Notes and Comment

North Carolina Law Review

NOTES AND COMMENT

Civil Procedure—Jurisdiction of Transitory Actions—Effect of Restriction of Venue After Voluntary Nonsuit

Generally speaking, a liberal attitude is taken in the United States towards allowing a plaintiff to take a voluntary nonsuit or to dismiss his action without prejudice.[1] However, there have undoubtedly been many instances in which plaintiffs have taken advantage of this liberality in order to obtain a change of venue when such change would not otherwise be possible.

Attempts to correct this abuse without restricting the plaintiff's right to take a voluntary nonsuit can be found in statutes and court orders which provide that, after such dismissal or nonsuit, a subsequent suit on the same cause of action may be brought only in the court which granted the nonsuit or dismissal. A problem then arises as to whether such a statute or court order precludes the plaintiff's bringing a suit on the same cause of action in the courts of another state, or in the federal courts, if such courts would otherwise have jurisdiction. This problem was considered in two recent cases wherein it was decided that the subsequent action would not be precluded.[2]

One of these cases arose under a Virginia statute.[3] The suit was brought in federal district court in Virginia by a citizen of Ohio against a citizen of Virginia to recover damages for personal injuries. The district court dismissed the action on the ground that a dismissal of

[1] ". . . nearly three-fourths of the states give the plaintiff the absolute right to halt proceedings, discontinue his action, and return again at a more convenient time upon the same issues, even though the trial was well commenced, or in fact, nearly over." 37 VA. L. REV. 969, 986 (1951).

North Carolina is one of the most liberal states in this respect. Plaintiff has the right to take a nonsuit any time before the rendition of the verdict. He may then institute a new action within one year from the date of the nonsuit. N. C. GEN. STAT. §§ 1-25, 1-224 (1953). Briley v. Roberson, 214 N. C. 295, 199 S. E. 73 (1938).

Taking a volutary nonsuit in federal court is within the discretion of the district judge unless it is taken before answer or by stipulation of all parties. FED. R. CIV. P. 41(a).

The terms "dismissal" and "nonsuit," unless otherwise indicated, are used synonymously herein, as they generally are. Wetmore v. Crouch, 188 Mo. 647, 87 S. W. 954 (1905); 27 C. J. S., *Dismissal and Nonsuit* § 1 (1941).

[2] As both of these cases appear to be decisions of first impression, the purpose of this note will be to point out the analogous situations and decisions which may be considered precedents for these decisions and to show that they represent extensions of the rules set forth in the analogous decisions.

[3] VA. CODE § 8-220 (1950), which provides that: ". . . after a non-suit no new proceeding on the same cause of action shall be had in any court other than that in which the non-suit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court."

a prior suit on the same cause of action in a Virginia state court precluded plaintiff's suit in the district court by reason of the Virginia statute.[4] This decision was reversed by the Court of Appeals for the the 4th Circuit which held, *per* Parker, Chief Judge, that: "the effect of the statute is merely to limit the venue of any new action on the cause of action nonsuited; and, of course, a state venue statute can have no application to the courts of the United States."[5]

In the other case, an order of a South Carolina trial court which granted the dismissal attempted to restrict any subsequent actions on the same cause of action to that court. However, the Supreme Court of North Carolina held that the plaintiff was not precluded from suing on the same transitory cause of action[6] in the courts of North Carolina.[7]

For purposes of discussion, the problem raised in these two cases can be considered from two aspects: (A) the res judicata effect of a nonsuit or dismissal which is prejudicial to plaintiff's rights to the extent of restricting the venue of a subsequent action on the same cause of action; and (B) the validity of attempts by the courts or legislature of one state to restrict the venue of a cause of action of which the courts of other states or the federal courts are otherwise competent to take jurisdiction.

In both of the principal cases it is obvious that the nonsuits granted were not intended to bar subsequent actions altogether, but were intended merely to restrict the venue of subsequent actions. There seems to be no reason, therefore, why the nonsuits in these cases cannot be brought within the general rule that a judgment of dismissal or non-

[4] Popp v. Archbell, 108 F. Supp. 571 (E. D. Va. 1952).

[5] Popp v. Archbell, 203 F. 2d 287, 288 (4th Cir. 1953). The decision also overrules Buchanan v. Norfolk Taxi-Cab Corp., 95 F. Supp. 810 (E. D. Va. 1951), wherein the same construction was given to the statute as in the District Court's opinion in Popp v. Archbell, 108 F. Supp. 571 (E. D. Va. 1952).

[6] "Transitory" actions are personal actions; the transactions on which they are based might take place anywhere; "local" actions, on the other hand, are based on transactions which could occur only in some particular place. The test as to whether actions are transitory or local is in the nature of the subject of the injury, not in the cause of the injury nor the place at which the cause of action arises. Brady v. Brady, 161 N. C. 325, 326, 77 S. E. 235, 236 (1913); McLeod v. Connecticut & P. R. Co., 58 Vt. 727, 733, 734, 6 Atl. 648, 649, 650 (1886).

[7] Howle v. Twin States Express, Inc., 237 N. C. 667, 75 S. E. 2d 732 (1953). Plaintiff, a resident of Tennessee, brought an action in North Carolina Superior Court against defendant, a North Carolina corporation, for damages for personal injuries sustained in an automobile accident in South Carolina. Plaintiff had previously brought an action in the South Carolina Court of Common Pleas. That court had granted plaintiff a voluntary nonsuit with limited prejudice, that is, with the right to renew the action in that county only, but without the right to bring the action in another county. The trial judge granted the dismissal in this form because he found that ". . . there is no denial of the defendant's assertion that the underlying purpose of the voluntary nonsuit is *to bring the action in another county.*" (Emphasis supplied.) 237 N. C. 667, 668, 75 S. E. 2d 732, 734 (1953). In the suit in North Carolina, the trial court allowed defendant's plea in abatement based on this order. The North Carolina Supreme Court reversed.

suit in a state court which is not an adjudication of the merits of the controversy will not support a plea of res judicata and will not bar a subsequent action on the same cause of action in the courts of another state,[8] or of the United States.[9] Conversely, a dismissal which is not on the merits in a federal court will not bar a new action in a state court.[10]

A more difficult problem arises when the legislature or the courts of a state attempt to restrict the prosecution of certain actions, or classes of action, either to the courts of that state in general or to specific courts.

An example of this is seen in early cases which arose under a statute of the Territory of New Mexico[11] which provided that actions for personal injuries received in the Territory could be maintained only in its courts. The Texas Court of Civil Appeals, however, allowed a recovery for personal injuries sustained in New Mexico.[12] The United

[8] Brunswick Tire Corp. v. Credit Tire Stores, Inc., 8 Cal. App. 2d 69, 46 P. 2d 804 (1935); Jones v. Supreme Lodge, K. of H., 236 Ill. 113, 86 N. E. 191 (1908); Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542 (1907); Wilson & Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S. W. 266 (1923); *see In re* Porep, 60 Nev. 393, 111 P. 2d 533 (1941).

But cf. Welch v. Kroger Grocery Co., 180 Miss. 89, 177 So. 41 (1937) (Plaintiff took a voluntary nonsuit in suit in Tennessee when the court was "in the act of granting" defendant a directed verdict. *Held:* subsequent suit in Mississippi on same state of facts properly dismissed as Tennessee court had, in effect, decided defendant's non-liability.); Morrow v. Atlanta & C. A. L. Ry. Co., 84 S. C. 224, 66 S. E. 186 (1909) (nonsuit in prior action in North Carolina because plaintiff's evidence proved as a matter of law that he was not entitled to recover, *held* to bar subsequent action on same cause in South Carolina).

[9] Security Realization Co. v. Henderson, 120 F. 2d 449 (9th Cir. 1941); Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 108 F. Supp. 170 (S. D. N. Y. 1952); Jacobs v. North La. & Gulf R. Co., 69 F. Supp. 5 (W. D. La. 1946).

This decision has been reached in cases in which plaintiff took a voluntary nonsuit after judgment for him in trial court was reversed on appeal, and case was remanded: Gardner v. Michigan Cent. R. Co., 150 U. S. 349 (1893); Southwestern Greyhound Lines, Inc. v. Buchanan, 126 F. 2d 179 (5th Cir. 1942), *cert. denied*, 317 U. S. 646 (1942), *rehearing denied*, 317 U. S. 707 (1942); Interstate Realty and Investment Co. v. Bibb County, Georgia, 293 Fed. 721 (5th Cir. 1923); Gabrielson v. Waydell, 67 Fed. 342 (C. C. E. D. N. Y. 1895).

For cases reaching the same result in which the dismissal was for failure of proof, see: Brooklyn Heights R. Co. v. Ploxin, 294 Fed. 68 (2d Cir. 1923), *cert. denied*, 263 U. S. 719 (1923); Glencove Granite Co. v. City Trust, etc. Co. 118 Fed. 386 (3d Cir. 1902); Cline v. Southern Ry. Co., 231 Fed. 238 (W. D. S. C. 1916).

Cf. Western Union Tel. Co. v. Ammann, 296 Fed. 453 (3d Cir. 1924) (involuntary nonsuit); Bixler v. Pennsylvania R. Co., 201 Fed. 553 (M. D. Pa. 1913) (compulsory nonsuit).

[10] *E.g.*, Swift v. McPherson, 232 U. S. 51 (1914); Carr v. Howell, 154 Cal. 372, 97 Pac. 885 (1908); Wells v. Western Union Tel. Co., 144 Iowa 605, 123 N. W. 370 (1909).

[11] N. M. LAWS 1903, c. 33, §§ 1-7.

[12] Atchison, T. & S. F. Ry. Co. v. Sowers, 99 S. W. 190 (Tex. Civ. App. 1906), *writ of error denied*, Texas Supreme Court, March 13, 1907, *aff'd.*, 213 U. S. 55 (1909). *But cf.* Southern Pac. Co. v. Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766 (1907) (distinguished *Sowers* case on ground that plaintiff here was resident of New Mexico and could not disregard its laws by suing in other states when the New Mexico statute forbade such practice).

States Supreme Court affirmed,[13] saying that full faith and credit was given to the statute when its other conditions (concerning making of affidavits and certain time limitations) were complied with,[14] but that the right of action could not be restricted as it was based on common-law principles.[15] This rule was extended in *Tennessee Coal, Iron & R. R. Co. v. George*[16] to include actions brought under statutes which created causes of action not existing at common law.[17] The Supreme Court said that venue was no part of the right created,[18] and that "a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action."[19]

[13] Atchison, T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, *affirming* 99 S. W. 190 (Tex. Civ. App. 1906).

[14] U. S. CONST. Art. IV, § 1; 28 U. S. C. § 1738 (Supp. 1949). A state is required to give full faith and credit to the public acts, records, and judicial proceedings of every other state; but the jurisdiction of a state's courts must be prescribed by that state's constitution and legislation, and a law attempting to to interfere with the jurisdiction of another state's courts does not come within the full faith and credit provision of the Constitution. Atchison, T. & S. F. Ry. Co. v. Sowers, 99 S. W. 190 (Tex. Civ. App. 1906).

[15] Atchison, T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, 70 (1909).

The distinction was accordingly made in several cases that where a statute created a right not previously existing, a condition could be attached that suits based on that right be brought only in courts of that jurisdiction. Coyne v. Southern Pac. Co., 155 Fed. 683 (D. Utah 1907); *see* Lessenden v. Missouri Pac. Ry. Co., 238 Mo. 247, 260, 261, 142 S. W. 332, 335, 336 (1911), *appeal dismissed,* 225 U. S. 696 (1911); Atchison, T. & S. F. Ry. Co. v. Mills, 53 Tex. Civ. App. 359, 116 S. W. 852, 854 (1909).

[16] 233 U. S. 354 (1914), *affirming* 11 Ga. App. 221, 75 S. E. 567 (1912).

[17] In the *George* case, *supra* note 16, suit was brought in Georgia to enforce a right created by an Alabama statute. An Alabama venue statute, ALA. CODE § 6115 (1907), attempted to confine the right to bring such actions to the courts of Alabama. This provision has subsequently been stricken from the Code, ALA. CODE, tit. 7 § 63 (1940).

The Georgia Court of Appeals said: "The statute of Alabama is the source of the right on which the jurisdiction acts; but it is not the source of the jurisdiction itself. We look to the act to determine the right; but we refuse to look to the law of Alabama to determine what rights the courts of this state will enforce, or to fix the jurisdiction of its tribunals." Tennessee Coal, Iron & R. R. Co. v. George, 11 Ga. App. 221, 75 S. E. 567, 571 (1912).

[18] Compare the language of the North Carolina Supreme Court in Howle v. Twin States Express, Inc., 237 N. C. 667, 672, 75 S. E. 2d 732, 736 (1953): "It [the order of the South Carolina court dismissing the plaintiff's action with limited prejudice] pertains to procedure, rather than to the substance of the cause of action."

[19] Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 360 (1914). See also, Slaton v. Hall, 172 Ga. 675, 158 S. E. 747 (1931); State *ex rel.* Bossung v. District Court, 140 Minn. 494, 168 N. W. 589 (1918); *accord,* Houston & T. C. R. Co. v. Fife, 147 S. W. 1181 (Tex. Civ. App. 1912), *writ of error denied,* Texas Supreme Court, June 26, 1912 (plaintiff not precluded from suing Louisiana corporation in Texas although the statute which incorporated defendant provided that actions against it could be brought only at its place of domicile).

The United States Supreme Court, in the *George* case, recognized that cases

The North Carolina Supreme Court, in the *Howle* case, after finding that the North Carolina courts would otherwise be competent to take jurisdiction over this cause of action, discussed the intent of the order of the South Carolina court and decided that the order was intended only to prevent the plaintiff from bringing his action in a neighboring county. The Court felt that the South Carolina court did not intend that its order should extend beyond the territorial limits of the state, and that the order could not have such force and effect.[20] Although the Court did not specifically rely on any authority discussed here, the decision would seem to be an extension of the principle that one state cannot oust another state's courts of jurisdiction of a transitory cause of action.

However, where the plaintiff attempts to bring his second action in a federal court, the conclusion reached must be based on different principles.

Generally, the rule of *Erie R. R. Co. v. Tompkins*,[21] which requires federal courts to follow state substantive law, does not apply to matters of practice or procedure, including matters of venue.[22] The federal courts, therefore, cannot be deprived of the jurisdiction granted to them by Congress, and that jurisdiction cannot be restricted, by a state law which regulates venue in state courts,[23] which confers exclusive juris-

would arise wherein right and remedy are so united that the right can only be enforced before the tribunal designated by the act. Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 359 (1914). For examples of such rights, see: Mosely v. Empire Gas & Fuel Co., 313 Mo. 225, 281 S .W. 762 (1926) (workmen's compensation statute); Davis v. P. E. Harris & Co., 25 Wash. 664, 171 P. 2d 1016 (1946) (same).

