reasonable manner.

⁵⁴ 6 N.C. at 248.

a court would find that the decision has been undercut by the enactment of more recent statutes.⁵⁵

The North Carolina statutes and cases hold other positive elements for the indigent. The statutes do offer a chance to get into court, which is more than some twenty odd other states allow.⁵⁶ The court has held that the statutory *in forma pauperis* privilege is available to nonresidents;⁵⁷ that the statutes apply to a court of a justice of the peace;⁵⁸ and that no notice to a party plaintiff is necessary to defend without bond in a suit "for land."⁵⁹ Supreme Court Rule of Procedure 22 mitigates normal costs of required briefs by allowing an indigent to file nine typewritten copies of the record rather than submitting printed briefs.⁶⁰ Finally, North Carolina has adopted the Uniform Reciprocal Enforcement of Support Act,⁶¹ which provides for payment of all fees by the county in the discretion of the judge when this state is a "responding state."⁶² When this state is the "initiating state," the clerk of court may waive the fees upon certification of plaintiff's indigency from the director of public welfare.⁶³

Statutory Problems

Unfortunately, the credits of the North Carolina statutes diminish in importance when compared with their corresponding debits. The statutes, far from comprising a workable and comprehensive plan, show the effects of piecemeal amendment over the years and of resultant conflicting language and provisions. For instance, on the trial level as a plaintiff, the indigent must show nonfrivolity by witnesses,⁶⁴ whereas on appeal⁶⁵ and

⁵⁵ The case apparently has never been cited by the North Carolina Supreme Court.

⁵⁶ See NLADA Survey.

⁵⁷ *Porter v. Jones*, 68 N.C. 320 (1873) (per curiam).

⁵⁸ *Rowark v. Gaston*, 67 N.C. 291 (1872) (per curiam). *But see* *Comron v. Standland*, 103 N.C. 207, 9 S.E. 317 (1899).

⁵⁹ *Deal v. Palmer*, 68 N.C. 215 (1873).

⁶⁰ N.C. SUP. CT. R. 22, 4A N. C. GEN. STAT. (App. I 1955).

⁶¹ N.C. GEN. STAT. §§ 52A-1 to -20 (1966).

⁶² The responding state has control over the substance of the action. The initiating state has no jurisdiction to make any binding determination between the parties. Note, however, that the defendant is taxed by the responding state with the costs if he is found guilty of avoiding support, even though he was charged no fees or costs at the outset. N.C. GEN. STAT. § 52A-11.1 (1966).

⁶³ *Id.* If this means that one has to be on welfare to be considered an indigent when North Carolina is the initiating state, an excellent equal protection argument is open to one whose income borders just above the welfare limit, yet who is indigent in any meaningful sense.

⁶⁴ N.C. GEN. STAT. § 1-110 (1969).

⁶⁵ N.C. GEN. STAT. § 1-288 (1969).

at trial as a defendant,⁶⁶ he must have an attorney certify that he has a good defense, or that the record contains legal error, in addition to doing so himself. At trial as a plaintiff, to show indigency he must allege that he is "unable to comply" with the statute requiring prosecution bonds.⁶⁷ Yet on appeal he must state that he is unable to "give the security required by law",⁶⁸ and when defendant in a land action he must show that he is "not worth the amount of the undertaking in any property whatsoever."⁶⁹ Clearly the differing requirements are confusing; yet should they not be strictly complied with, the North Carolina Supreme Court has held that the case or appeal will be dismissed.⁷⁰

An even more confusing statutory provision than those noted above is found in section 6-24.⁷¹ The statute was enacted in 1895, and has not been construed or changed since the turn of the century. The grammatical construction is loose enough so that it may be logically interpreted several ways. The mandate of the section is that "no officer shall require of him [the person suing as a pauper] any fee . . ."⁷² Yet the succeeding two phrases speak of costs, leaving the implication that costs may be taxed against the unsuccessful plaintiff. It is equally arguable that since the next two phrases—"and he shall recover no costs, except in case of recovery by him"⁷³—do not mention taxing, but only recovery of costs, the legislature meant costs to be on equal footing with fees. Thus, a logical way to read the section is to assume that fees and costs are coterminous. That assumption would lead to this reading: the indigent, having paid no costs or fees, shall recover none. Should the indigent win the action, costs will be taxed against the defendant and used to reimburse the state. Should the indigent lose the action, the state loses the amount of fees it waived, and no costs may be taxed against the indigent. The supreme court has seemingly agreed that should the plaintiff win, costs may be recovered from the defendant and must be paid to the court.⁷⁴ The court has not indicated what their holding would be on the converse—costs to be taxed to plaintiff if he loses.

