Insurance -- Contribution Rights under G.S. § 1-240

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consonant with the potential use in light of the surrounding circumstances.  

In the final analysis the status of the doctrine of acceptance of dedication by user in North Carolina is confused. The decided cases have left a wake of conflicting statements and strangely amalgamated concepts which do not entirely agree with the better reasoned authorities. At least in the context of the principal case, a simple solution would be to acknowledge that the general public, relying on the manifested intent to dedicate streets in a subdivision, could make the offer irrevocable by user without thereby imposing a duty of maintenance on the public authorities.

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Of extreme practical importance to the practicing bar is the contribution statute, G.S. § 1-240, around which a maze of questionable procedural rules has been judicially constructed. Considerable

E.g., Dormont Borough Appeal, 371 Pa. 84, 89 A.2d 351 (1952) (use only by residents of immediate neighborhood, insufficient acceptance by general public).

The finding of an incomplete dedication in the principal case may well have been supportable on the facts, even if the court had recognized user as a mode of acceptance. Even so, it would seem that a discussion of user and the weighing of the factors that combine to determine whether there has been sufficient user was necessary to correctly reach the final result.

N.C. Gen. Stat. § 1-240 (1953) provides in effect that “(1) those who are jointly and severally liable as judgment debtors, either as joint obligors or as joint tort-feasors, may pay the judgment and have it transferred to a trustee for their benefit, and such transfer shall have the effect of preserving the lien of the judgment against the judgment debtor who does not pay his proportionate part thereof to the extent of his liability; (2) joint tort-feasors against whom judgment has been obtained may, in a subsequent action therefore, enforce contribution from other joint tort-feasors who were not made parties to the action in which the judgment was taken; (3) joint tort-feasors who are made parties defendant, at any time before judgment is obtained, may, upon motion, have the other joint tort-feasors made parties defendant; (4) joint judgment debtors who do not agree as to their proportionate liability, by petition in the cause, in which it is alleged that any other joint judgment debtor is insolvent or a nonresident and cannot be forced under execution to contribute to the payment of the judgment, may have their proportionate liability ascertained by court and jury; and (5) joint judgment debtors who tender payment of judgment and demand in writing transfer thereof to a trustee for their benefit, and are refused such transfer by judgment creditors, may not thereafter have execution issued against them upon said judgments.” Gaffney v. Lumbermen’s Mut. Cas. Co., 209 N.C. 515, 518, 184 S.E. 46, 47 (1936).

See 40 N.C.L. Rev. 633 (1962).
uncertainty also exists as to the act's current substantive effect, and legislative revision would seem to be in order.

One important question to be considered if the statute is revised will be whether to codify or eradicate the present rule recently reaffirmed in Herring v. Jackson⁴ that a liability insurance carrier may not be subrogated to its insured's right to contribution against a joint tortfeasor. This dubious doctrine, peculiar to this state, was announced by our court over twenty-five years ago in Gaffney v. Lumbermen's Mut. Cas. Co.,⁴ where the original defendant insurer attempted to implead the joint tortfeasor and his liability carrier. It was said there that since the right to contribution was purely statutory in derogation of the common-law rule that joint tortfeasors had no such remedy, "a most liberal construction of the statute will not permit the writing into it of the liability insurance carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein."⁵ It may well be questioned whether a truly "liberal" court in that instance would not have written the word "insurers" into the statute, relying upon the equitable theory of subrogation.⁶ Other courts have not found themselves incapable of performing this very task⁷ and liability insurance carriers are generally held to be entitled to such rights without question where they exist in favor of their insureds.⁸

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⁵ 209 N.C. 515, 184 S.E. 46 (1936), discussed in 15 N.C.L. Rev. 289 (1937). A default judgment had been entered and returned unsatisfied against defendant's insured prior to the action.
⁶ Id. at 519, 184 S.E. at 47-48.
⁷ See note 14 infra and accompanying text.

The **Uniform Contribution Among Tortfeasors Act § 1(e)** (1955) provides: "A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the
Apparently defendant insurer in *Gaffney* did not believe the court meant what it said, for after satisfying the judgment and causing it to be assigned to a trustee, the insurance carrier recovered a default judgment against the joint tortfeasor and then proceeded to sue his insurer for contribution. The theory advanced was that if G.S. § 1-240 did not confer the right, the equitable principle of subrogation did without regard to the provisions of the statute. A demurrer was sustained and affirmed.