There are situations not within the scope of this note in which the courts of the state in which the cause of action is sought to be enforced may *refuse* to entertain jurisdiction, particularly if the cause of action arises under a statute of another state which is penal in character or which is contrary to the public policy of the state in which the right is sought to be enforced. *E.g.*, Carey v. Schmeltz, 221 Mo. 132, 119 S. W. 946 (1909).

[20] Howle v. Twin States Express, Inc., 237 N. C. 667, 672, 673, 75 S. E. 2d 732, 737 (1953).

[21] 304 U. S. 64 (1938).

[22] Carby v. Greco, 31 F. Supp. 251 (W. D. Ky. 1940).

However, the Federal Rules of Civil Procedure will not be applied in diversity cases where such application would permit the contravention of state policy and state law. Hoosier Cas. Co. of Indianapolis, Ind. v. Fox, 102 F. Supp. 214 (N. D. Iowa 1952).

[23] Foote v. Kansas City Life Ins. Co., 92 F. 2d 744 (5th Cir. 1937) (rule that only court with power to cancel a sheriff's deed of sale in execution of judgment was the court which originally issued the execution order); Blunda v. Craig, 74 F. Supp. 9 (E. D. Mo. 1947) (provision in non-resident motorists act that suits under it must be filed in county in which the cause of action accrues); East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. 608 (C. C. S. D. Ga. 1892) (state statute providing that suits against a corporation must be brought in the county in which its principal office is located); Davis v. James, 2 Fed. 618 (C. C. N. D. Ill. 1880) (state statute allowing guardians to mortgage real estate of their wards provided that foreclosures of such mortgages could only be had in the county court which allowed the mortgage); Cunningham v. County of Ralls, 1 Fed. 453 (C. C. E. D. Mo. 1880) (state statute providing that actions against a county shall be brought in the circuit court of such county).

diction of certain controversies upon its own courts or upon a particular court,[24] or which ". . . prescribes the modes of redress in [its] courts, or which regulates the distribution of [its] judicial power."[25] In accordance with these principles, the Court of Appeals, in *Popp v. Archbell*,[26] decided that the Virginia statute was a statute regulating practice and procedure in state courts and could have no effect on federal jurisdiction.

Thus, there is apparently no direct precedent for the decisions in the principal cases. Yet, on the basis of the decisions in analogous cases, it would seem that the results reached in these two cases are correct and proper, in that the jurisdiction of a court should not be restricted or eliminated by laws or rules governing procedure in the courts of other jurisdictions.

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Constitutional Law—Right of Counsel

The North Carolina Supreme Court has recently affirmed the constitutional principle that counsel need not be assigned to defend persons accused of non-capital crimes, absent special circumstances brought to the attention of the court and revealing the necessity for counsel.[1]

The English common law denied a person accused of treason or felony the benefit of counsel,[2] and did not even consider the assignment of counsel,[3] while most of the original American colonies at least nominally provided for the right to counsel.[4] The privilege, which has

[24] Barber Asphalt Pav. Co. v. Morris, Judge, 132 Fed. 945 (8th Cir. 1904) (city charter allowing claims against the city to be appealed only to a certain state court); Darby v. L. G. DeFelice & Son, Inc., 94 F. Supp. 535 (E. D. Pa. 1950) (statute providing that suits against turnpike commission could be brought only in courts of certain county); Wunderlich v. National Surety Corp., 24 F. Supp. 640 (D. Minn. 1938) (statute authorizing issue of bonds required suit on them to be brought within the state); Brown v. Return Loads Bureau, 15 F. Supp. 1073 (S. D. N. Y. 1936) (wrongful death statute providing that actions under it must be prosecuted within the state); *accord,* Slaton v. Hall, 172 Ga. 675, 158 S. E. 747 (1931) (*held* that action under same wrongful death statute could be prosecuted in competent court of another state). *Cf.* Crowley v. Goudy, 173 Minn. 603, 218 N. W. 121 (1928).

As to effect of state statutes granting exclusive jurisdiction over suits affecting probate or administration of decedents' estates to probate courts, see Annotation, 158 A. L. R. 9 (1945).

[25] Hyde v. Stone, 20 How. 170, 175 (U. S. 1858); Lappe v. Wilcox, 14 F. 2d 861 (N. D. N. Y. 1926).

[26] Note 5 *supra.*

[1] State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953).

[2] Herein, the general constitutional privilege concerning counsel for defense in criminal cases is called "right of counsel," and includes: (1) "benefit of counsel," which means that a person may be represented by a lawyer whom he has employed; and (2) "assignment of counsel," which means that a person is entitled to the assignment of a lawyer to defend him.

[3] Powell v. Alabama, 287 U. S. 45, 60 (1932).

[4] *Id.* at 64.

troubled the United States Supreme Court since 1932[5] and is increasingly the subject of litigation in state courts,[6] has assumed substantial meaning in recent years[7] when the courts have attempted an adequate definition of the privilege.

In North Carolina the privilege is broadly defined in the Constitution,[8] by statutes,[9] and by an early statement of the Supreme Court,[10] but later cases applying the rule are less liberal. *State v. Hedgebeth*[11] contains the fullest statement of the present interpretation, holding the right to an assignment of counsel mandatory in capital cases, guaranteeing those accused of non-capital felonies and misdemeanors the benefit of counsel, and making the assignment of counsel in non-capital cases dependent on (1) circumstances showing "the apparent necessity of counsel for the protection of the defendant's rights," and (2) a request for counsel.[12] This case was affirmed by the United States Supreme Court,[13] although the majority[14] did not rest their decision on the merits,[15] and it is the law in North Carolina today.

[5] The first significant federal case, preceding the decisions cited herein, was Powell v. Alabama, 287 U. S. 45 (1932).

[6] See list of cases cited in 16 C. J. S., *Const. Law* § 591 (Supp. 1953).

[7] Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N. Y. U. L. Q. REV. 1, 7, 9 (1944).

[8] N. C. CONST. Art. I, § 11: "In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense. . . ."

[9] N. C. GEN. STAT. § 15-4 (1953), enacted in 1777, provides: "Every person, accused of any crime whatsoever shall be entitled to counsel in all matters which may be necessary for his defense." See N. C. GEN. STAT. §§ 15-4.1, 5 (1953).

[10] State v. Collins, 70 N. C. 241, 244 (1874): "In this country every one has a constitutional right in all criminal prosecutions to have counsel for his defense; and if he be too poor to employ counsel, it is the duty of the court to assign some one to defend him; and it is the duty of the counsel thus assigned to give to the accused the benefit of his best exertions. It is gratifying to be able to state that the bench and bar in North Carolina have always dealt mercifully and generously with those who have had the double misfortune to be stricken with poverty and accused of crime."

[11] 228 N. C. 259, 45 S. E. 2d 563 (1947).

[12] *Id.* at 266, 45 S. E. 2d at 567.

The importance of a request for the assignment of counsel in noncapital cases is not clear. The general statement in the *Hedgebeth* case, *ibid.*, places this factor on an equal plane with "special circumstances," but *In Re* Taylor, 229 N. C. 297, 301 49 S. E. 2d 749 (1948), citing the *Hedgebeth* case, provides that "the appointment of counsel . . . is discretionary with the trial court." Probably a request for counsel in another circumstance which the court considers in determining whether there was an improper failure to assign counsel, although the broad rule of the *Hedgebeth* case is so indefinite that later cases may enlarge or diminish the importance of a request.

[13] Hedgebeth v. North Carolina, 334 U. S. 806 (1947).

[14] Justices Rutledge and Douglas dissented.

[15] Hedgebeth v. North Carolina, 334 U. S. 806, 807 (1947): "If petitioner's allegations, with supporting affidavits, in the *habeas corpus* proceedings controlled the issue before us, they would established circumstances that make the right to assistance of counsel an ingredient of the Due Process clause. * * * Since the North Carolina Supreme Court went on the ground that it did not have the full record before it, we are constrained to dismiss the writ because the judgment below can rest on a non-federal ground."

Several cases have raised the question of what circumstances will warrant the assignment of counsel in non-capital cases, but the court has not given a general rule in answer. Where a person indicted for violation of a criminal penalty provision of the election law[16] rejected the trial court's attempt to assign counsel, no error was found, although the court seemed to assume that he might have the privilege of assignment of counsel.[17] In the *Hedgebeth* case,[18] a tenant farmer was indicted for "highway robbery." He was twenty-four years old with a third grade education, without money, unfamiliar with business and legal affairs, and although not questioned as to his desire for counsel, the court held the failure to assign counsel for him was not a denial of the constitutional privilege. The court's attitude seemed different where a nineteen year old Negro soldier was charged with assault with intent to kill. By dictum it indicated that the judge should have assigned counsel for the defendant, and reversed his conviction on this and other grounds.[19]

In the principal case[20] an indigent defendant, thirty-nine years of age, had attended school through the sixth grade, had formerly been convicted of serious crimes and had served time in prison. Charged with conspiracy to assault and rob, assault with a deadly weapon with the intent to kill, and robbery, he did not ask for counsel and after attempting to try his own case was convicted on all counts and given sentences running consecutively. The court held that there was no error in the failure of the trial court to assign counsel for him. A general rule based on these cases can be no clearer than the overworked maxim that "each case must stand on its own facts."

Although there is feeling that assignment of counsel is ordered more frequently now than in the past,[21] and some decisions do support this theory,[22] the North Carolina rule is not in conflict with that of Florida,[23] Massachusetts,[24] Pennsylvania[25] and some of the other states.[26]

There are provisions in the United States Constitution[27] which

[16] Now N. C. GEN. STAT. § 163-196(10) (1952).
[17] State v. Pritchard, 227 N. C. 168, 41 S. E. 2d 287 (1947).
[18] 228 N. C. 259, 45 S. E. 2d 563 (1947).
[19] State v. Wagstaff, 235 N. C. 69, 68 S. E. 2d 858 (1951).
[20] State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953).
[21] Notes, 30 B. U. L. REV. 139, 141 (1940), 42 COL. L. REV. 271, 282 (1942), 28 TEXAS L. REV. 236, 240 (1950).
[22] Johnson v. Zerbst, 304 U. S. 458 (1938); People v. Avilez, 86 Cal. App. 289, 194 P. 2d 829 (1948); Todd v. State, 226 Ind. 496, 81 N. E. 2d 530 (1948); Cogdell v. State, 193 Tenn. 261, 246 S. W. 2d 5 (1951); Thorne v. Callahan, 39 Wash. 2d 43, 234 P. 2d 517 (1951).
[23] Sneed v. Mayo, —— Fla. ——, 66 So. 2d 865 (1953).
[24] McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874 (1899), followed in Allen v. Commonwealth, 324 Mass. 558, 87 N. E. 2d 192 (1949).
[25] Popovich v. Claudy, 187 Pa. Super. 482, 87 A. 2d 489 (1952).
[26] See, Betts v. Brady, 316 U. S. 455, 477 (1942) (appendix). The classification set out there does not adequately present the North Carolina rule, however.
[27] U. S. CONST. AMENDS. V, VI, XIV, § 1.

affect the state rule concerning the right to counsel, but the application of these provisions seems to be a policy question on which the members of the United States Supreme Court have consistently divided, revealing wide differences of opinion. A majority has expressed the idea that the "due process" clause is the only limit on state interpretation of this privilege, defining the test of denial of due process to be whether the facts of the particular case are "shocking to the universal sense of justice."[28] Another theory in support of this view is that the matter of criminal justice is properly left in state hands,[29] and it has led a majority to erect technical barriers to the consideration of this privilege.[30] The contrary view states that the assignment of counsel is a fundamental right, and is guaranteed to defendants in all state criminal cases by the Fourteenth Amendment.[31]

Recently the court has recognized this division,[32] and following the death of two justices usually voting with the minority,[33] a rule has begun to evolve which is a hybrid of the two conflicting views. The basic theory remains that of the majority,[34] but in response to a minority appeal for a formulated principle, *Powell v. Alabama*[35] is now cited as holding that the assignment of counsel in capital cases is required.[36] In non-capital cases, the rule remains fluid and the right to assignment of counsel is said to depend upon the facts of the particular case.[37]

The tendency of the federal Supreme Court is to declare the right to an assignment of counsel in an increasing number of non-capital cases,[38] and a dissenting opinion presents the test as the "need" for counsel, measured by the "nature of the charge and the ability of the

[28] Betts v. Brady, 316 U. S. 455, 461 (1942).

[29] In Uveges v. Pennsylvania, 335 U. S. 437, 449 (1948), Mr. Justice Frankfurter said in dissenting: ". . . intervention by this Court in the criminal processes of States is delicate business. It should not be indulged in unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution."

[30] In Carter v. Illinois, 329 U. S. 173, 176 (1946), the court, in reaching its decision that there had been no denial of due process, said ". . . the very narrow question now before us is whether this common law record establishes that the defendant's sentence is void . . . ," and repeatedly used the phrase "upon the record before us" to introduce any statement of law.

[31] Betts v. Brady, 316 U. S. 455, 475 (1942) (dissenting opinion).

[32] Uveges v. Pennsylvania, 335 U. S. 437, 440 (1948).

[33] Justices Frank Murphy and Wiley B. Rutledge.

[34] Uveges v. Pennsylvania, 335 U. S. 437, 441 (1948): "The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial."

[35] 288 U. S. 45 (1932).

[36] Williams v. Kaiser, 323 U. S. 471, 476 (1944); Bute v. Illinois, 333 U. S. 640, 680 (1948) (dissenting opinion).

[37] Palmer v. Ashe, 342 U. S. 134 (1951).

[38] Palmer v. Ashe, 342 U. S. 134 (1951); Gibbs v. Burke, 337 U. S. 773 (1949); Uveges v. Pennsylvania, 335 U. S. 437 (1948); Townsend v. Burke, 334 U. S. 736 (1948); Wade v. Mayo, 334 U. S. 672 (1948).

average man to face it alone. . . ."[39] The court has held the failure to assign counsel to be a denial of due process where the defendant was incapable of defending himself on trial by reason of his age, race, or mentality;[40] where the trial court or its officers acted unfairly;[41] and where the defendant was unable to conduct adequate defense because of a complex charge or fact situation.[42]

The rule of the United States Supreme Court affecting the states is thus similar to the North Carolina rule, but the "special circumstances" which require the assignment of counsel in non-capital cases have been more thoroughly explored, and it is likely that the United States rule is more liberal than the North Carolina rule. It appears that a person accused of a non-capital crime in North Carolina today has no assurance of an assignment of counsel.