Even though confusing, there has been an attempt by the legislature

⁶⁶ N.C. GEN. STAT. § 1-112 (1969).

⁶⁷ N.C. GEN. STAT. § 1-110 (1969).

⁶⁸ N.C. GEN. STAT. § 1-288 (1969).

⁶⁹ N.C. GEN. STAT. § 1-112 (1969) (emphasis added).

⁷⁰ See pp. 692-98 *infra*.

⁷¹ N.C. GEN. STAT. § 6-24 (1969). See note 48 *supra*.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Speller v. Speller*, 119 N.C. 356, 357, 26 S.E. 160 (1896).

to relieve the plight of the indigent plaintiff; the same cannot be said for the indigent defendant. With the exception of a suit for land,⁷⁵ there is no statutory provision for a defense in forma pauperis.⁷⁶ Arguably the indigent defendant is more in need of statutory relief than the indigent plaintiff. At least the plaintiff has a chance of getting an attorney on a contingent basis who may pay his fees, or arrange for waiver. Unless the defendant has some type of cross claim he must use his own funds to pay costs, fees, and incidental expenses. It is a departure from reality to imagine the indigent defendant capable of paying all these bills. Thus, "[i]t may be that some defendants . . . simply default because they cannot afford to litigate."⁷⁷ There is no justification for the omission of a defendant from the waiver statutes, given North Carolina's otherwise broad attempt at statutory coverage.

Court-Created Problems

The North Carolina Supreme Court decisions construing the statutes are generally narrow and strict, indicating disapproval of the statutory remedy granted the indigent. It was pointed out previously that some of the problems facing the courts in Washington were common ones; the judicial hostility to the indigent noted in the first section is found also in North Carolina. For example, in *McIntire v. McIntire*,⁷⁸ the North Carolina Supreme Court held:

Where a party to a civil action which has been tried in the Superior Court, desires to appeal from a judgment rendered at such trial to this Court, without giving security as required by C.S., 646, he must comply strictly with the provisions of C.S., 649, which are mandatory. Otherwise this Court is without jurisdiction of the appeal, and of its own motion must dismiss the appeal.⁷⁹

McIntire is illustrative⁸⁰ of the judicial attitude that the indigent faces. While the attitude is probably not one of outright hostility, it is most certainly not a favorable one. Whatever its label, the view is unfortunate.

Another of the court-created problems is the treatment of three parties—the administrator, the attorney on contingent fee, and the assignee of a

⁷⁵ N.C. GEN. STAT. §§ 1-111, -112 (1969).

⁷⁶ Silverstein, *supra* note 2, at 33-34.

⁷⁷ Duniway 1285.

⁷⁸ 203 N.C. 631, 166 S.E. 732 (1932) (per curiam).

⁷⁹ *Id.* at 632, 166 S.E. at 733.

⁸⁰ See also *Martin v. Chasteen*, 75 N.C. 96, 98-100 (1876).

pauper's claim—who attempt to bring in forma pauperis proceedings on behalf of or in the place of the pauper himself. With one exception, the theme that runs through the cases is that the right of suit or appeal in forma pauperis is a personal one, not assignable or transferable; where other parties have an interest in the action they also will be required to prove their poverty or be denied suit. The clearest example of this theme occurs where a suit is filed by a pauper and is in progress and then the claim is assigned to one not a pauper. Such occurred in *Davis v. Higgins*,⁸¹ in which the assignee was typified by the court as “a wealthy resident in the city of New York.”⁸² The facts of the assignment were not brought out at the trial, but upon their emergence at the appellate level, the court held that the assignee did not acquire the right to sue as a pauper along with the right to sue and that had the facts been brought to the attention of the trial judge, the leave to sue in forma pauperis would have been withdrawn.⁸³

A situation similar to that of the assignee is that of the attorney who takes an indigent's case on a contingent fee. In consideration for taking plaintiff's claim, the attorney is “assigned” a percentage of any amount recovered. The general rule is that an attorney on contingent fee is not a party to suit to the extent that he has to prove his poverty as well as his client's.⁸⁴ To date the North Carolina Supreme Court has not directly considered the point, but in *Allison v. Southern Railway*⁸⁵ it stated that

[t]he plaintiff, in his affidavit, affirmed that he was unable to give a prosecution bond in the sum of \$200, or to make a deposit of like amount for the same purpose; but it did not necessarily follow that he was unable to compensate his counsel in some way other than by a division of the amount of recovery, or that his counsel had not assumed the prosecution of the suit without compensation.⁸⁶

The language leaves the impression that should the attorney be paid by contingent fee, he must be presumed to be a party for proof-of-poverty pur-

⁸¹ 91 N.C. 382 (1884).