These decisions did not attain their real importance, however, until the enactment of the Motor Vehicle Financial Responsibility Acts of 1953 and 1957, providing for compulsory liability coverage. The question then arose as to how far these cases extended. The answer came three years ago in *Squires v. Sorahan*. Judgment had been entered against four defendants, an agent and his three principals, one of which had left the state and could not be forced under execution to contribute to payment. Liability insurers of two defendants satisfied the judgment, one paying five-sixths and the other the remainder. After having the judgment assigned to a trustee for the benefit of its insured, the former company in the name of its insured proceeded by petition in the cause for a judgment establishing the proportionate part each judgment debtor should pay. The petition was denied. On appeal, counsel for appellant argued that the earlier decisions were distinguishable in that they merely held that a liability insurer and its insured, upon paying more than a proportionate share of the judgment, could not go directly against the insurer of the other joint judgment debtor, and did not rule out an action against the latter. The supreme court disagreed.

"Extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship." *Handbook of the National Conference of Commissioners on Uniform State Laws* 218 (1955).

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9 See note 14 *infra*.

10 Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936), 15 N.C.L. Rev. 289 (1937): "There is no relationship between joint tort-feasors which entitles one joint tort-feasor to contribution from the other joint tort-feasor. Neither is liable as surety for the other. Each is liable for the damages caused by their joint and concurring negligence. But for the statute, neither is entitled to contribution from the other." *Id.* at 17, 188 S.E. at 636.


13 Brief for Appellant, p. 17. Counsel for appellant pointed out that the court had recognized without comment in Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936), that plain-
Although producing no substantial change in the North Carolina law, the *Herring* decision, because of the particular facts involved, presented the court with a reasonable opportunity to re-evaluate the *Gaffney* rule. In *Herring* the insured instituted an independent suit for contribution against the joint tortfeasor after plaintiff's insurance carrier had paid the injured party pursuant to a consent judgment in return for the insured's execution of a "loan receipt." Reasoning that the "loan receipt" was merely a subterfuge employed by the insurer in an effort to circumvent and subvert G.S. §§ 1-57

[1] This agreement was in the standard form, stating that the plaintiff received the sum required to pay the judgment against him from the insurance company as a loan to be repayable only in the event and only to the extent of any recovery which might be had by the plaintiff from the defendant as a joint tortfeasor. It further provided that the plaintiff agreed to cooperate fully with the insurer and would allow the suit to be brought in his name, if necessary, to the end that all right of contribution which he had or might thereafter acquire could be enforced. Finally, it was provided that the expense of the litigation, if any, would be borne by the insurance carrier and if an action was brought, it would be under the exclusive control of the insurance company.

Counsel for plaintiff-appellant, representing insurer and insured, informed this writer that the decision to bring the loan receipt arrangement before the court by way of an independent action for contribution in lieu of impleading the joint tortfeasor as a third party defendant in the claimant's suit was reached on the basis of the following facts: Claimant and joint tortfeasor were related and instituted separate suits against the insured in different counties. It was thought that claimant could prove liability and recover at least $15,000, but that insured was not liable for the injury specified in the joint tortfeasor's suit. Also, insured had a substantial claim against the latter. Hence, settlement was made with claimant for $8,750, the policy limit being $10,000, and a counterclaim was filed along with the answer to the joint tortfeasor's subsequent action. The joint tortfeasor failed to establish negligence as the proximate cause of the injury for which he had sued, the jury apparently choosing to believe that this injury had been received in a previous accident, but the insured established the joint tortfeasor's negligence and recovered over $4,000 on his counterclaim as to which the joint tortfeasor had failed to plead contributory negligence. The stage was then set to test the "loan receipt" in an independent action for contribution since the issue of defendant's negligence was res judicata under the rule of *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E.2d 345 (1953).
and 1-240, the court held that the settlement represented not a loan but payment under the policy. Thus, the insurer—not its insured—was the real party in interest under G.S. § 1-57, and since insurance carriers have no right of contribution under G.S. § 1-240 as construed, the judgment of dismissal was affirmed.