The writer suggests that the United States Supreme Court has maintained a strong and liberal policy on civil rights, including the right to counsel in criminal cases, expressing a desire to leave the application of this privilege in the hands of the several states. Thus, the function of the states is to delineate a policy which will insure defendants in non-capital cases a substantial constitutional right.

ROY W. DAVIS, JR.

Corporations—Dissolution—Deadlock

The problem of corporate stockholder and/or director deadlock is a familiar one to the practicing corporation lawyer.[1] This deadlock situation is, of course, only one of many problems which arise under the general subject of dissolution of a corporation, for any cause, at the instance of minority stockholders. The broader topic above referred to has already been treated in this *Law Review*[2] and therefore, the

[39] Bute v. Illinois, 333 U. S. 640, 682 (1948).

[40] Palmer v. Ashe, 342 U. S. 134 (1951) ("young irresponsible boy" of low mentality); Wade v. Mayo, 334 U. S. 672 (1948) (eighteen year old "youth unfamiliar with court procedure"); De Meerleer v. Michigan, 329 U. S. 663 (1947) (seventeen year old boy); Rice v. Olson, 324 U. S. 786 (1945) (Indian).

[41] Uveges v. Pennsylvania, 335 U. S. 437 (1948) (defendant threatened by state's attorney); Townsend v. Burke, 334 U. S. 736 (1948) (court questioned defendant about former criminal charges, of which he had been exonerated); Smith v. O'Grady, 312 U. S. 329 (1941) (false promises by officers of the court).

[42] Palmer v. Ashe, 342 U. S. 134 (1951) (defendant, convicted of robbery, meant to plead guilty to breaking and entering); Gibbs v. Burke, 337 U. S. 773 (1949) (court said counsel could have prevented admission of incriminating testimony); Rice v. Olson, 324 U. S. 786 (1945) (venue problem of trial court's jurisdiction over an Indian on reservation).

[1] For an excellent discussion of the problem in general, see Israels, *Deadlock and Dissolution*, 19 CHI. L. REV. 778 (1952).

[2] Note, 28 N. C. L. REV. 313 (1950).

"Deadlock, which appears by the decided cases to have occurred only in corporations having a few stockholders, implies dissension due to equal division, and therefore does not involve problems of protection for the minority." Horstein, *A Remedy for Corporate Abuse*, 40 COL. L. REV. 220, 231 (1940).

present note will be confined to a discussion only of deadlock situations, which usually occur in closely held or "family" corporations in which each group has 50% of the outstanding voting stock. These "glorified partnerships" will be seen to be extremely vexing headaches when it is realized that most courts, absent any specific statutory authority, will not act to dissolve the corporation merely on the grounds of deadlock or dissension.[3]

Although courts of equity, even in the absence of a statute, will sometimes assume jurisdiction,[4] the general rule still prevails that unless specific statutory authority is given, the courts have no right to interfere in the dispute.[5]

An increasing number of decisions, however, seem to exhibit a willingness to assume jurisdiction where there would be irreparable injury to the corporation,[6] where the interests of the stockholders may

[3] Alabama Coal and Coke Co. v. Shackleford, 137 Ala. 224, 34 So. 833 (1903) (director's terms expired; equity refused to act); Drob v. National Memorial Park, Inc., 28 Del. Ch. 254, 41 A 2d 589 (1945) (no dissolution because there was a Board of Directors); Lush'us Brand Lithograph Co. v. Fort Dearborn Lithograph Co., 330 Ill. App. 216, 70 N. E. 2d 737 (1946); Wallace v. Pierce-Wallace Publishing Co., 101 Iowa 313, 70 N. W. 216 (1897) ("a situation into which the parties voluntarily placed themselves," and equity court would not dissolve); Reid Drug Co. v. Salyer, 268 Ky. 522, 105 S. W. 2d 625 (1937); McGuire v. Kayser-McGuire Co., 184 Minn. 553, 239 N. W. 616 (1931), commented on in Note, 16 MINN. L. REV. 707 (1932); Dorf v. Hill Bus Co., 140 N. J. Eq. 444, 54 A. 2d 761 (1947) (deadlock; statute applied to even number of directors and court would not dissolve because there were 3 directors); Bowman v. Gum, Inc., 321 Pa. 516, 184 Atl. 258 (1936); McKay v. Beard, 20 S. C. 156 (1882) (refusal of one of the two incorporators-stockholders to be bound by the by-laws did not work a dissolution); Hammond v. Hammond, 216 S. W. 2d 630 (Tex. Civ. App., 1949).

"Dissension, then, would seem not to be an independent ground for dissolution but rather a contributing element to the factual situation necessary for relief on one of the other grounds." Note, 41 MICH. L. REV. 714, 720 (1943).

See also: Anno. 13 A. L. R. 2d 1261 (1950).

[4] Saltz v. Saltz Bros., 84 F. 2d 246, *cert. denied*, 299 U. S. 567 (1936); Vale v. Atlantic Coast and Inland Corp., — Del. Ch. —, 99 A. 2d 396 (1953) (no specific deadlock statute but court held the complaint sufficient to withstand a motion to dismiss.

But see Hall v. Woods, 325 Ill. 114, 156 N.E. 258 (1927). In this case the court held that part of the stock, owned by a foreign corporation, cannot be voted and therefore there is no deadlock. On a petition to rehear, the court suggested how such stock could be voted but then said that it would not anticipate a deadlock (which would occur whenever the excluded stock was allowed a vote).

[5] Cases cited note 3 *supra;* BALANTINE, CORPORATIONS § 304 (Rev. ed., 1946); 16 FLETCHER, CYC. CORPORATIONS § 8080 and § 8098 (Rev. ed. 1942); STEVENS, CORPORATIONS § 199 (2nd ed., 1949); Note, 47 MICH. L. REV. 684 (1949).

[6] Handlan v. Handlan, 360 Mo. 1150, 232 S.W. 2d 944 (1950); Guaranty Laundry Co. v. Pulliam, 200 Okla. 185, 191 P. 2d 974 (1948); Application of Radom, 282 App. Div. 854, 124 N. Y. S. 2d 424 (1st Dep't 1953) (evidence did not establish deadlock or frustration of corporate activities by lack of a board of directors; dissolution denied).

But under statutes which state that corporations may be dissolved "for good cause shown," courts have refused to dissolve on the mere fact of deadlock alone. Gidwitz v. Cohn, 238 Ill. App. 227 (1925); Platner v. Kirby, 138 Iowa 259, 115 N.W. 1032 (1908).

suffer,[7] or where the court says that these corporations are mere partnerships.[8] Notwithstanding these more liberal interpretations of applicable laws or of equitable jurisdiction without a particular law, there is still a need for definite statutory authority in this field.

The present state of the North Carolina law on this point is in doubt. The relevant statutes set out various methods of involuntary dissolution at the instance of private persons,[9] stockholders,[10] or the Attorney-General,[11] but in the opinion of writers on the subject, these statutes are not specific enough to encompass the problem at hand[12] Therefore an examination of pertinent corporation laws in other states is necessary in order to be able to formulate a suggested addition to Chapter 55 of the General Statutes.

Some states merely give their equity courts the power to dissolve corporations "whenever any good and sufficient reason exists,"[13] or when liquidation is "reasonably necessary for the protection of the rights of the stockholders or creditors."[14] In this writer's opinion, such statutes are far from adequate for the reason that these courts tend to give an undue amount of weight to various factors such as

[7] Petition of Collins-Doan Co. 3 N. J. 382, 70 A. 2d 159 (1949); Application of Cantelmo, 275 App. Div. 231, 88 N. Y. S. 2d 604 (1st Dep't 1949); *Re* Waldorf Amusement Co., 13 Ohio App. 438 (1928).

[8] Flemming v. Heffner-Flemming, 263 Mich. 561, 248 N.W. 900 (1933); Green v. National Advertising and Amusement Co., 137 Minn. 65, 162 N.W. 1056 (1917). Note, 22 VA. L. REV. 469, 470 (1936).

Israels, *Deadlock and Dissolution,* 19 U. CHI. L. REV. 778, 792 (1952), advances the theory of considering the participants in a stalemated close corporation as joint venturers as between themselves.

Contra: Freedman v. Fox, —Fla.—, 67 So. 2d 692 (1953); Cohen v. Wacht, —Misc.—, 124 N. Y. S. 2d 207 (Sup. Ct. 1953).

[9] N. C. GEN. STAT. § 55-124 (1950).

[10] N. C. GEN. STAT. § 55-125 (1950).

[11] N. C. GEN. STAT. § 55-126 (1950) which provides in part:

". . . . It is the duty of the Attorney General, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, *and also in every other case in which satisfactory security is given to indemnify the state. . . .*" (italics added)

In response to a North Carolina attorney's contention that the Attorney General was required under this clause to bring action in a situation where two persons each owned 50% of the stock and could not elect a third director, the Attorney General replied; ". . . I do not think that it would be proper for me to authorize one of the parties in the controversy to institute an action in the name of the Attorney General." Letter from Attorney-General, Aug. 12, 1953.

A subsequent letter states that "I am not satisfied that the failure of the directors . . . to agree upon . . . a third director . . . would in itself justify an action to dissolve. . . ." The Attorney General then suggests that it might be possible to proceed under N. C. GEN. STAT. § 55-114 (1950), but this gives the court the right to *continue* the corporation whereas in the majority of cases, a dissolution is desired. Letter from Attorney-General, Aug. 20, 1953.

[12] Israels, *Deadlock and Dissolution,* 19 CHI. L. REV. 778 (1952). The writer in Note, 28 N. C. LAW REV. 313, 315 (1950), discusses in some detail the relevant North Carolina cases on involuntary dissolution and concludes that ". . . all the presently appropriate circumstances for dissolution are not covered by statute in North Carolina." *Supra* at 318.

[13] CONN. GEN. STAT. § 5226 (1949).

[14] N. H. REV. LAWS c. 274, § 96 (1942).

solvency[15] or impossibility of carrying out corporate purpose,[16] and do not squarely face the issue of paralysis in the management because of a deadlock.

Other legislatures have adopted the provision set out in the Model Business Corporation Act.[17] Even this paragon was elaborated upon by some states which adopted the Model Act clause verbatim and then supplemented it with additional sections pertaining not only to director deadlocks but also to situations where no new directors can be elected because of a stockholder deadlock which has extended over a period of time, usually two successive annual meetings.[18] Consequently, the Model Act was amended in 1952 so as to include this additional provision.[19]

Another group of states have statutes[20] derived from the New York General Corporation Law, the pertinent section of which is as follows:

> . . . If a corporation has an even number of directors who are equally divided respecting the management of its affairs, or if the votes of its stockholders are so divided that they cannot elect a Board of Directors, the holders of one-half of the stock . . . may present a verified petition for dissolution. . . .[21]

[15] The Mississippi Statute specifically provides for liquidation if the corporation ". . . ceases to be a going concern." MISS. CODE ANN. § 5355 (1942).

[16] Olechny v. Thadeus Kosciuszko Society, 128 Conn. 534, 24 A. 2d 249 (1942) (dissolution denied, but the court admitted that the test to be applied was impossibility of corporate purpose).

[17] MODEL BUSINESS CORPORATION ACT § 90 (1950): "The courts shall have full power to liquidate . . . a corporation . . . when it is established . . . that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof." MINN. STAT. ANN. § 301.49 (West 1947); Mo. ANN. STAT. § 351.485 (Vernon 1949); PA. STAT. ANN. tit. 15 § 2852-1107 (1938).

[18] ILL. ANN. STAT. c. 32, § 57.86 (Supp. 1952); Wimp Packing Co. v. Wimp, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); Wiedoeft v. Frank Holton & Co., 294 Ill. App. 118, 13 N. E. 2d 854 (1938) (statute to be strictly construed); WIS. STAT. § 180.771 (1951), as amended by Wis. Laws 1953, c. 399, §§ 49, 50.

Of the laws examined, the California statute seems to the writer to meet the situation most adequately. CAL. CORP. CODE ANN. § 4651 (1948).

[19] "The courts shall have full power to liquidate . . . a corporation . . . when it is established . . . that the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors. . . ." MODEL BUSINESS CORPORATION ACT § 90 (1952 Revision).

[20] FLA. LAWS 1953, § 608.28, p. 631; KY. REV. STAT. § 271.570 (1948), as amended by Ky. Laws 1952, c. 116; LA. REV. STAT. ANN. § 12.55 (1950); N. J. REV. STAT. § 14:13-15 (Supp. 1953); OHIO GEN. CODE ANN. § 1701.94 (1938); WASH. REV. CODE § 23:44:030 (1952).

[21] N. Y. GENERAL CORPORATION LAW § 103 (Supp. 1953). It is to be noted that this statute does not say "irreparable damage" like the Model Act, but as construed by the New York Courts, this statute is to be read in connection with N. Y. General Corporation Law § 117 which states that the dissolution must be beneficial to the stockholders. It has been held that this test is not met when the corporation is financially sound. *Re* Cantelmo, 275 App. Div. 231, 88 N. Y. S. 2d 604 (1st Dep't 1949).

But even with the above type of statute, the decisions show that the courts are still overly conscious of the old rule, and therefore tend to construe strictly the applicable statute.[22] For example, the New York Court has denied dissolution in cases where the evidence did not establish that corporate activities were frustrated by lack of a board of directors,[23] where dissolution would not be in the best interest of the stockholders,[24] and where it was claimed that there was in fact an existing deadlock and one of the three directors was merely a "dummy" who refused to act.[25] Therefore it would seem that any proposed statute should be definite enough to meet the deadlock situation in general, while retaining sufficient elasticity to enable the court adequately to cope with specific problems which might arise.

The North Carolina General Statutes Commission has drafted a deadlock statute as part of a revised corporation law for submission to the 1955 General Assembly. The latest draft of this proposed law would give the superior court the power to liquidate a corporation when it is established that:

(1) The directors are deadlocked in the management of the corporate affairs and the stockholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders; or

(2) The shareholders are deadlocked in voting power and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose term had expired; . . .

This proposal is an adoption of the present Illinois statute,[26] with the exception of the last clause in subsection (1), which has been changed from the Illinois requirement of actual or threatened "irreparable injury to the corporation." This change is a commendable one because presumably the inclusion of the phrase "to the advantage of *all* of the shareholders" would give the court, in its discretion, power

[22] Wimp Packing Co. v. Wimp, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); *In re* Belton, 47 La. 1614, 18 So. 642 (1896) (failure to elect officers does not work a dissolution); Dorf v. Hill Bus. Co., 140 N. J. Eq. 444, 54 A. 2d 761 (1947).

But see In re Evening Journal Ass'n, 15 N. J. Super. 58, 83 A. 2d 38 (1951) (the test used here was not solvency but whether or not there was a corporate paralysis).

[23] Application of Radom, 282 App. Div. 854, 124 N. Y. S. 2d 424 (1st Dep't 1953).