⁸² *Id.* at 383.

⁸³ *Id.* at 388. See also *Hamlin v. Neighbors*, 75 N.C. 66 (1876) (per curiam), in which plaintiff, suing in forma pauperis, died and his executor petitioned to be allowed to take his place. The court held that the executor must file a petition showing his poverty and reassert a good cause of action.

⁸⁴ See, e.g., *Isrin v. Superior Court*, 63 Cal. 2d 153, 403 P.2d 728, 45 Cal. Rptr. 320 (1965).

⁸⁵ 129 N.C. 336, 40 S.E. 91 (1901), *rev'd on other grounds*, 190 U.S. 326 (1903).

⁸⁶ *Id.* at 337-38, 40 S.E. at 91-92.

poses. The impression is buttressed by the indication in the concurring opinion that the court should have held that even if the attorney were paid on a contingent basis, he should not be considered a party.⁸⁷

At an early date, in *McKiel v. Cutler*,⁸⁸ the court held that an administrator of an estate could not sue in forma pauperis. The holding was based on the argument that while both the personal representative and the estate might be insolvent, the creditors, legatees or next of kin normally are not, and since the action—a suit for interest in property—was for their benefit, they should bear the cost.⁸⁹ Fifty years later in *Christian v. Railroad Co.*,⁹⁰ an action for wrongful death, the court was faced with facts substantially similar to *McKiel*. The court distinguished the two, holding that a wrongful death action did not actually accrue to the estate; that it was a personal right of the administrator; and that should he be insolvent, he could proceed in forma pauperis.⁹¹ The court refused to apply *McKiel*, but also refused to overrule it.⁹² Although *Christian* mitigates *McKiel* somewhat, the more logical solution for the court to reach would be to require that the estate alone be insolvent.

The third court-created problem is a procedural one—at what point will an appellate court review a discretionary decision of a trial judge? Of necessity many of the decisions made by the trier of facts will be discretionary ones. By leaving the trial judge with these decisions, a requisite amount of flexibility is injected into the system. In order to maintain this flexibility, the appellate court must be willing to find an abuse of discretion in an appropriate situation. If not, the trial judge becomes paramount.

The North Carolina court has indicated three areas of decision that are within the discretionary powers of the trial judge—frivolity,⁹³ level of poverty,⁹⁴ and requirement of bond.⁹⁵ The nature of the suit and whether

⁸⁷ *Id.* at 343-44, 40 S.E. at 93-94. From a policy standpoint, the view in the concurring opinion is the better one. How is the indigent to obtain counsel if not on a contingent fee basis?

⁸⁸ 45 N.C. 139 (1853) (per curiam).

⁸⁹ *Id.* at 140. Cf. *Hamlin v. Neighbors*, 75 N.C. 66 (1876) (per curiam).

⁹⁰ 136 N.C. 321, 48 S.E. 743 (1904).

⁹¹ *Id.* at 322-23, 40 S.E. 743-44.

⁹² *Id.* The concurring opinion quite rightly pointed out that the Code did not cover this case. Since the Code only required the plaintiff to certify that he "is unable to comply" with the bond requirement, why make a distinction? The logical result is to overrule *McKiel*.

⁹³ *Brendle v. Heron*, 68 N.C. 496 (1873) (per curiam).

⁹⁴ *Alston v. Holt*, 172 N.C. 417, 90 S.E. 434 (1916) (by implication).

⁹⁵ *Modlin v. Atlantic Fire Ins. Co.*, 151 N.C. 35, 39, 65 S.E. 605, 607 (1909), citing *Christian v. Railroad Co.*, 136 N.C. 321, 48 S.E. 743 (1904).

it is a good cause of action are controlled by sections 1-110⁹⁸ and 1-288,⁹⁷ which require some averment by the petitioner that he believes or is advised that he has a good cause of action.⁹⁸ Both also require a third party, either a witness⁹⁹ or an attorney,¹⁰⁰ to certify likewise. Apparently the court has never considered whether it is an abuse for a trial judge to accept an affidavit or certification when the action is clearly frivolous.¹⁰¹ In fact, the court has apparently never found a per se abuse of discretion from incorrect acceptance of any affidavit or certification.¹⁰² Even though the court has been unwilling to utter the magic word—abuse—the same effect has been achieved where acceptance of an affidavit or certification has conflicted with the court's strong policy of strict construction of the acts.¹⁰³ In none of the cases does the court mention abuse of discretion; yet in each it has been willing to reverse a trial judge on a discretionary decision.