No valid quarrel can be made with the unerring logic of the decision. Many cases have approved the "loan receipt" device as a means of avoiding subrogation of the insurer and leaving the insured as the real party in interest, but with few exceptions, all involved claims for damage to the insured's property by fire, collision or similar casualty allegedly caused by the tortious act of a third party. In such situations, the only purpose of a "loan" is to shield insurance companies from the possible prejudice of jurors, since by full payment insurers are universally subrogated to their insureds' rights and may sue in their own names. In fact, the North Carolina Supreme Court has said in dictum no less than three times, including the instant decision, that a "loan receipt" will be respected in such a situation.

In contrast, the only case found allowing an insured to prosecute a contribution suit for the benefit of his liability insurance carrier through the use of a "loan receipt" was decided in a jurisdiction where the insurer, had it chosen, could have sued in its own right. Since in that decision the sole purpose of the "loan" was to avoid

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16 Counsel for appellant presented the Herring case by way of hypothetical in his brief in Squires and predicted this result.


20 Blair v. Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950).

21 Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926).
jury prejudice, the holding was distinguished, our court reasoning that since the insurer there could have prosecuted the action itself had it so desired, the defendant was not adversely affected. In short, Herring v. Jackson stands for the proposition that a liability insurance carrier cannot create a cause of action in itself through the use of a "mere fiction." Overall, it is reluctantly conceded that it was asking too much of the court to overturn the established rule on the basis of such a fictitious transaction. Plaintiff-appellant might have argued that the insured was the trustee of an express trust\(^2\) under G.S. § 1-63 or that payment by the insurer was in practical effect payment by the insured through the premiums,\(^2\) but no authority directly in point could have been cited for either proposition. It appears safe to say that the court has spoken the final word on this question,\(^2\) and that any relief from the harshness of the present rule can only come through the legislative process.

As the law apparently now stands, an insurer must bear the entire burden if it satisfies a judgment before judgment is entered in favor of its insured for contribution against the joint tortfeasor; that is, the liability carrier can preserve its insured's right to contribution


The contention that the insured is the trustee of an express trust, or an action brought in the name of the trustee after assignment of claimant's judgment to him would very likely be unsuccessful. The North Carolina court recently in Ingram v. Nationwide Mut. Cas. Co., 258 N.C. 632, 637, 129 S.E.2d 222, 227 (1963), held in effect that the assignee of a judgment, or the trustee of a judgment debtor, could maintain an independent action for indemnity against a co-defendant "subject to the rule that the payment in full by a judgment debtor operates as an absolute discharge of the judgment, notwithstanding that an assignment is made to a trustee to keep it alive, if the payor is not, aside from the assignment, entitled to contribution, subrogation or indemnity." The court would probably hold that the insurer, not the insured, was the "payor" under this exception to the rule that the trustee may sue. Also, plaintiff insured in Herring was really no more than an agent for collection who cannot qualify as trustee of an express trust.


\(^2\) "Manifestly, plaintiff cannot, by the 'device' or 'mere fiction' of a 'Loan Receipt' agreement or otherwise, confer upon Nationwide a right to contribution when such right is denied by the decisions of this Court." Herring v. Jackson, 255 N.C. 537, 545, 122 S.E.2d 366, 373 (1961). (Emphasis added.)
only by impleading the joint tortfeasor as an additional defendant. By this procedure, plaintiff’s judgment against the insured and the latter’s judgment against the additional defendant for contribution are entered at the same time, thus preserving the right.\textsuperscript{26} The teaching of the \textit{Gaffney} case is that this cross-action must be prosecuted in the name of the insured. Independent actions and motions in the cause for contribution after entry and satisfaction of plaintiff’s judgment, whether brought by insurer or insured, afford no relief as shown by the decisions in \textit{Lumbermen’s Mut. Cas. Co., Herring, and Squires}. It is difficult, if not impossible, to find any rational basis for allowing contribution in the one instance and not in the other. Also, under the decisions interpreting G.S. §1-57, if plaintiff’s judgment exceeds the policy limits by the slightest amount, the cause of action remains in the insured, thus enabling him to bring a subsequent suit for contribution against the joint tortfeasor\textsuperscript{26} or his insurer, if the former’s liability has been established in a prior action.\textsuperscript{27}

Furthermore, the sole procedural remedy of cross-action is not always available. For example, if the joint tortfeasor is a large corporation, wealthy individual, or other so-called “target defendant,” counsel for original defendant may decide that forfeiture of the contribution right is wiser than risking an increased recovery due to the additional defendant’s presence in the suit. Also, when plaintiff joins all defendants in his complaint, cross-claims for con-