[24] Application of Numode Realty Co., Inc., 278 App. Div. 979, 105 N. Y. S. 2d 588 (2nd Dep't 1951).

[25] Petition of Binder, 172 Misc. 634, 15 N. Y. S. 2d 4 (Sup. Ct. 1939), reversed without opinion, 258 App. Div. 1041, 17 N. Y. S. 2d 1020 (1st Dep't 1940) (remanded with instructions for referee to find out whether the third director was in fact a "dummy").

[26] ILL. ANN. STAT. c. 32, § 57.86 (Supp. 1952).

to liquidate even a solvent concern if the internal dissension reached a point where such action would be the only feasible solution. It was presumably the intention of the Drafting Committee that by making the above change, the North Carolina courts will be able to take a more liberal attitude than has the Supreme Court of Illinois[27] under their similar statute.

Subsection (1) of the proposed statute seems very adequately to provide a solution in any director deadlock situation. This section also seems applicable to stockholder deadlocks by the clause "and the stockholders are unable to break the deadlock."[28] The need for specific reference to stockholder deadlock is vividly brought out in the case of *Cook v. Cook*[29] where, although there was a 50-50 stock division, the applicable statute dealt with director deadlocks and therefore relief was denied.

If however the situation should arise where there is an uneven split among directors, but the stockholders become deadlocked so that it is impossible to elect a new board, then subsection (2) could be put into use.

The California[30] and West Virginia[31] statutes have an additional section which in essence allows the defendant stockholders, if they wish to prevent dissolution, to purchase the plaintiff's stock at a fair market value set by the court. In the opinion of this writer, the above provision, which would preserve the going concern and possibly prevent hardship to some defendants, is an excellent addition and serious thought should be given as to the possibility and advisability of incorporating it into the new proposal.

The need for this statute is amply shown by case law on the subject and the fact that four states, Florida, Kentucky, New Jersey, and Wisconsin, following the example set by the recent change in the Model Act, adopted similar laws or amended old laws at the last meeting of their legislatures. In order to clarify the vague and inadequate state of the North Carolina law on involuntary dissolution, it is hoped that

[27] Lush'us Brand Lithograph Co. v. Fort Dearborn Lithograph Co., 330 Ill. App. 216, 70 N. E. 2d 737 (1946) (statute to be strictly construed).

[28] This writer is convinced that the proposed statute would be a sufficient remedy for any conceivable deadlock situation, but should there be any doubt as to its applicability to stockholder deadlocks, the California Code has a pertinent section which provides for dissolution if "there is internal dissension and two or more factors of shareholders in the corporation are so deadlocked that its business cannot be conducted with advantage to its shareholders." CAL. CORP. CODE § 4651(d) (1948).

[29] 270 Mass. 534, 170 N. E. 455 (1930). After this case the Massachusetts statute was amended to include the clause "or if the votes of its stockholders are equally divided in the election of directors." See also: Wimp Packing Co. v. Wimp, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); *In re* Hedberg-Freidheim Co., 233 Minn. 534, 47 N. W. 2d 424 (1951).

[30] CAL. CORP. CODE ANN. § 4658 (1948).

[31] W. VA. CODE ANN. § 3093 (1949).

the next legislature will give careful consideration to the proposed corporation laws, with special emphasis on a remedy for the deadlock situation.

R. C. VAUGHN, JR.

Labor Law—Fair Labor Standards Act—Coverage of Maintenance Employees of Office Buildings

Maintenance employees in office buildings present a real problem under the Fair Labor Standards Act. Their employer is frequently a corporation whose sole business is that of renting space in local buildings, although the employer may be a manufacturing company or a bank using a part of the building for its own offices and renting the balance. Where all or part of the building is rented, the tenants may be engaged in purely local business, or in interstate commerce either on or off the premises, or in the production of goods for commerce either in the building or at another location. The maintenance employees themselves seldom have any direct contact with the carrying on of interstate commerce or with the physical production of goods for commerce. They clean the building, operate the elevators, make repairs, guard and heat the premises, and perform a variety of other activities admittedly essential to the successful operation of the modern office building. The question which arises in each case, however, is whether such activities are so closely related to commerce or production of goods for commerce as to bring the maintenance employees under the coverage of the Fair Labor Standards Act.

Coverage under the act is dependent on the activities of the employee rather than on the business of the employer. Thus the employees may be under the act even though the employer is a local real estate firm and therefore clearly not engaged in commerce or in the production of goods for commerce.[1] On the other hand, the employees may not be covered even though their employer is engaged in commerce.[2]

Any employee is covered who is engaged in commerce or in the production of goods for commerce,[3] the latter including any closely related process or occupation directly essential to the production of goods for commerce.[4] In this connection it is necessary to distinguish

[1] Kirschbaum v. Walling, 316 U. S. 517 (1942).

[2] Carrigan v. Provident Trust Co., 153 F. 2d 74 (3rd Cir. 1946); Building Service Employees International Union v. Trenton Trust Co., 142 F. 2d 257 (3rd Cir. 1944).

[3] 52 STAT. 1062, 1063 (1938), 29 U. S. C. §§ 206, 207 (1946), as amended, 63 STAT. 912 (1949), 29 U. S. C. §§ 206, 207 (Supp. 1953). See LIVENGOOD, THE FEDERAL WAGE AND HOUR LAW (American Law Institute 1952); Tyson, *The Fair Labor Standard Amendments of 1949*, 28 N. C. L. REV. 161 (1950).

[4] 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

between "engaged in commerce" on the one hand and "in the production of goods for commerce" on the other.

The courts have narrowly construed the phrase "engaged in commerce" and have not extended the act to cover maintenance employees whose only connection with interstate commerce is that they work in the same building in which tenants are engaged in commerce.[5] Thus in the recent case of *Tobin v. Girard Properties, Inc.*[6] where the major part of the building was rented to a telephone company for its executive offices, the court found that the maintenance employees were not engaged in commerce. Also, in the early bank cases the courts held that even though the employer-bank might be engaged in commerce, the work of the maintenance employees was not closely enough related to bring the employees under the act.[7]

The phrase "production of goods for commerce" has been given a much more liberal meaning. The basis for this distinction is in the act itself. As to production of goods for commerce, the act specifically states that it includes not only the employees who are employed in producing, manufacturing, mining, handling, transporting, or in any manner working on the goods, but also those employed in any closely related process or occupation directly essential to the production of goods,[8] or, prior to the 1949 amendment, those necessary to the production of such goods. Commerce is defined as trade, commerce, trans-

[5] Tobin v. Girard Properties, Inc., 206 F. 2d 524 (5th Cir. 1953); Blumenthal v. Girard Trust Co., 141 F. 2d 849 (3rd Cir. 1944); Johnson v. Masonic Building Co., 138 F. 2d 817 (5th Cir. 1943), *cert. denied*, 321 U. S. 780 (1943); Rucker v. First National Bank of Miami, 138 F. 2d 699 (10th Cir. 1943), *cert. denied*, 321 U. S. 769 (1943); Rosenberg v. Semeria, 137 F. 2d 742 (9th Cir. 1943), *cert. denied*, 320 U. S. 770 (1943); Johnson v. Dallas Downtown Development Co., 132 F. 2d 287 (5th Cir. 1942), *cert. denied*, 318 U. S. 790 (1942); Wideman v. Blanchard & Calhoun Realty Co., 50 F. Supp. 626 (S. D. Ga. 1943); Hinkler v. Eighty-Three Maiden Lane Corp., 50 F. Supp. 263 (S. D. N. Y. 1943); *In re* New York Title & Mortgage Co., 179 Misc. 789, 39 N. Y. S. 2d 893 (Sup. Ct. 1943); Greene v. Anchor Mills Co., 224 N. C. 714, 32 S. E. 2d 341 (1944), *cert denied*, 324 U. S. 880 (1945); Robinson v. Massachusetts Mutual Life Ins. Co., 158 S. W. 2d 441 (Tenn. 1941).

[6] Tobin v. Girard Properties, Inc., 206 F. 2d 524 (5th Cir. 1953).

[7] Building Service Employees International Union v. Trenton Trust Co., 142 F. 2d 257 (3rd Cir. 1944); Convey v. Omaha National Bank, 140 F. 2d 640 (8th Cir. 1943), *cert. denied*, 321 U. S. 781 (1944); Rucker v. First National Bank of Miami, 138 F. 2d 699 (10th Cir. 1943), *cert. denied*, 321 U. S. 769 (1943); Lofther v. First National Bank of Chicago, 138 F. 2d 299 (7th Cir. 1943); Brandell v. Continental Illinois National Bank & Trust Co., 43 F. Supp. 781 (N. D. Ill. 1941); Fultz v. United States Trust Co., 302 Ky. 493, 195 S. W. 2d 87 (1946); Stoike v. First National Bank, 290 N. Y. 195, 48 N. E. 2d 482 (1943), *cert. denied*, 320 U. S. 762 (1943); Connelly v. Hamilton National Bank, 182 Tenn. 77, 184 S. W. 2d 173 (1944). *But cf.* Walling v. Bank of Wanesboro, 61 F. Supp. 384 (S. D. Ga. 1945) where janitor also served as messenger for the bank and was considered as engaged in interstate commerce.

[8] 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

portation, transmission, or communication[9] and no specific extension is made to occupations or processes directly essential thereto.

An interesting illustration of the difference in construction of the two phrases is afforded by the bank cases. Those cases in which the sole issue was whether the employees were engaged in commerce held that although the bank was engaged in commerce, the maintenance employees were not closely enough related to be brought under the act.[10] In the later cases, however, where it was found that the bank was engaged in the production of goods for commerce, maintenance employees were found to be covered by the act.[11]

Maintenance employees are almost never found to be actually producing or physically handling the goods being produced for commerce. The question is almost always one of whether they are engaged in activities "necessary to" or since 1949, "directly essential to" production of goods for commerce. In order to determine this, it is necessary to look not only at the activities of the employee but also at the activities of the employer and of the tenant, where these activities are performed, the number and nature of intervening processes between the activity and the actual physical production, and the characteristics and purposes of the employer's business.[12]

The cases involving maintenance employees allegedly engaged in the production of goods for commerce fall into three groups:

(1) Where a substantial part of the building is rented to tenants who are engaged in the production of goods for commerce in the building itself, the maintenance employees are covered, even though the employer is a local real estate firm. This was established by the U. S. Supreme Court in *Kirschbaum v. Walling* in 1942,[13] and has been applied in numerous cases since.[14] Even though the employees do not handle the

[9] *Ibid,* § 203(b).
[10] See note 7 *supra.*
[11] Union National Bank of Little Rock v. Durkin, 207 F. 2d 848 (8th Cir. 1953); Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946).
[12] 29 CODE FED. REGS. § 776.17(c) (1950).
[13] 316 U. S. 517 (1942).
[14] D. A. Schulte v. Gangi, 328 U. S. 108 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U. S. 697 (1945); Grant v. Bergdorf & Goodman Co., 172 F. 2d 109 (2d Cir. 1949); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946); Baldwin v. Emigrant Industrial Trust Sav. Bank, 150 F. 2d 524 (2d Cir. 1945), *cert. denied,* 326 U. S. 767 (1945); Fleming v. Post, 146 F. 2d 441 (2d Cir. 1944); Merryfield v. F. M. Hoyt Shoe Corp., 128 F. 2d 452 (1st Cir. 1942); Asselta v. 149 Madison Avenue Corp., 65 F. Supp. 385 (S. D. N. Y. 1945); Frank v. McMeekan, 56 F. Supp. 369 (E. D. N. Y. 1944); Bittner v. Chicago Daily News Printing Co., 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944); Berry v. 34 Irving Place Corp., 52 F. Supp. 875 (S. D. N. Y. 1943); Spaeth v. Washington University, 213 S. W. 2d 276 (Mo. 1948); Quest v. George A. Bowman, Inc., 64 N. Y. S. 2d 60 (N. Y. City Ct. 1946); Rienzo v. City Bank Farmers Trust Co., 183 Misc. 153, 53 N. Y. S. 2d 68 (Sup. Ct. 1944); Schineck v. 386 Fourth Ave. Corp., 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944); Floyd v. 58-64 Fortieth Street Corp., 44 N. Y. S. 2d 422 (N. Y. City Ct. 1943).

goods produced, their maintenance work is considered to have such a close and immediate tie with the process of production that they are considered to be engaged in an occupation necessary to the production of goods for commerce. Although the *Kirschbaum* case was decided before the 1949 amendment which changed "necessary to" to "directly essential to" legislative history[15] and administrative statements[16] have indicated that no change was intended by this amendment. In the recent decision of *Union National Bank of Little Rock v. Durkin*[17] the 8th Circuit expressly followed the *Kirschbaum* case and indicated that the 1949 amendment had made no change. *The Union National Bank* case, however, was a stronger case for coverage since the employer himself was found to be engaged in the production of goods for commerce in the building whereas in the *Kirschbaum* case it was the tenants who were producing the goods.

(2) Where the building is owned by a business which is engaged in the production of goods for commerce and is used at least in part for its executive offices, the maintenance employees are covered by the act. Thus in *Borden v. Borella,*[18] although there was no physical production of goods in the office building itself, the court felt that since the employer-owner was himself engaged in the production of goods for commerce at another location and used this building for directing and controlling that production, the maintenance employees were engaged in an occupation necessary to such production. These employees, the court pointed out, would have been covered had the offices been in the same building with the manufacturing establishment. The office, even though at another location, was a part of an integrated effort for the production of goods and to make a distinction based on the mere fact that the office was physically separated from the plant was economically unjustifiable.

This case was followed and in fact extended by the recent case of *General Electric v. Porter*[19] where the 9th Circuit held the act covered firemen employed by General Electric in a company-owned town in which the executive offices of the plant were located although the plant which was producing goods for commerce was several miles away. Whether the Supreme Court will uphold such an extension in the light of the 1949 amendments remains to be seen.

(3) In those buildings in which there is no substantial production of goods for commerce in the building but in which there are tenants,

[15] H. R. REP. No. 1453, 81st Cong., 1st Sess. 2253 (1949).
[16] Adm. Statement (Dec. 8, 1953), WAGE & HOUR MANUAL (BNA) 10:295 (1953).
[17] 207 F. 2d 848 (8th Cir. 1953).
[18] 325 U. S. 679 (1945).
[19] 208 F. 2d 805 (9th Cir. 1953).

as distinguished from the owner, who are engaged in the production of goods for commerce at another location, the maintenance employees are not covered. In *Ten East 40th Street Bldg., Inc. v. Callus*[20] the U. S. Supreme Court by a five to four decision held that the employees were too far removed from the actual production of goods for commerce to be included even within that phrase "necessary to the production." Renting office space in a building devoted to an unrestricted variety of office work, said the majority of the court, spontaneously satisfied common understanding of what is local business and made the employees of such a building engaged in local business. The dissent felt that the connection with the production of goods here was as close as that in the *Borden* case which was decided on the same day, that coverage depended on the work of the employees which in the two cases was the same, and that the mere chance of whether the employee was employed by the producer of the goods or by the independent owner of the building should make no difference.