The same phenomenon occurs when the trial judge considers the poverty of the indigent. The court has held the determination of poverty to be in the hands and discretion of the trial judge.¹⁰⁴ Yet, even where a trial judge found that the petitioner had more assets than alleged in his affidavit but still allowed the *in forma pauperis* motion,¹⁰⁵ the court did not find abuse, but remanded to the trial judge to see if the affidavit "was made in good faith."¹⁰⁶ Once again, however, where the finding of the court below conflicts with the court's policy of strict construction, it will reverse without hesitation. This has been done where the affidavit was

⁹⁸ See note 45 *supra*.

⁹⁷ See note 47 *supra*.

⁹⁸ See notes 45 & 47 *supra*.

⁹⁹ See note 45 *supra*.

¹⁰⁰ See note 47 *supra*. Note that the trial judge determines the sufficiency of the certificate and the affidavit for trial, and may do so for appeal. The clerk of superior court may also judge the sufficiency of the certificate and affidavit.

¹⁰¹ A possible reason is the unwillingness of an attorney to sign his name to a false certification.

¹⁰² The court *has* held that refusal to grant leave to defend an action "for land" when defendant has complied with the statute was incorrect. The holding was that once the defendant has complied with the statute, an absolute right to sue *in forma pauperis* vests in him, and "it did not rest in the discretion of the court to refuse to allow him to do so." *Wilson v. Fowler*, 104 N.C. 471, 472, 10 S.E. 566 (1889), *citing* *Dempsey v. Rhodes*, 93 N.C. 120, 125 (1885).

¹⁰³ *E.g.*, *Gilmore v. Imperial Life Ins. Co.*, 214 N.C. 674, 200 S.E. 407 (1939); *Lupton v. Hawkins*, 210 N.C. 658, 188 S.E. 110 (1936); *Noble v. Pritchett*, 204 N.C. 804, 169 S.E. 618 (1933) (*per curiam*).

¹⁰⁴ *Alston v. Holt*, 172 N.C. 417, 90 S.E. 434 (1916) (by implication).

¹⁰⁵ *Perry v. Perry*, 230 N.C. 515, 53 S.E.2d 457 (1949) (*per curiam*).

¹⁰⁶ *Id.* The court merely asked the trial judge to review his allowance of the appeal and made no attempt to examine the facts to determine whether an abuse of discretion had occurred.

not placed in the record¹⁰⁷ and where the affidavit contained some minor deviation from the required formality.¹⁰⁸

In areas in which the court has no strong policy favoring strict construction, the discretion of the trial judge is generally absolute. For example, where petitioner had been allowed to sue in forma pauperis and the trial judge subsequently denied a motion to require prosecution bond, the court held that it was bound by the trial judge's decision, such being in his discretion.¹⁰⁹ Likewise, where a trial judge granted leave to sue in forma pauperis and later required bond or dismissal, the court again held that it could not participate in the decision since such decision was in the absolute discretion of the trier of facts.¹¹⁰

The fourth of the problems created by the North Carolina Supreme Court is attitudinal—the court simply does not favor in forma pauperis suits. Though this bias may be seen in the problems already discussed, it is most obvious in three areas—fees, costs, and bonds. While fees, bonds and costs are presumably governed by statute in North Carolina,¹¹¹ the court has taken every available opportunity to define and limit the statutes where they are confusing or do not cover a particular item. The general trend of the decisions is that while most costs are waived at trial,¹¹² and while bonds are waived at trial and on appeal, the costs and fees on appeal for the most part are not.¹¹³

Even at trial, where it would seem that all fees and costs would be waived for the indigent, he is still responsible for witness fees.¹¹⁴ Earlier it was pointed out that in all actions except those for land, waiver of bond at trial was not open to a defendant.¹¹⁵ Clearly, therefore, fees and costs

¹⁰⁷ *Noble v. Pritchett*, 204 N.C. 804, 169 S.E. 618 (1933) (per curiam).