\textsuperscript{26} Counsel for plaintiff in the \textit{Herring} case states that there is a strong belief among many members of the insurance bar that this avenue is also closed by \textit{Herring}. At least one insurer of an additional defendant has been advised not to recognize the judgment for contribution rendered against its insured, and litigation is expected to follow. The theory is that the original defendant cannot enforce the judgment for contribution until the plaintiff’s judgment has been paid, and when this payment has been made by an insurer, the cause of action for contribution no longer resides in the insured but is extinguished. No case has yet decided this issue. See also Smith v. Whisenhunt, 259 N.C. 234, 130 S.E.2d 334 (1963), where the jury was unable to reach a decision on the contribution issue, and the court ordered a new trial on that issue alone.


Suppose the insurer is liable on its policy up to $10,000 and judgment is entered for $12,000. It would be consistent with the cases discussed in this note if the insured could only recover $1,000 in contribution from the joint tortfeasor, but in accord with current real party in interest rules, the insured may collect $2,000 for himself and $4,000 as trustee for his liability insurance carrier.

\textsuperscript{26} Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963). Most policies provide that the insurer shall be liable only for those sums insured is “legally obligated” to pay.
This necessarily means that G.S. §1-240 is completely ineffective as to joint judgment debtors and obligors, at least in the instance when they are active joint tortfeasors, when the judgment is satisfied by the liability insurer or insurers paying the entire sum or more than their proportionate share or shares.

When G.S. § 1-240 was first enacted in 1929, it amounted to an announcement of legislative policy favoring contribution. Considering the fact that nearly all North Carolina motorists now carry liability insurance, it is evident that the statute retains little of its former effectiveness. It is often said that if the rule were otherwise the particular insurer would profit little, since gains from realizing and losses from paying contribution would probably cancel one another in a multitude of cases. It would seem, however, that the validity of this argument depends on whether the different insurance firms write approximately the same number of policies. Also overlooked is the fact that the absence of the right is reflected in higher insurance rates, and it is highly unlikely that the insurer will ever recoup any amount paid in contribution to resident self-insurers and nonresident motorists who are uninsured. Simply stated, the current rule does not treat the particular parties in the specific suit in an equitable manner.

It is also safe to assume that insurers are hesitant to settle and lose their contribution possibilities where there is an honest question of joint tortfeasorship and where a compromise settlement cannot be reached with the other carrier. Thus, the no contribution as to insurers rule runs afoul of the general policy of the law favoring settlement and frustrates the purpose of the Financial Responsibility

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29 A defendant secondarily liable may cross-claim for indemnity against his co-defendant, who is primarily responsible. Greene v. Charlotte Chem. Labs, Inc., supra note 28.

30 As to the policy of contribution, see the opposing positions of Professors James and Gregory, Contribution Among Joint Tortfeasors: A Pragmatic Criticism; A Defense, 54 Harv. L. Rev. 1156 (1941).

31 It is true that G.S. §1-240 requires a judgment to support the right to contribution so that in every instance at least a consent judgment must be entered. Should the statute be revised, the legislature should seriously consider whether this burdensome condition should be retained. A prior judgment is unnecessary because the identical questions will be in issue and the same defenses available to the joint tortfeasor in the contribution action. Western Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 251 N.W. 491 (1933).

Section 1 of the Uniform Contribution Among Tortfeasors Act, set
Acts, which were enacted for the benefit of the highway victim. The General Assembly might well consider changing this rule based purely upon legal reasoning without sufficient regard to practical considerations.

JOHN BRYAN WHITLEY

Oral Contracts to Devise Realty—Right of Third Party Beneficiary to Recover on Quantum Meruit

In North Carolina an oral contract to devise real property is void under the Statute of Frauds, and part performance by the promisee will not remove the contract from the operation of the Statute. However, the promisee who performs services pursuant to such a contract has a remedy on implied assumpsit or quantum meruit to recover the value of the services rendered.

Pickelsimer v. Pickelsimer presented the question of whether the third party beneficiary of a contract that is void under the Statute of Frauds may recover on quantum meruit the value of services rendered pursuant to the contract. In this case the father of an illegitimate child had orally promised the child’s mother that he would devise and bequeath to the child a one-fifth part of his estate if she would refrain from instituting bastardy proceedings

out in the Handbook of the National Conference of Commissioners on Uniform State Laws 218 (1955), provides: “(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. . . . (d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.” (Emphasis added.)