As the 1949 amendment was intended to restrict the coverage of the act and these employees were excluded even before that amendment, the amendment cannot, of course, further restrict coverage in these cases.

Since whether maintenance employees in these cases are covered by the act depends on the production of goods for commerce either by the owner or the tenants, it is necessary to examine just what activities are considered by the courts to be production.

The act defines "produced" as "produced, manufactured, mined, handled, or in any other manner worked on,"[21] and "goods" as "goods, wares, products, commodities, merchandise, or subjects of commerce of any character, or any part or ingredient thereof."[22] The actual manufacture of such tangible items as women's clothes, watches, or jewelry is, of course, clearly production of goods.[23] "Produced," however, has also been held to cover the process of issuing insurance policies,[24] mimeographing news bulletins,[25] preparing advertising plates

[20] 325 U. S. 578 (1945).

[21] 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

[22] *Ibid.* § 203(i); 29 CODE FED. REGS. § 776.20 (1950).

[23] D. A. Schulte v. Gangi, 328 U. S. 108 (1946); Kirschbaum v. Walling, 316 U. S. 517 (1942); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946).

[24] Union National Bank of Little Rock v. Durkin, 207 F. 2d 848 (8th Cir. 1953) (branch office); Darr v. Mutual Life Ins. Co., 169 F. 2d 262 (2d Cir. 1948), *cert. denied*, 335 U. S. 871 (1948). *Contra:* Hinkler v. Eighty-Three Maiden Lane Corp., 50 F. Supp. 263 (S. D. N. Y. 1943).

[25] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949); Baldwin v. Emigrant Industrial Trust Sav. Bank, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945); Berry v. 34 Irving Place Corp., 52 F. Supp. 875 (S. D. N. Y. 1943).

and copy,[26] editing and proofreading scripts for books and motion pictures,[27] and publishing a newspaper.[28] The more recent cases have held that banks by issuing or authenticating bonds, stocks, notes, or drafts are engaged in the production of goods for commerce.[29] Lawyers or brokers, however, are not producing goods merely because they draw deeds or write letters that are sent through the mails into another state.[30]

Production of goods also includes handling. Repacking and relabeling goods have been held to be production,[31] as have receiving and shipping them.[32] Other cases have held that repacking or shipping by a jobber who did not manufacture the goods is not production.[33]

A tenant may be producing goods for commerce even though he sell to local concerns. It is enough if he knows or has reason to know that his products are to be shipped in interstate commerce.[34]

The amount of production for commerce in the building must be substantial for the maintenance employees to be covered by the act. The statute gives no definition of "substantial," but the administrator and most of the courts adopted 20 per cent as a rough guide; that is, where the tenants producing goods for commerce occupied more than 20 per cent of the floor space, the maintenance employees were covered,[35] and

[26] Asselta v. 149 Madison Avenue Corp., 65 F. Supp. 385 (S. D. N. Y. 1945); Schineck v. 386 Fourth Ave. Corp., 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944).

[27] Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946); Baldwin v. Emigrant Industrial Trust Sav. Bank, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945).

[28] Bittner v. Chicago Daily News Printing Co., 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944).

[29] Union National Bank of Little Rock v. Durkin, 207 F. 2d 848 (8th Cir. 1953); Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946). *But cf.:* Holmes v. Elizabeth Trust Co., 72 F. Supp. 182 (D. N. J. 1947).

[30] Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946); Wideman v. Blanchard & Calhoun Realty Co., 50 F. Supp. 626 (S. D. Ga. 1943).

[31] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946); Baldwin v. Emigrant Industrial Trust Sav. Bank, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945); Spaeth v. Washington University, 213 S. W. 2d 276 (Mo. 1948); Schineck v. 386 Fourth Ave. Corp., 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944).

[32] Fleming v. Post, 146 F. 2d 441 (2d Cir. 1944); Holmes v. Elizabeth Trust Co., 72 F. Supp. 182 (D. N. J. 1947).

[33] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949); Blumenthal v. Girard Trust Co., 141 F. 2d 849 (2d Cir. 1944); Prescott v. Broadway & Franklin Street Corp., 57 F. Supp. 272 (S. D. N. Y. 1944); Burke v. Hide & Leather Realty Co., 182 Misc. 319, 48 N. Y. S. 2d 594 (Sup. Ct. 1944).

[34] 328 U. S. 108 (1946).

[35] Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946) (48%); Baldwin v. Emigrant Industrial Trust Sav. Bank, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945) (39%); Fleming v. Post, 146 F. 2d 444 (2d Cir. 1944) (25%); Frank v. McMeekan, 56 F. Supp. 369 (E. D. N. Y. 1944) (76%); Bittner v. Chicago Daily News Printing Co., 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944) (46%); Asselta v. 149 Madison Avenue Corp., 65 F. Supp. 385 (S. D. N. Y. 1945) (24%); Quest v. George A. Bowman, Inc., 64 N. Y. S. 2d 60 (N. Y. City Ct. 1946) (more than 20%); Schineck v. 386 Fourth Ave. Corp., 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944) (50%).

where such tenants occupied less than 20 per cent, maintenance employees were not covered.[36] Other courts said little or nothing about percentages.[37] Under the new 1953 Administrative Statement, the 20 per cent rule has been retained for buildings where tenants are "manufacturing" on the premises.[38]

A tenant either is or is not engaged in the production of goods for commerce; that is, either all or none of his floor space is counted. In determining whether any single tenant is producing goods for commerce, the trial courts have considered the percentage of space, the percentage of employees actually engaged on the premises in physical production of goods, and the relation of production for interstate commerce to the total production.[39]

Some courts have interpreted the 20 per cent rule as applying to this determination of whether the tenant is engaged in commerce.[40] Other courts have held that it is not necessary to have 20 per cent,[41] the 2nd Circuit court holding in one case that 2 per cent of the income of one tenant and 5 per cent of the floor space of another were sufficient to classify these tenants as engaged in the production of goods for commerce.[42] Thus if 20 per cent of the total floor space of the building is being occupied by firms producing goods for commerce but each of those firms is devoting only 5 percent of its own floor space to that production it would be possible for the maintenance employees to be covered even though only 1 per cent of the total floor space in the building were actually devoted to production.

Where a building owned by a producer of goods for commerce is occupied as its executive offices, the courts have simply indicated that if maintenance employees are to be covered by the act the building must be "predominantly" occupied for its offices.[43] In the *Borden* case this requirement was met where 58 per cent of the area was so used, al-

[36] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949) (15%); Hunter v. Madison Avenue Corp., 174 F. 2d 164 (6th Cir. 1949), *cert. denied*, 338 U. S. 836 (1949) (3%); Johnson v. Great National Life Insurance Co., 166 S. W. 2d 935 (Tex. Civ. App. 1942) (8%); *In re* New York Title & Mortgage Co., 179 Misc. 789, 39 N. Y. S. 2d 893 (Sup. Ct. 1943) (10%).

[37] Berry v. 34 Irving Place Corp., 52 F. Supp. 875 (S. D. N. Y. 1943); Hinkle v. Frank Nelson Bldg. Inc., 245 Ala. 679, 18 So. 2d 374 (1944); Baum v. A. C. Office Bldg. Co., 157 Kan. 558, 143 P. 2d 417 (1943); Spaeth v. Washington University, 213 S. W. 2d 276 (Mo. 1948).

[38] Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).

[39] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946); Berry v. 34 Irving Place Corp., 52 F. Supp. 875 (S. D. N. Y. 1943).

[40] Fleming v. Post, 146 F. 2d 441 (2d Cir. 1944); Asselta v. 149 Madison Ave. Corp., 65 F. Supp. 385 (S. D. N. Y. 1945).

[41] Ullo v. Smith, 177 F. 2d 101 (2d Cir. 1949); Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946).

[42] Roberg v. Henry Phipps Estate, 156 F. 2d 958 (2d Cir. 1946).

[43] Borden Co. v. Borella, 325 U. S. 679 (1945).

though there was no discussion as to what percentage would be considered "predominantly" occupied.

Where a bank occupies part of the building, the courts have indicated that the maintenance employees will be covered if the proportion of goods produced is enough to "color the activities of the employees as a whole."[44] Here again the courts have not interpreted "enough to color" but have held 50 per cent in one case[45] and 80 per cent in another sufficient.[46] The new administrative rulings on the latter two points are not wholly clear.[47]

Until 1949, coverage of the act had gradually spread to include more and more maintenance employees. The *Kirschbaum* case in 1942 extended it to maintenance employees of independent real estate companies if the tenants were engaged in the production of goods for commerce. The *Borden* case in 1945 brought within the coverage of the act maintenance employees in office buildings owned by producers of goods for interstate commerce and used by them for their executive offices. The *Martino* case[48] in 1946 extended coverage to employees of a local window washing firm who worked only temporarily on the premises of a plant producing goods for interstate commerce. The *Gangi* case[49] in the same year made it clear that employees in buildings where the tenants produced goods which were not sold directly in interstate commerce but which the tenant had reason to believe would go into interstate commerce were within the act.

Extension took place also in another form. More and more types of activities were considered by the courts as production of goods for commerce. Banking activities, for example, which at first were assumed to be merely interstate commerce were later held to be production of goods for commerce. In the later cases, too, there is a great deal more judicial investigation into the activities of the tenants.

The 1949 amendment by changing "necessary" to "directly essential" was intended to restrict coverage under the act. The House Conference Report[50] indicated, however, that the changes were not intended to remove from the act the maintenance employees of manufacturers and other producers of goods for commerce and that employees engaged in such maintenance work would remain subject to the act even though

[44] Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946).
[45] *Ibid.*
[46] Union National Bank of Little Rock v. Durkin, 207 F. 2d 848 (8th Cir. 1953).
[47] Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).
[48] Martino v. Michigan Window Cleaning Co., 327 U. S. 173 (1946).
[49] D. A. Schulte v. Gangi, 328 U. S. 108 (1946).
[50] H. R. REP. No. 1453, 81st Cong., 1st Sess. 2253 (1949); Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950).

they were employed by an independent employer. Such activities were closely related and directly essential to the production of goods for commerce. Maintenance employees like those in the *Martino* case, however, were to be removed from the act.

The first Interpretative Bulletin issued after the 1949 amendment was in such general terms that it threw little light on the policies to be followed with regard to maintenance employees.[51] A more detailed administrative policy was announced in a statement dated December 8, 1953.[52] The statement expressly excluded consideration of maintenance employees of manufacturers, processors, mining companies, banks, or insurance companies engaged in producing goods for interstate commerce since, according to the statement, it is well established that they are covered by the act.

The statement indicates that:

Employees of office buildings housing the usual miscellany of offices, including doctors, dentists, lawyers, etc., and also various small enterprises such as local watch repair, branch telegraph offices, etc., as well as executive and sales offices of manufacturing and mining companies where these offices are a part of the general miscellany are not considered covered by the act. This is apparently the situation that existed in the *Callus* case and represents no change.

Employees of loft buildings occupied exclusively by tenants engaged on the premises in manufacturing goods for interstate commerce are considered covered by the act. This is the strongest type of *Kirschbaum* case.

Employees of buildings occupied partly by producers and partly by offices will be covered or not depending on the percentage of certain activities in the buildings. If 20 per cent or more of the rentable area is used by tenants engaged on the premises in the manufacture of goods for commerce, the maintenance employees of the building will be covered by the act. This is the usual *Kirschbaum* situation with the same 20 per cent rule previously used.

If 50 per cent or more of the rentable area of the building is occupied by the executive offices of a manufacturer or mining company, the maintenance employees of the building will be covered. This statement in its ambiguity raises several questions. Does this 50 per cent policy apply only to buildings where the manufacturer owns the building but occupies only part of its as its executive offices, as in the *Borden* case where the manufacturer occupied 58 per cent of the floor space but the court in holding the employees under the act made no point of the

[51] 29 CODE FED. REGS. §§ 776.0-776.21.

[52] Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).

percentage involved? Or does it apply only to buildings owned by an independent real estate firm and occupied by a manufacturer for its executive offices, as in the *Callus* case where 26 per cent of the building was used for executive offices but the majority of the court in denying coverage did not base its decision on the percentage of the space so used? Or is the administrator announcing that ownership of the building is immaterial and that he views the distinction between the *Borden* and the *Callus* case as one of percentages and not one of ownership of the building? In the light of the language of the statement it would appear that the administrator is saying that if 50 per cent of the building is rented by a tenant for executive offices from which he controls his manufacturing of goods for commerce, then those offices are not a part of the "usual miscellany" and thus are not within the rule of the *Callus* case.

If 50 per cent or more of the rentable area is occupied by a bank or insurance company, the maintenance employees will be covered. This raises the same question, that is, whether this applies to situations where the bank or insurance company owns the building or to situations where an independent real estate company owns the building or to both situations.

Of the three Circuit court cases decided since the 1949 amendment, no restriction of coverage has been indicated. The *Girard* case in denying coverage to employees in a building the major part of which had been rented for offices by a company engaged in commerce simply followed the earlier cases denying coverage because there was not a sufficiently close connection with interstate commerce. That part of the statute relating to "engaged in commerce" was not changed by the amendment. The *Union National Bank* case in holding the maintenance employees covered by the act relied on the *Kirschbaum* case and indicated that no change was intended by the amendment. The case, however, was a stronger one for coverage than the *Kirschbaum* case because the employer was himself engaged in the production of goods for interstate commerce. The *General Electric* case extended rather than restricted the doctrine of the *Borden* case. None of these cases, however, has been passed upon by the Supreme Court. The only district court case pointing toward a possible restriction held that the act did not cover a watchman employed to guard the outside of buildings rented to tenants producing goods for commerce.[53] No cases, of course, have reached the courts since the announcement of the 1953 Administrative Statement.

Judging from the limited number of court decisions and from the

[53] Tobin v. Famous Realty, Inc., 111 F. Supp. 659 (E. D. N. Y. 1953).

administrative interpretations it would appear that little restriction of coverage of maintenance employees was effected by the 1949 amendment. The real effect of the amendment will not be known definitely until some case in these borderline areas reaches the Supreme Court. Until then it is probable that coverage under the act will not only be materially restricted but that it will continue to be extended in spite of the amendment.