¹⁰⁸ See, e.g., *Ogburn v. Sterchi Bros. Stores*, 218 N.C. 507, 11 S.E.2d 460 (1940); *Waters v. Boyd*, 179 N.C. 180, 102 S.E. 196 (1920). Hopefully this problem may be partially cured by the 1937 amendment to N.C. GEN. STAT. § 1-288 (1969). See note 47 *supra*.

¹⁰⁹ *Modlin v. Atlantic Fire Ins. Co.*, 151 N.C. 35, 65 S.E. 605 (1909); *Christian v. Railroad Co.*, 136 N.C. 321, 48 S.E. 743 (1904).

¹¹⁰ *Alston v. Holt*, 172 N.C. 417, 90 S.E. 434 (1916).

¹¹¹ See statutes cited notes 45-47 *supra*.

¹¹² But see *Whedbee v. Ruffin*, 191 N.C. 257, 131 S.E. 653 (1926).

¹¹³ The theory is that the court below is presumed to be correct and "public officers are not called upon to render gratuitous services to impeach the result of a trial already had." *Bailey v. Brown*, 105 N.C. 127, 129, 10 S.E. 1054 (1890). It should also be noted that N.C. GEN. STAT. § 1-288 (1969), does provide for appeal by a defendant by allowing "any party" to appeal. The court apparently has never heard a case involving the right of a defendant to appeal in forma pauperis.

¹¹⁴ *Draper v. Buxton*, 90 N.C. 182 (1884); *Booshee v. Surles*, 85 N.C. 90 (1881); *Morris v. Rippey*, 49 N.C. 533 (1857). Witness fees in North Carolina are three dollars per day plus nine cents per mile. Expert witness fees are in the discretion of the court. N.C. GEN. STAT. § 7A-314 (1969).

¹¹⁵ See p. 689 *supra*.

may not be waived for a defendant in a suit not involving land. Amazingly, the court has also held that even in a suit for land the defendant is liable for fees and costs.¹¹⁶

The holdings of the court in regard to costs and fees on appeal closely parallel those involving defendants in land suits.¹¹⁷ Uniformly the court has denied waiver of either to all indigents.¹¹⁸ The court has recognized, however, that costs on appeal are great and has made some effort to reduce them.¹¹⁹ The legislature at times has had a similar attitude and by statute in 1907¹²⁰ overruled the court's requirement that payment be made for transcripts on appeal.¹²¹

The single statutory provision that one would think inviolate is the provision for waiver of bond at trial and on appeal. For the most part this is a correct assumption. Where, however, a trial appellate judge later finds that the indigent has property sufficient for bond, the judge will immediately put the indigent to an election—either produce bond or the action will be dismissed.¹²² The situation is further complicated in a suit for land because of the exacting poverty standard of the statute involved.¹²³ In a set of facts where the indigent has nothing except land of small value, the court has required that he mortgage it pursuant to section 109-29 or be subject to dismissal.¹²⁴ The court made this holding in spite of the permissive, rather than mandatory, provisions of section 109-29.¹²⁵ In short the court seemingly excluded the indigent from any other means of financing. Hopefully this is an improper interpretation. The court has also held that an indigent may not give a mortgage in lieu of bond in a court

¹¹⁶ *Dempsey v. Rhodes*, 93 N.C. 120 (1885).

¹¹⁷ *See, e.g., Speller v. Speller*, 119 N.C. 356, 26 S.E. 160 (1896).

¹¹⁸ *See, e.g., Martin v. Chasteen*, 75 N.C. 96, 99 (1876).

¹¹⁹ N.C. SUP. CT. R. 22, 4A N.C. GEN. STAT. (App. I 1955).

¹²⁰ Ch. 878, § 1, [1907] N.C. Sess. L. 1275. *See also* N.C. GEN. STAT. § 1-288 (1969) (Editor' [sic] Note).

¹²¹ *Compare Bailey v. Brown*, 105 N.C. 127, 129 (1890), *and Andrews v. Whisnant*, 83 N.C. 446, 448 (1880), *with Skipper v. Kingsdale Lumber Co.*, 158 N.C. 322, 74 S.E. 342 (1912).

¹²² *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896). In *Dale*, the court said [t]his privilege . . . was only intended for the benefit of parties who could not give the security. And when he becomes able to do so we see no reason why he should not be put to his election to do so or to have his action dismissed. *Id.* at 492, 26 S.E. at 28.

¹²³ N.C. GEN. STAT. § 1-112 (1969), requires that defendant state "that he is unable to give and is not worth the amount of the undertaking in any property whatsoever."

¹²⁴ *Alston v. Holt*, 172 N.C. 417, 90 S.E. 434 (1916).

¹²⁵ N.C. GEN. STAT. § 109-29 (1966), provides that "[i]t is lawful . . . to execute a mortgage on real estate [in lieu of a bond]"

of a justice of the peace if the indigent is found to have enough property for bond.¹²⁶

Solutions

There are at least three alternatives within the present system that could be used to produce a workable plan for granting effective access to the courts for the indigent. The most complete of the three possibilities would be to revoke the present statutes and overrule the cases limiting the remedies available to the indigent. As a substitute, the provisions of the URESA could be adopted and made mandatory for all civil cases. The tests for poverty and frivolity now in effect should be kept in substantially the same form.¹²⁷ It should be made a policy of the act that the determinations of poverty and frivolity are in the discretion of the trial judge, subject to review for abuse of discretion by the appellate court. It should finally be indicated that the intent of the legislature is to give the indigent an absolute right to entrance to the courts and that he is to be treated in the same manner as any other plaintiff or defendant.

A second and somewhat less radical possibility would be to amend the welfare laws to provide for complete subsidization of the welfare recipient in court, subject to repayment if he is successful. A similar approach was authorized by the Minnesota Supreme Court in *Munkelwitz v. Hennepin County Welfare Department*,¹²⁸ in which the court held that the authorization by the legislature to the welfare department of "such support or relief as the case may require"¹²⁹ was broad enough to cover legal expenses. This approach has the disadvantage of excluding those not on welfare, and is therefore subject to serious equal protection questions.

The third path for change is to leave the present statutory system as is, and press for a judicial decision that the courts inherently have the power to waive all fees, costs and bonds. The holding could be based partially on *McClenahan v. Thomas*,¹³⁰ though not entirely, since that case was dependent on English statutory law. This is the least satisfactory of

¹²⁶ *Comron v. Standland*, 103 N.C. 207, 9 S.E. 317 (1889).

¹²⁷ The defect in these provisions is not their form or the fact that they are in the discretion of the trial judge. The problem is that the trial judge has not particularly favored the indigent and has ruled against him in close cases, and the decisions have generally not been reviewable because of the court's policy of review of abuse of discretion. Given a liberal interpretation and a willingness to declare abuse, the two procedures will work correctly.

¹²⁸ 280 Minn. 377, 159 N.W.2d 402 (1968).

¹²⁹ *Id.* at 379, 159 N.W.2d at 403, citing MINN. STAT. § 261.03 (1967).

¹³⁰ 6 N.C. 247 (1813).

the three solutions because it depends on an extremely liberal interpretation of the powers of the court and of the common law.

THE CONSTITUTION AND THE INDIGENT

On March 2, 1971, the United States Supreme Court held, in *Boddie v. Connecticut*,¹³¹ that "due process . . . prohibit[s] the State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."¹³² Though the decision is an important one, its primary use in this comment is to serve as a measure of the constitutionality of the North Carolina statutes waiving fees and costs for the indigent. However, the decision will be examined, both to determine the method by which the Court reached its holding, and also to spot any problems the holding may cause the indigent.

The Constitution as a Measure of an Indigent's Right to Waiver of Fees and Costs

In *Boddie* plaintiffs filed a divorce action in a Connecticut superior court, but tendered neither the filing fee required by statute,¹³³ nor the amount due the sheriff for service of process.¹³⁴ The Clerk of Superior Court returned plaintiffs' papers, whereupon a class action was initiated in federal district court to declare Connecticut's fee statute unconstitutional as applied to plaintiffs and all persons similarly situated, and to compel "the appropriate officials to permit them 'to proceed with their divorce actions without payment of fees and costs.'"¹³⁵ A three-judge panel held that Connecticut's failure to waive filing and service of process fees for plaintiffs was not a violation of any constitutional right.¹³⁶

The Supreme Court reversed, finding that the due process clause of the fourteenth amendment requires a state to give an indigent plaintiff a hearing in a divorce action without requiring plaintiff to pay fees.¹³⁷ The Court first noted that the state has a monopoly over its court system. Normally this monopoly is proper, even where it acts to exclude some individuals from the courts, since there are usually other means of settling disputes.¹³⁸ The Court noted that the only way to settle a mar-

¹³¹ 91 S. Ct. 780 (1971).

¹³² *Id.* at 784.

¹³³ CONN. GEN. STAT. REV. § 52-259 (Supp. 1970-71).