JEANNE OWEN

Sales—Warranties—Implied in Sale of Food for Human Consumption

In the recent case of *Draughon v. Maddox*[1] the North Carolina Supreme Court held that in the sale of a cow at auction on a public market to a retail dealer there was an implied warranty that it was fit for human consumption. The court relied on two earlier North Carolina cases in which it was held (1) that there was an implied warranty that the article sold was suitable for the purpose intended[2] and (2) that there was an implied warranty in the sale of food for human consumption that it was wholesome and fit for that purpose.[3] Relying on the statute requiring a health certificate with a cow if not sold for immediate slaughter,[4] the court found that this cow, sold without a health certificate, must have been intended for immediate slaughter and therefore for human consumption.

The North Carolina cases on implied warranty of fitness for the purpose intended are not wholly consistent. In the early case of *Dickson v. Jordan*[5] the court had held that there was no implied warranty of quality even where the seller knew the purpose for which the article was to be used, basing the decision on the fact that since the same price was paid by the one who did not reveal his purpose as by the one who did, there was no consideration to support a warranty of fitness.

Some doubt must have been cast on this rule by the decision in *Thomas v. Simpson*[6] where the seller who contracted to furnish shingles was denied recovery because they were not fit for the purpose intended. The court did not mention the earlier case. Then in a dictum in a much later case, the court again said that if there was a sale for a particular purpose, the seller warranted the article to be fit for that purpose.[7]

One year after that dictum, however, there was a direct holding

[1] 237 N. C. 742, 75 S. E. 2d 917 (1953).
[2] McConnell v. Jones, 228 N. C. 218, 44 S. E. 2d 876 (1947).
[3] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951).
[4] N. C. GEN. STAT. § 106-409 (1952).
[5] 33 N. C. (11 Ired.) 166, 53 Am. Dec. 403 (1850).
[6] 80 N. C. 4 (1879).
[7] W. F. Main Co. v. Field, 144 N. C. 307, 311, 56 S. E. 943, 944 (1907).

that there was no warranty where the seller knew the purpose unless there was appropriate language to be a warranty.[8] The court relied on the *Dickson* case and stated that there were some cases where a warranty would be implied, as where the article was manufactured for a particular purpose, citing the *Thomas* case. By way of dictum two years later, the court again stated that there would be no implied warranty even where the seller knew the purpose for which the article was intended.[9]

Since that time, the court has ignored these earlier cases denying implied warranties and with a few exceptions[10] has indicated that there is an implied warranty of fitness for the purpose for which the article is intended,[11] the court frequently not making it clear whether the warranty is one of suitability for general purposes or one of fitness for a particular purpose. In some of these cases, the court has indicated that if the article was wholly unfit for the purpose intended, there would be a failure of consideration.[12]

At times the rule as to implied warranty for fitness has been stated so broadly that it could cover even those sales where the seller did not know the intended purpose, although in all of the cases in which the

[8] Woodridge v. Brown, 149 N. C. 299, 62 S. E. 1076 (1908).

[9] J. I. Case Threshing Machine Co. v. McClamrock, 152 N. C. 405, 408, 67 S. E. 991, 992 (1910).

[10] Poovey v. International Sugar Co., 191 N. C. 722, 725, 133 S. E. 12, 13 (1926) (dictum that there is a warranty if the seller assures the buyer the article is suitable); Hampton Guano Co. v. Hill Live-Stock Co., 168 N. C. 442, 447, 84 S. E. 774, 775 (1915) (dictum that there is no implied warranty of fitness).

[11] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951) (salt substitute); Stokes v. Edwards, 230 N. C. 306, 52 S. E. 2d 797 (1949) (oil burners); McConnell v. Jones, 228 N. C. 218, 44 S. E. 2d 876 (1947) (hay); Walker v. Hickory Packing Co., 220 N. C. 158, 16 S. E. 2d 668 (1941) (lard); Primrose Petroleum Co. v. Allen, 219 N. C. 461, 14 S. E. 2d 402 (1941) (written warranty excluded any implied warranty as to fitness for a particular purpose); Williams v. Elson, 218 N. C. 157, 10 S. E. 2d 668 (1940) (sandwich); Aldridge Motors, Inc. v. Alexander, 217 N. C. 750, 9 S. E. 2d 469 (1940) (automobile); Pool v. Pinehurst, Inc., 215 N. C. 667, 2 S. E. 2d 871 (1939) (boiler condemned by state authorities); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939) (sausage); Williams v. Dixie Chevrolet Co., 209 N. C. 29, 182 S. E. 719 (1935) (automobile); Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935) (flour; warranty recognized but held not to run from manufacturer to ultimate consumer); Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926) (fertilizer); Standard Sand & Gravel Co. v. McClay, 191 N. C. 313, 131 S. E. 754 (1926) (gravel and sand); Swift & Co. v. Etheridge, 190 N. C. 162, 129 S. E. 453 (1925) (fertilizer); McCaskey Register Co. v. Bradshaw, 174 N. C. 414, 93 S. E. 898 (1917) (machines); Farquhar Co. v. Hardy Hardware Co., 174 N. C. 369, 373, 93 S. E. 922, 924 (1917) (peanut pickers; dictum); Hall Furniture Co. v. Crane Mfg. Co., 169 N. C. 41, 85 S. E. 35 (1915) (hearse; apparently warranty for general use only); Lexington Grocery Co. v. Vernoy, 167 N. C. 427, 83 S. E. 567 (1914) (apparently warranty of merchantability only); Ashford v. H. C. Schrader Co., 167 N. C. 45, 48, 83 S. E. 29, 31 (1914) (dictum).

[12] Pool v. Pinehurst, Inc., 215 N. C. 667, 2 S. E. 2d 871 (1939) (boiler condemned by state authorities); Williams v. Dixie Chevrolet Co., 209 N. C. 29, 182 S. E. 719 (1935) (automobile); Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926) (fertilizer).

problem has arisen the seller actually knew.[13] In only two of the cases was reliance of the buyer on the seller's skill or judgment expressly made a factor to be considered in determining whether there was an implied warranty.[14]

Where the article sold is for human consumption, whether the North Carolina court recognizes an implied warranty seems to depend upon whether there is a contractual relation between the parties. Thus in suits by the consumer against the retailer, North Carolina has recognized an implied warranty of fitness for human consumption.[15] Likewise in suits by the retailer against his vendor, the court has recognized such an implied warranty.[16] But in suits by the ultimate consumer against the manufacturer, the court has refused to recognize an action for breach of implied warranty.[17] Thus as between the vendee and his immediate vendor, North Carolina has consistently allowed an action on implied warranty of fitness for human consumption.

In most of these cases recognizing an implied warranty of fitness for human consumption, the court apparently has based its decision on the general rule of fitness for the use intended, although the court in one case talked about the policy of preservation of public health[18] and by way of dictum in a case involving the sale of feed for cattle, the court said that the rule was based on the public policy of regard for human life.[19]

The decision in the instant case would appear to be consistent with the more recent North Carolina cases both as to warranty of fitness for the purpose intended and for human consumption. The inference seems

[13] McConnell v. Jones, 228 N. C. 218, 44 S. E. 2d 876 (1947); Pool v. Pinehurst, Inc., 215 N. C. 667, 2 S. E. 2d 871 (1939); Williams v. Dixie Chevrolet Co., 209 N. C. 29, 182 S. E. 719 (1935); Standard Sand & Gravel Co. v. McClay, 191 N. C. 313, 131 S. E. 754 (1926).

[14] Stokes v. Edwards, 230 N. C. 306, 52 S. E. 2d 797 (1949); Poovey v. International Sugar Co., 191 N. C. 722, 133 S. E. 12 (1926) (feed for cattle).

[15] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951) (salt substitute; immediate issue was whether defendant-retailer could bring in his vendor as co-defendant in suit on implied warranty); Williams v. Elson, 218 N. C. 157, 10 S. E. 2d 668 (1940) (sandwich); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939) (sausage).

[16] Davis v. Radford, 233 N. C., 283, 63 S. E. 2d 822 (1951) (salt substitute); Walker v. Hickory Packing Co., 220 N. C. 158, 16 S. E. 2d 668 (1941) (lard); Lexington Grocery Co. v. Vernoy, 167 N. C. 427, 83 S. E. 567 (1914) (beans).

[17] Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935) (flour); Caudle v. F. M. Bohannon Tobacco Co., 220 N. C. 105, 110, 16 S. E. 2d 680, 683 (1941) (tobacco; dictum); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N. C. 305, 307; 180 S. E. 582, 583 (1935) (bottled drinks; dictum). In an earlier case the question was raised but the court found it unnecessary to decide whether suit could be maintained on an implied warranty, since in that case there was clearly negligence. Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916) (fish).

[18] Rabb v. Covington, 215 N. C. 572, 574, 2 S. E. 2d 705, 707 (1939).

[19] Poovey v. International Sugar Co., 191 N. C. 722, 724, 133 S. E. 12, 13 (1926); Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935) (dissenting opinion).

reasonable that since the cow was sold without a health certificate, the seller must have contemplated that it was being bought for immediate slaughter for human food. In many cases, however, as was pointed out above, the court has stated the rule of implied warranties in such a way as to imply that knowledge of the seller is not necessary.[20]

Although the North Carolina court has put little stress on reliance on the skill or judgment of the seller, two cases have indicated that such reliance by the buyer was necessary.[21] However, neither the instant case nor the two cases cited in it as authority[22] say anything about reliance of the buyer on the seller's skill and judgment. Apparently in this case there was no reliance, since the cow was sold at auction on a public market and both buyer and seller were experienced cattle dealers.

While the *Draughon v. Maddox* decision seems consistent with recent North Carolina cases, it is inconsistent with the weight of authority in other states. Although a majority of the courts recognize an implied warranty of fitness where the article is sold for a particular purpose,[23] the rule applies only where the buyer relies on the seller's skill or judgment.[24] Under the Uniform Sales Act, also, such an implied warranty for a particular purpose is recognized, but only if there is reliance by the buyer.[25] Generally, too, in sales at auction, there are no implied warranties except as to title, the rule of *caveat emptor* being applied.[26]

At common law there was also generally recognized an implied warranty that food sold for human consumption was fit for that purpose and where food was bought from a retailer it was generally assumed that the seller knew the purpose for which the food was bought and that the buyer relied on the seller's skill or judgment.[27] However, that special warranty did not usually apply where the sale was between dealers, as in the instant case, although there were cases recognizing an implied warranty even there.[28] The Uniform Sales Act no longer recognizes a special warranty of the fitness of food for human consumption,[29] but where there is knowledge of the purpose by the seller

[20] See note 13 *supra*. [21] See note 14 *supra*.

[22] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951); McConnell v. Jones, 228 N. C. 218, 44 S. E. 2d 876 (1947).

[23] 46 AM. JUR., *Sales* § 346 (1943); 77 C. J. S., *Sales* § 325(a) (1952); 1 WILLISTON, SALES § 227 (Rev. ed. 1948).

[24] 46 AM. JUR., *Sales* §§ 346, 348 (1943); 77 C. J. S., *Sales* §§ 315(b), 325(b) (1952); 1 WILLISTON, SALES §§ 206, 235 (Rev. ed. 1948).

[25] UNIFORM SALES ACT § 15(1); 77 C. J. S., *Sales* § 315 (b) (1952); 1 WILLISTON, SALES §§ 227, 235, 248 (Rev. ed. 1948).

[26] 5 AM. JUR., *Auctions* § 46 (1936); 7 C. J. S., *Auctions and Auctioneers* § 8c(2) (1937).

[27] 22 AM. JUR., *Food* § 94 (1939); 77 C. J. S., *Sales* § 331(a)(1) (1952); 1 WILLISTON, SALES § 242 (Rev. ed. 1948).

[28] 22 AM. JUR., *Food* § 109 (1939); 77 C. J. S., *Sales* §§ 330, 331(a)(1) (1952); 1 WILLISTON, SALES § 242 (Rev. ed. 1948).

[29] 1 WILLISTON, SALES § 242a (Rev. ed. 1948).

and reliance by the buyer, the same result can be reached under the provision for an implied warranty for a particular purpose. Where the sale of food is to the ultimate consumer, the section has been given a liberal construction so that much the same result has been reached as under the common law.[30] Since in the instant case the sale was not to the ultimate consumer and the buyer did not rely on the seller's skill and judgment, there would under the majority rule be no implied warranty that the product was fit for human consumption.

The court in the principal case gives no reason other than precedent for its decision. Perhaps it is following the policy expressed in *Swift & Co. v. Aydlett* in 1926, when the court in advocating an extension of the doctrine of implied warranty said:[31]

> The harshness of the common-law rule of *caveat emptor,* when strictly applied, makes it inconsistent with the principle upon which modern trade and commerce are conducted; the doctrine of implied warranty is more in accord with the principle that "honesty is the best policy," and that both vendor and vendee, by fair exchange of values, profit by a sale.

Or perhaps it is following expressions in other cases that such a warranty is based on the public policy of preservation of public health or regard for human life.[32]

The *Draughon* case raises several interesting questions. By ignoring earlier cases requiring reliance and applying the doctrine of implied warranty to a set of facts where there was no reliance, is the court indicating that reliance is unnecessary? If it is desirable to extend the doctrine of implied warranties and to protect the public from unwholesome food, will the court imply a warranty directly from the manufacturer to the ultimate consumer?[33]

The trend in these North Carolina cases seems to point toward a rule of implied warranty which in effect is more nearly one of absolute liability on the sellers of food for human consumption, at least as to the immediate purchaser, whether the sale be to the consumer or to a dealer, whether or not there be any reliance by the buyer on the seller's skill or judgment, and whether or not there be any actual knowledge by the seller of the purpose for which the article is to be used.

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[30] 1 WILLISTON, SALES § 248 (Rev. ed. 1948).
[31] 192 N. C. 330, 334, 135 S. E. 141, 144 (1926). Repeated in Rabb v. Covington, 215 N. C. 572, 576, 2 S. E. 2d 705, 708 (1939).
[32] See notes 18 and 19 *supra.*
[33] See Note, 30 N. C. L. REV. 191 (1952).

Taxation—Income—Long-Term Compensation—Partnerships

If an individual or a partnership receives[1] in a tax year at least 80 per cent of the total compensation[2] for personal services[3] rendered over a period of thirty-six months or more,[4] § 107 (a) of the Internal Revenue Code may provide relief from the application of a high tax bracket in that particular year.[5] This relief is granted by limiting the tax on such compensation to the additional tax that would have been payable if the compensation had been received on a pro rata basis over the period of service prior to the receipt of the qualifying payment.[6] Thus the taxpayer is allowed the benefit of paying the smaller

[1] If the taxpayer is on an accrual basis then an accrual is sufficient. INT. REV. CODE § 107(a).