¹³⁴ CONN. GEN. STAT. REV. § 52-261 (Supp. 1970-71). The total amounted to about sixty dollars. 91 S. Ct. at 783.

¹³⁵ 91 S. Ct. at 783-84.

¹³⁶ *Boddie v. Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

¹³⁷ 91 S. Ct. at 784.

¹³⁸ *Id.* at 785.

riage dispute is through an agency of the state—the courts. Against this background the Court stated the two principles decisive of the case—that due process requires the state to give persons forced to settle their claims in court an avenue to the court,¹³⁹ and that a statute may be constitutional on its face and still be unconstitutional in its application to specific persons.¹⁴⁰ The Court used four cases to buttress the first contention: *Windsor v. McVeigh*,¹⁴¹ *Baldwin v. Hale*,¹⁴² *Hovey v. Elliott*,¹⁴³ and *Mullane v. Central Hanover Bank & Trust Co.*¹⁴⁴ The Court's summation of the applicable holding in all four cases was

that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.¹⁴⁵

Such a statement of the four holdings is somewhat deceptive, in that all four cases dealt with a *defendant's* right to be heard. The Court justified extension of the defendant-oriented doctrine on the basis that in this case the plaintiff had just as little choice as a defendant about going into court since the state controls the institution of marriage and procedures for dissolution thereof.

To support the second principle, the Court cited *Mullane* and *Covey v. Town of Somers*,¹⁴⁶ analogizing notice statutes to the present case. In both *Mullane* and *Covey* valid notice statutes operated in an unconstitutional manner to foreclose a defendant's right to be heard, just as in *Boddie*, a valid fee statute operated to close a plaintiff from the only state agency in which he could be heard.

As a final matter the Court disposed of Connecticut's contention that substantial state interests, in the form of prevention of frivolous litigation and allocation of scarce state resources, should justify the state in turning away the indigent from the courtroom. With regard to frivolous litigation, the Court pointed out that the connection between a plaintiff's assets and the quality of his litigation is tenuous at best, and in addition, that there were other methods of discouraging frivolous litigation.¹⁴⁷ In

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 787.

¹⁴¹ 93 U.S. 274 (1876).

¹⁴² 68 U.S. (1 Wall.) 223 (1863).

¹⁴³ 167 U.S. 409 (1897).

¹⁴⁴ 339 U.S. 306 (1950).

¹⁴⁵ 91 S. Ct. at 785.

¹⁴⁶ 351 U.S. 141 (1956).

¹⁴⁷ 91 S. Ct. at 788.

dealing with Connecticut's quest for a self-financing judiciary, the Court simply reaffirmed the rationale of *Griffin v. Illinois*¹⁴⁸ that a state may not impugn constitutional rights in order to fund its judicial agency.¹⁴⁹

The major problem raised by the Court's resolution of Mrs. Boddie's claim is that the decision is restricted to situations where the proceeding is a divorce, and where "the *bona fides* of . . . [the supplicants'] indigency and desire for divorce are . . . beyond dispute."¹⁵⁰ Thus, it would seem that the indigent has a constitutional right to waiver of fees and costs only where (1) the action pursued is a divorce, (2) there has been a determination that the plaintiff (or defendant) is an indigent, and that he desires a divorce, and (3) the facts determined in (2), above, are "beyond dispute."

Though the first requirement limits the number of indigents who may have waiver of fees and costs as a constitutional right, it is less troubling than the second and third requirements. Possibly the Court could have gone further and granted all indigents the right to waiver of costs and fees.¹⁵¹ The Court did not reach such result, however, and it is useless to do other than live with what we have, and actively work for a more inclusive decision in the future.

Requirements two and three could pose serious problems for the indigent. The Court gave the states no guidelines for making these determinations, thus allowing each state to set its own standards. Thus, by limiting its opinion, and by failing to set adequate guidelines, the Court has forced the states to determine beyond dispute if the person in question is truly indigent and truly desires a divorce.

What standards a state will use to determine whether an indigent desires a divorce is an open question. A better question is why should the indigent be forced to prove that he desires a divorce? In the normal case, such desire is not an item of proof. If, during the process of the action, it is found that the parties do not want a divorce, the action is dismissed and costs are taxed to the plaintiff. Why not apply the same standard to the

¹⁴⁸ 351 U.S. 12 (1956).

¹⁴⁹ 91 S. Ct. at 788.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 791 (Brennan, J., concurring). See also *Id.* at 788-89. As Justices Douglas and Brennan suggest in their concurring opinions, the case could easily have been decided on the basis of the equal protection rationale found in *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny. Mr. Justice Brennan also argued that the Court's distinction between divorce and the normal civil case was meaningless. ["I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law." 91 S. Ct. at 791].

indigent? The Court itself made an analogous point when speaking of a state's use of fee statutes to discourage frivolous litigation.¹⁵² It would seem that the argument should be extended to cover this requirement.

The question of what the level of poverty should be in order to qualify as an indigent has been explored to some extent previously. As already noted, many states have established indigency standards, and there is wide variance.¹⁵³ Variance of standards is not bad; however, some states have standards set so low that it is almost impossible for anyone to be indigent.¹⁵⁴ This problem of restrictive standards is further complicated by the Court's requirement that proof of indigency be "beyond dispute." If "beyond dispute" is to be taken as requiring the highest level of proof, this factor when combined with the Court's failure to prescribe reasonable guidelines may allow a state to exclude many of the indigent from the courtroom until the Court rules on what constitutes acceptable indigency standards.

The Constitution As a Measure of the North Carolina Indigency Statutes

Measured by *Boddie* the North Carolina statutes waiving fees and costs for indigents seem to comply with constitutional standards. The same statement may not hold true for the statutes as construed by the North Carolina Supreme Court. For instance, in *Whedbee v. Ruffin*¹⁵⁵ the court stated that "[t]he right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court."¹⁵⁶ This *dictum* is in clear conflict with the United States Supreme Court holding in *Boddie*. In divorce cases at least, the indigent has a *right* to fee waiver once he has complied with the *Boddie* requirements, not merely a privilege. The answer to this argument is to admit that the constitutional grant is one of right, but point out that the decisions as to indigency and frivolity (desire for divorce) still lie in the discretion of the trial judge. Thus North Carolina arguably may still retain its policies regarding the ambit of the trial judge's discretion and review of that discretion.

A second instance in which the policies of the North Carolina Supreme Court when coupled with the statutes may fail to meet constitutional stan-

¹⁵² 91 S. Ct. at 788.

¹⁵³ See note 43 *supra*. See also notes 3 & 4 *supra*.

¹⁵⁴ See note 30 *supra*.

¹⁵⁵ 191 N.C. 257, 131 S.E. 653 (1926).

¹⁵⁶ *Id.* at 259, 131 S.E. at 654.

dards lies in the previously discussed area of strict compliance with technical rules.¹⁵⁷ The North Carolina Supreme Court's policy seems to be that since what is granted is a favor, strict compliance with the statutes is necessary to avoid a waiver. Since what is granted is no longer a favor, but a matter of right, at least in some limited circumstances, strict compliance should no longer be necessary. Yet it is clear that a constitutional right may be knowingly waived. Examples that come to mind immediately are waivers of *Miranda* rights¹⁵⁸ and fifth amendment rights.¹⁵⁹ In each of these situations, however, the individual defendant must make the waiver. In many of the North Carolina cases, the error involved is one made by the attorney of the indigent.¹⁶⁰ Although the attorney is his client's agent, it is arguable whether he may waive a constitutional right for his principal. In addition, the waiver required is a knowing one. Again, it is at least arguable that an indigent will never know enough about all the technicalities required by the cases and statutes to knowingly waive his constitutional right to courtroom entry in divorce cases. Thus, it may well be that the requirement of strict technical compliance with the statutes endorsed by the North Carolina Supreme Court is not a constitutionally acceptable one.

CONCLUSION

It is axiomatic to say that the lower socio-economic groups in this country have not shared access to the civil courtroom with those better situated. Both the courts and the legislatures have recognized the inequality and both are to be congratulated for attempting to change it. Yet much needs to be done.

The *O'Connor* decision holds promise, but has not been tested enough at this writing to determine if it will offer access to the courts to a significant number of the poor. *Boddie* is extremely narrow in coverage. In addition, it contains ambiguities that will take many years of litigation to clarify. The North Carolina fee and cost waiver statutes do not protect the indigent from enough of the costs of litigation. In addition, the North Carolina Supreme Court cases interpreting the statutes further restrict the statutory ambit, and may possibly make them unconstitutional in their operation.

Each of these attempts to give the indigent access to the civil court is

¹⁵⁷ See pp. 693-99 *supra*.

¹⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

¹⁵⁹ *Smith v. United States*, 337 U.S. 137 (1949).

¹⁶⁰ See, e.g., *Queen v. Snowbird Valley R.R.*, 161 N.C. 217, 76 S.E. 682 (1912).