[2] Total compensation is important in determining whether the payment received represents 80 per cent thereof. Thus what appears to be a qualifying payment in a particular year may be reduced below 80 per cent by a subsequent payment for the same services. Also, there is a problem concerning the separability of lump-sum payments. For example, in one case the severance pay received by an employee after 26 years of service was held to be not separable from total compensation received over that period and so the 80 per cent test was not met. Carrigan v. Commissioner, 197 F. 2d 246 (2d Cir. 1952). In another case the additional pay to a corporate officer for services in connection with a patent controversy between his employer-corporation and another corporation was held separable from his regular salary. E. A. Terrell, 14 T. C. 572 (1950).

[3] It has been held that advance payments from a client set apart in a trust fund do not constitute compensation for personal services until withdrawn. Hanna v. Commissioner, 156 F. 2d 135 (9th Cir. 1946). In another case it was held that the proceeds arising from the compromise of a copyright infringement suit did not constitute compensation for personal services. Jack Rozenzweig et al., 1 T. C. 24 (1942).

[4] The period of thirty-six months or more is measured from the beginning of services until their termination. The following cases are illustrative of the problems arising in this area: (a) Was there a thirty-six month period? Lucilla de V. Whitman, 12 T. C. 324 (1949), *aff'd*, 178 F. 2d 913 (2d Cir. 1949) (corporate salary of officer was for services rendered in current year, rather than compensation for the officer's services during the period in which the corporation was formed); (b) When did the period begin? James D. Gordon, 10 T. C. 772 (1948), *aff'd per curiam*, 172 F. 2d 864 (2d Cir. 1949) (the period included unsuccessful attempts to sell stock by a broker in addition to the time spent by him on successful negotiations); Guy C. Myers, 11 T. C. 447 (1948) (time spent in finding a customer may not be included); (c) When did the period end? Norman R. Williams, 1951 P-H TC MEMO DEC. ¶ 51,207 (1951) (in the sale of a corporation the broker's services continued until the last stockholder turned in his stock).

[5] INT. REV. CODE § 107(a) provides: "If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual."

[6] If the payment of 80 per cent or more is received upon the completion of services, then the compensation will be spread over the period during which the services were rendered. If the date of payment and the date of the completion of services are different, then the earlier date is used as the ending date for the allocation of the lump-sum compensation for purposes of computing the tax. Thus, in computing the tax, the allocation period may be less than thirty-six

of either (1) the tax on the special compensation for the current year without adjustment or (2) the additional tax on such compensation which would have been payable if the pay had been spread evenly over the period during which services were rendered prior to the receipt of the qualifying payment. The tax for other years is not changed, as the statute merely provides a formula for computing the income tax on long-term compensation in the year in which it is received.

This statutory provision is of special interest to professional persons and partnerships who frequently render services over a long period of time and who may receive a large payment in one tax year.[7] Proper tax planning is desirable to insure that the requirements of § 107 (a) are met.[8] The problems to be considered here are some which are peculiar to partnerships. These particular situations arise in connection with the admission of new partners and the change of the business "entity" while services are being rendered.

In *Van Hook v. United States*,[9] the taxpayer, an attorney, was requested in 1945 to join in the appeal of a case on which another attorney had been working for a period of about four years. The taxpayer was to share in the contingent fee only in the event that the outcome was favorable. In 1946 there was a favorable disposition of the case and the taxpayer claimed the benefit of § 107 (a) of the Internal Revenue Code, even though the services which he performed covered a period of only about thirteen months. The district court determined that a joint venture existed and that this relationship qualified as a partnership under § 107 (a).[10] Then the court held that the taxpayer was entitled to spread the fee over the entire period during which the services were rendered. In reversing, the circuit court, assuming that there was a joint venture, held that the joint venture did not exist prior to 1945 and, consequently, the taxpayer could not

months where the payment of 80 per cent or more of total compensation is received prior to completion of services. U. S. TREAS. REG. 118, § 39.107-1 (1953).

[7] Thus this section is available to doctors, lawyers, accountants, executors, architects, consultants, or anyone who may render personal services and meet the other requirements.

INT. REV. CODE § 107(b) provides for similar treatment of income received by individuals from artistic works or inventions.

INT. REV. CODE § 107(d) provides somewhat similar treatment for the back pay received by an individual under specified circumstances.

[8] For 107(a) problems in general, see 29 A. L. R. 2d 592 (1953); Comments, *Current Problems Under I. R. C. Section 107*, 48 N. W. U. L. R. 51 (1953); Bayly, *Proper Use of Section 107 Lessens Tax Burden on Lump-Sum Income*, 96 J. ACCOUNTANCY 582 (1953); Note, *Section 107(a) and the Partnership*, 65 HARV. L. REV. 1193 (1952); Tannenbaum, *Recent Developments Under Section 107*, 9 INST. FED. TAX. 381 (N. Y. U. 1951).

[9] 204 F. 2d 25 (7th Cir. 1953), *reversing* 107 F. Supp. 499 (N. D. Ill. 1952), *cert. denied* 74 Sup. Ct. 42 (1953).

[10] INT. REV. CODE § 3797(a)(2) provides, in part: "The term 'partnership' includes a . . . joint venture . . . by means of which any business, financial operations, or venture is carried on. . . ."

tack on the services rendered by his partner in order to meet the thirty-six month requirement. Furthermore, since there was no evidence that the compensation received by the taxpayer covered any of the services rendered prior to the formation of the joint venture, the fee was considered to cover only current services.

Section 107 was brought into the law by the Revenue Act of 1939 and its provisions then covered compensation received for personal services rendered "by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services. . . ."[11] Under this statute it was held that a taxpayer could not tack on the individual services of his new partner rendered prior to the formation of the partnership.[12] Under the prior law, the statutory language seemed to make it plain that a partner must actually participate in the services throughout the required time.

An amendment in 1942 changed § 107 (a) of the Internal Revenue Code to its present form.[13] One of the changes liberalized the requirements so that a partner who shares in long-term compensation may be entitled to the benefits of the section, even though he performed none of the services.[14]

If a partner is a member of the partnership during the time in which the services are rendered, he is entitled to the benefits of § 107 (a), providing the other requirements are met, regardless of whether or not he participates in the work.[15] In *Elder W. Marshall,*[16] where a new

[11] Revenue Act of 1939, § 220, 53 STAT. 878 (1939).

[12] Ralph G. Lindstrom, 3 T. C. 686 (1944), *aff'd,* 149 F. 2d 344 (9th Cir. 1945).

[13] Revenue Act of 1942, § 139, 56 STAT. 837 (1942).

[14] The Congressional intent was stated in the following language: "In order for section 107(a) to be applicable, it is not necessary that the individual who includes in his gross income compensation for such personal services be the person who rendered such services. For example, a partner who shares in compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107(a), notwithstanding that he took no part in the rendering of such services. Likewise, in community property states, the spouse of a person who renders such personal services may be entitled to the benefits of section 107(a)." SEN. REP. No. 1631, 77th Cong., 2nd Sess. 109 (1942).

[15] Although the partner does not perform any of the particular services he is a part of the partnership for the required time and his share of partnership income represents a return from *all* partnership services.

[16] 14 T. C. 90 (1950), *aff'd per curiam,* 185 F. 2d 674 (3d Cir. 1950); *accord,* Burnham Enersen, 1950 P-H MEMO. DEC. ¶ 50,024 (1950), aff'd per curiam, 187 F. 2d 233 (9th Cir. 1951; Sigvald Nielsen, 1950 P-H MEMO. DEC. ¶ 50,025 (1950), *aff'd per curiam,* 187 F. 2d 233 (9th Cir. 1951). In each of these cases the new partner was an employee of the firm before being made a partner. In Burnham Enersen, *supra,* the partner, as an employee, participated in the services from the beginning. However, this factor does not seem to be an important element in the court's decision.

In Elder W. Marshall, *supra,* the court noted that the admission of a new partner did not bring about a dissolution of the old firm or create a new one, so that it could not be argued that the services were not rendered by the same partnership. The opinion cited Callahan v. War Contracts Price Adjustment

partner was admitted to the firm less than thirty-six months prior to the receipt of the qualifying fees, the court held that he could avail himself of the benefits of the statute and spread his share of the fees back to the beginning of the services. The court held that it is "the status of the recipient of the income in the year of receipt and not either his status in prior years . . . or the identity of the individual who contributed the services that is made to govern the application of section 107. . . ."[17]

However, in a later case law partners were not allowed to spread back their share of long-term compensation where a different partnership had rendered the services.[18] The taxpayers were special partners in a law firm which had performed services for an estate. The firm was dissolved due to the bankruptcy of one of the partners and a second partnership was formed by the same parties. The taxpayers' status remained the same as special partners with no interest in the assets. The second partnership was dissolved because of the death of a partner. A third firm was organized in which the taxpayers were general partners owning a percentage interest in the assets, and this firm purchased the claim against the estate from the first firm at public auction. Upon the collection of the claim the taxpayers claimed that their share represented payment for services rendered by them as members of the first firm. The court held that the controlling factor was that the partnership receiving the income was not the partnership which performed the services and, therefore, § 107 (a) was not applicable. The court stated that the amendment in 1942 "did not dispense with the requirement that the partnership through which the taxpayer received his income, must have performed the services for which the income is paid."[19]

The decision in the *Van Hook*[20] case appears to be sound. The court's main consideration was the purpose for which § 107 was enacted and that was to provide relief from the hardship resulting from the receipt of long-term compensation in one year and subjecting it to tax at higher surtax brackets.[21] The court noted that the 1942 amend-

Board, 13 T. C. 355 (1949) and the Uniform Partnership Act §§ 29, 31.

But see dissenting opinion, 14 T. C. at 95 (1950). Three judges in the Tax Court (Hill, Leech and Arnold) dissented on the following grounds: (1) A new partnership is formed when a new partner is admitted. The Uniform Partnership Act does not change the common law rule that the old partnership is ended. (2) The compensation received by the new partner was to cover only services since admission.

[17] 14 T. C. at 94, 95 (1950). § 107(a) has been applied to income earned by a husband but attributable to his wife in a joint return filed under the income splitting provisions. Hofferbert v. Marshall, 200 F. 2d 648 (4th Cir. 1952).

[18] Sovik v. Shaughnessy, 191 F. 2d 895 (2d Cir. 1951).

[19] 191 F. 2d at 896 (2d Cir. 1951). [20] See note 9 *supra*.

[21] 204 F. 2d at 27 (7th Cir. 1953). The court cited SEN. REP. No. 648, 76 Cong., 1st Sess., p. 7.

ment eliminated the requirement that the recipient of the compensation be the one who performs the services, but the court emphasized that "there is nothing in the legislative history to indicate that Congress abandoned the 'burden' theory which was the motive for enacting the original legislation."[22] In this case it is obvious that the compensation received by the taxpayer was for the services he had rendered and those services covered only a thirteen month period.

It is submitted that this "burden" test represents a desirable approach to the problem of the new partner in § 107 (a) situations. It seems that the *Marshall*[23] rationale is an unwarranted extension of the purpose behind the statute, even though the situation came under the literal language of the section, because the compensation received by the new partner was for current services although it was measured, in part, by long-term compensation. Perhaps the *Marshall* line of cases may be justified by the fact that in each of these cases the new partner was a former employee. However, under the "burden" test this should not be significant because the employee is paid for his services. Nevertheless, the Bureau of Internal Revenue has announced that it would follow these cases.[24]

The *Van Hook* decision appears to be a justifiable limitation on the scope of § 107 (a) of the Internal Revenue Code.

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Torts—Malicious Prosecution—Public Officers

It would seem that all persons capable[1] of instituting, or causing to be instituted, a malicious prosecution[2] without probable cause should

[22] 204 F. 2d at 27 (7th Cir. 1953). [23] See note 16 *supra*.

[24] In G. C. M. 26993, 1951 INT. REV. BULL. No. 22 at 2, the Bureau of Internal Revenue announced that it would follow the *Marshall* line of cases (see note 16 *supra*), and noted that in each of these cases there was a proper business motive. It stated that a partner would be entitled to allocate his share of long-term compensation over the entire period "notwithstanding the fact that part of the services" were rendered prior to the admission of the partner.

One author has suggested the possibility that the Bureau may oppose allocation where *all* of the work was done prior to the admission of the new partner, because of the wording of G. C. M. 26993, *supra*, quoted above. For this point and for a discussion of several partnership questions that have not been considered by the courts see note, 65 HARV. L. REV. 1193, 1197 (1952).

[1] It is held in some instances that a mentally incompetent person, or an infant, is not capable of instituting a malicious prosecution. 34 AM. JUR., *Malicious Prosecution* § 84 (1941).

[2] In order to establish an action for malicious prosecution, the plaintiff must prove (1) that the defendant instituted or procured the institution of the criminal prosecution against him; (2) that it was with malice; (3) that the prosecution was without probable cause; and (4) that it was terminated in favor of the plaintiff in the action. Alexander v. Lindsey, 230 N. C. 663, 55 S. E. 2d 470 (1949). No action will lie for the prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of his property. Jerome v. Shaw, 172 N. C. 862, 90 S. E. 764 (1916). Generally, see 34 AM. JUR., *Malicious Prosecution* §§ 1-171 (1941).

respond in damages for their unlawful and malicious act, and it is generally so held.[3] However, for reasons of public policy, this general principle has been limited in case of public officers.[4] If it is assumed that a plaintiff has grounds for a malicious prosecution action, the outcome of his action against a public officer,[5] who acted with malice and without probable cause,[6] will vary with the jurisdiction and the immunity given the particular officer.

The judiciary was the first group of public officers to be granted immunity for malicious acts. It is well established today that a judicial officer acting judicially and within his jurisdiction is not liable in an action for malicious prosecution, even though he may have acted maliciously and without probable cause.[7] This may seem to be a wrong without a remedy, but the rationalization for adhering to the proposi-

[3] Rieger v. Knight, 128 Md. 189, 97 Atl. 358 (1916); Mfgr.'s and Jobber's Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. 2d 849 (1942); Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897); 34 AM. JUR., *Malicious Prosecution* § 8 (1941).

[4] Anno., 28 A. L. R. 2d 646 (1951).

[5] "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or series of acts for the State . . . To illustrate our definition: The Executive Department is an agency for the State, and the Governor and others, whose duty it is to discharge this agency, are public officers. The Judicial Department is an agency for the State, and the Judges are public officers. The Legislative Department is an agency of the State and the members of the Senate and House of Representatives are public officers." Clark v. Stanley, 66 N. C. 60, 63 (1871); 67 C. J. S., *Officers* § 2(b) (1950).

[6] In Ellis v. Hampton, 123 N. C. 194,195, 31 S. E. 473,474 (1898), the court had this to say about malice relative to malicious prosecution: "In Brooks v. Jones, 33 N. C., 260, it was held that in actions of malicious prosecution the plaintiff must show particular malice as *contra* distinguished from general malice, a disposition to do wrong—malice against mankind—on the part of the defendant towards him. The court said in that case: 'This particular malice may be proved by positive testimony of threats or expressions of ill will used by the defendant in reference to the plaintiff, or it may be inferred from the want of probable cause and other circumstances.' However, in Thomas v. Norris, 64 N. C., 780, apparently a different rule is laid down. There evidence of malice on the part of the defendant against another person, who was arrested under same warrant with the plaintiff, was received as evidence of malice toward the plaintiff also." Generally, see 34 AM. JUR., *Malicious Prosecution* § 135 (1941).

[7] Ravenscroft v. Casey, 139 F. 2d 776 (2d Cir. 1944), *cert. denied*, 323 U. S. 745, *rehearing denied*, 323 U. S. 814 (1944) (police judge and county judge held immune); Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907) (mayor acting as magistrate held immune); Prentice v. Bertken, 50 Cal. App. 2d 344, 123 P. 2d 96 (1942) (justice of peace); Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982 (1896) (justice of peace); Hoppe v. Klopperich, 224 Minn. 224, 28 N. W. 2d 780 (1947) (municipal judge); Linder v. Foster, 209 Minn. 43, 295 N. W. 299 (1940) (commr. in bankruptcy proceeding); Grant v. Williams, 54 Mont. 246, 169 Pac. 286 (1917) (justice of peace); Scott v. Fishblate, 117 N. C. 265, 24 S. E. 436 (1895) (mayor acting as magistrate); Furr v. Moss, 52 N. C. 525 (1860) (justice of peace); Cunningham v. Dillard, 20 N. C. 485 (1839) (justice of peace); Shaw v. Moon, 117 Or. 558, 245 Pac. 318 (1926) (recorder judge); 34 AM. JUR., *Malicious Prosecution* § 87 (1941). *Contra:* Hagerman v. Sutherland, 16 Ky. L. R. 301, 27 S. W. 982 (1894) (justice of peace); Vennum v. Huston, 38 Neb. 293, 56 N. W. 970 (1893) (justice of peace).

tion is stated in a North Carolina case, *Scott v. Fishblate*,[8] where it is said:

> But if this is so (that there is a wrong without a remedy), it is necessarily so; and it must be taken that the plaintiff has agreed that it shall be so.
>
> But for the government of which he is a part, there would be no law, nor would there be any courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law and the courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law of course might prevail. To have this legal protection, it is necessary to have courts, judges, justices of the peace, including mayors of towns and cities. And it is the experience and wisdom of our country that those courts cannot exist, or at least cannot discharge their judicial functions, unless they are made free from pecuniary liability for their judgments while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud or corruption in office, because these are public wrongs committed against the government whose servants they are.

Nevertheless, some North Carolina cases contain language which might lead one to believe that the law in North Carolina is otherwise than as stated above. In *State v. Swanson*,[9] where a sheriff was being sued for malicious prosecution, the court used the following language:

> The law applicable to the facts alleged in the complaint, as enunciated by the opinions of this court, is that public officers acting in a judicial capacity or *quasi*-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of his judgment though his judgment may have been erroneous; however, in cases where a public officer, even judicial or *quasi*-judicial, instead of acting in an honest exercise of his judgment, acts corruptly or of malice, such officer is liable in a suit instituted against him by an individual who has suffered special damage by reason of such corrupt or malicious action.

But in the above quoted case, and in other North Carolina cases which contain statements that a judicial officer is not completely immune for malicious acts, it appears that the public officer involved was not

[8] 117 N. C. 265, 275, 23 S. E. 436 (1895) (contempt order of mayor acting in judicial capacity could not be questioned by plaintiff even though the mayor acted erroneously and with malice).

[9] 223 N. C. 442, 444, 27 S. E. 2d 122, 123 (1943).

a judge acting in his judicial capacity, but was an administrative or executive officer with discretionary or ministerial powers.[10] Thus, it would seem that the *Scott v. Fishblate* decision, which granted immunity to judges, justices of the peace, and mayors acting in a judicial capacity for malicious judicial acts within their jurisdiction, is not affected by *State v. Swanson,* or similar decisions.

Relative to the judiciary, the majority rule is that grand jurors may not be held liable in an action for malicious prosecution for acts performed in the discharge of their official duties, however malicious or destitute of probable cause their action may have been.[11]

As a result of the growth of administrative and executive governmental activities, many duties formerly considered to be completely ministerial in function have taken on the semblance of judicial character, and *quasi*-judicial officials[12] whose functions require the exercise of discretion in the administration of their duties have been given immunity in many jurisdictions.[13] The immunity given to administrative and executive officers exercising judgment and discretion has not been as complete as that given to judges. Prosecuting attorneys have been held immune to civil liability for their malicious actions in the performance of their duties by the majority of the jurisdictions deciding

[10] Smith v. Hefner, 235 N. C. 1, 68 S. E. 2d 783 (1951) (school trustees and park commissioners); State v. Swanson, 223 N. C. 442, 27 S. E. 2d 122 (1943) (sheriff); Wilkinson v. Burton and Ward v. Burton, 220 N. C. 13, 16 S. E. 2d 406 (1941) (division engineer of state highway); Old Fort v. Harmon, 219 N. C. 241, 13 S. E. 2d 423 (1941) (mayor and aldermen); Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938) (coroner not acting in judicial capacity); Spruill v. Davenport, 178 N. C. 364, 100 S. E. 527 (1919) (school committee); Hipp v. Ferrall, 173 N. C. 167, 91 S. E. 831 (1917) (highway commission); Templeton v. Beard, 159 N. C. 63, 74 S. E. 735 (1912) (county commissioners).

[11] Yaselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), *aff'g.,* 8 F. 2d 161 (S. D. N. Y. 1925), *cert. granted,* 273 U. S. 677, and *aff'd.,* 275 U. S. 503 (1926); White v. Towers, 27 Cal. 2d 727, 235 P. 2d 209 (1951); Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001 (1896); 38 C. J. S., *Grand Juries* § 45 (1943).

[12] The difference between judicial and *quasi*-judicial officers is explained in 34 C. J., *Judicial* § 5 (1924) as follows: "The term 'judicial' may be applied to the act of an officer who, in the exercise of his functions, is required to pass upon facts and to determine his action by the facts found; this is sometimes called a 'quasi-judicial function.' Quasi-judicial is a term used to describe acts presumed to be the product of judgment based upon evidence, either oral or visual, or both. There is a distinction between acts that are quasi-judicial and those that are purely judicial. Where a power vests in a judgment or discretion, so that it is of judicial nature, but does not involve the exercise of the functions of a judge or is conferred upon an officer having no authority of a judicial character the expression used is generally 'quasi-judicial.'"

[13] Yaselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), *aff'g.,* 8 F. 2d 161 (S. D. N. Y. 1925), *cert. granted,* 273 U. S. 677, and *aff'd.,* 275 U. S. 503 (1926) (ass't. to U. S. Atty. Gen.); Pearson v. Reed, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935) (city prosecutor); Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001 (1896) (prosecuting attorney); Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917) (city attorney); Copeland v. Donovan, 124 Misc. 553, 208 N. Y. Supp. 765 (County Ct. 1925) (prosecuting attorney); Kittler v. Kelsch, 56 N. D. 227, 216 N. W. 898 (1927) (state's attorney); Anderson v. Manley, 181 Wash. 327, 43 P. 2d 39 (1935) (prosecuting attorney); RESTATEMENT, TORTS § 656(d) (1938). *Contra:* Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

the question.[14] Some other administrative and executive officers who have been given immunity though they acted maliciously in the performance of their duties are as follows: postmaster general,[15] comptroller of currency,[16] secretary of treasury,[17] parole board,[18] mayor,[19] board of health,[20] superintendent of schools,[21] and town commissioners.[22] Although the tendency today seems to be toward extending immunity for malicious prosecution to public administrative and executive officers exercising judgment and discretion in the performance of their duties, North Carolina has not extended such immunity to these officials. In a tort action against county commissioners, the Supreme Court of North Carolina held in *Moye v. McLawhorn*[23] that the commissioners could not be held liable as public officers with discretionary duties *in the absence of an allegation of malice or corruption.* (Italics supplied.) The rule is stated in *Hipp v. Ferrall*[24] as follows:

> It is held in this State that public officers in the performance of their official and governmental duties, involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice.

Law enforcement officers, *i.e.,* police,[25] constables,[26] sheriffs,[27] fish and game investigators,[28] and building inspectors,[29] have had immunity

[14] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938); 34 AM. JUR., *Malicious Prosecution* § 88 (1941); RESTATEMENT, TORTS § 656(d) (1938); see Note 13, *supra.*

[15] Spalding v. Vilas, 161 U. S. 483 (1896).

[16] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938).

[17] Standard Nut Margarine Co. v. Mellon, 63 App. D. C. 339, 72 F. 2d 557 (1934), *cert. denied,* 293 U. S. 605 (1934).

[18] Lang v. Wood, 67 App. D. C. 287, 92 F. 2d 211 (1937), *cert. denied,* 302 U. S. 686 (1937).

[19] Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907).

[20] Raymond v. Fish, 51 Conn. 80 (1883).

[21] Johnson v. Moser, 181 Okla. 75, 72 P. 2d 715 (1937).

[22] Brown v. Wimpenny, 239 Mass. 278, 132 N. E. 43 (1921).

[23] 208 N. C. 812, 182 S. E. 493 (1935).

[24] 173 N. C. 167, 169, 91 S. E. 831, 832 (1917).

[25] Laughlin v. Garnett, 78 App. D. C. 194, 138 F. 2d 931 (1943), *cert. denied,* 322 U. S. 738 (1943); White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951); Anno., 28 A. L. R. 2d 646 (1951). *Contra:* Brown v. Wimpenny, 239 Mass. 278, 132 N. E. 43 (1921); Motley v. Dugan, 191 S. W. 2d 979 (Mo. App. 1945); Hawkins v. Reynolds, 236 N. C. 422, 72 S. E. 2d 874 (1952); Alexander v. Lindsey, 230 N. C. 662, 55 S. E. 2d 470 (1949); Perry v. Hurdle, 229 N. C. 216, 49 S. E. 2d 400 (1948); Atkinson v. Birmingham, 44 R. I. 123, 116 Atl. 205 (1922); Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600 (1899).

[26] White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951). *Contra:* Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600 (1899).

[27] Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876, *cert. denied,* 344 U. S. 840 (1952). *Contra:* Moser v. Fulk, 237 N. C. 302, 74 S. E. 2d 729 (1953); Alexander v. Lindsey, 230 N. C. 662, 55 S. E. 2d 470 (1949).

[28] White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951).

[29] Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949); White v. Brinkman, 23 Cal. App. 2d 307, 73 P. 2d 254 (1937).

extended to them in a few jurisdictions even though they may have acted maliciously and without probable cause. Fewer jurisdictions have been willing to go this far in granting immunity than in the other two categories mentioned, *i.e.,* judiciary and administrative and executive officers. The reason for so extending immunity has been predicated on the ground that public policy requires that law enforcement officers be exempted from civil liability for acts within the scope of their authority so that they may fearlessly administer their duties.[30] That North Carolina does not extend immunity to law enforcement officers relative to an action for malicious prosecution is exemplified by the Court's statement in *Perry v. Hurdle,*[31] an action against two police officers for malicious prosecution:

> The existence of circumstances and facts strong enough to excite in a reasonable mind the well-founded belief that the person charged is guilty would be sufficient to protect a police officer who acts in good faith, though it be subsequently shown that the person arrested and prosecuted was not guilty of the offense.

In the jurisdictions which grant immunity to law enforcement officers, it is extended only if the officer acts within the scope of his authority.[32] Even where such immunity is not extended to law enforcement officers, it has been held that if the officer does no more than is required of him in the execution of a legal process, fair on its face, this constitutes a defense to any action for malicious prosecution based on such process.[33] However, the decision would be affected by the fact of whether the officer swore out the warrant in the first place. Advice of counsel before instituting an action is a defense in the majority of states,[34] but in North Carolina it is only evidence bearing on the issue of malice and probable cause.[35] North Carolina is in accord with the jurisdictions

[30] Anno., 28 A. L. R. 2d 646 (1951).

[31] 229 N. C. 216, 220, 49 S. E. 2d 400, 402 (1948).

[32] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938); Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949); Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876, *cert. denied,* 344 U. S. 840 (1952).

[33] Hoppe v. Klopperich, 224 Minn. 224, 28 N. W. 2d 780 (1947); Alexander v. Lindsey, 230 N. C. 663, 55 S. E. 2d 470 (1949); Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. E. 600 (1899).

[34] 34 AM. JUR., *Malicious Prosecution* § 71 (1941).

[35] Bryant v. Murray, 239 N. C. 18, 79 S. E. 2d 243 (1953); Downing v. Stone, 152 N. C. 525, 530, 68 S. E. 9, 11 (1910) wherein it is said: "The decisions of this state have uniformly held that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury on the issue of malice... And where it is proven that legal advice was taken by a prosecutor, this too is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause . . . This restriction as to advice of counsel learned in the law on facts fully and fairly

which hold that a prosecution under a void warrant will not support an action for malicious prosecution in that no offense has been legally charged.[36] There is a conflict of authority on this point however.[37] If the law enforcement officer, or other public officer, escapes an action for malicious prosecution, he may still be liable for the tort of false arrest[38] or abuse of process[39] in the jurisdictions where he is not given immunity for malicious acts in the performance of his duties.

There seems to be a growing tendency to extend immunity for malicious prosecution to administrative, executive, and law enforcement officers, but it is submitted that North Carolina's position is more fair to the citizen in refusing to extend such immunity beyond judicial officers acting in a judicial capacity. It is conceded that governmental administrative, executive, and police officers should not be unduly hampered in the exercise of their duties, but it is of paramount importance that the individual citizen be granted some protection and be compensated for injury to him without right and with malice.

ELTON C. PRIDGEN

Torts—Negligence—Availability of Defense of Assumption of Risk

In an action brought by the administrator of a guest passenger in defendant's automobile to recover damages for the wrongful death of plaintiff's intestate, the North Carolina Supreme Court recently said, "Assumption of risk was not available as a defense for there was no

stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions . . . , but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position."

[36] Satilla Mfg. Co. v. Cason, 98 Ga. 14, 25 S. E. 909 (1895); Moser v. Fulk, 237 N. C. 302, 74 S. E. 2d 729 (1953); Wadkins v. Digman, 82 W. Va. 623, 96 S. E. 1016 (1918). *Contra:* Calhoun v. Bell, 136 La. 149, 66 So. 761 (1914); Williams v. Vanmeter, 8 Mo. 339 (1844).

[37] 34 AM. JUR., *Malicious Prosecution* § 21 (1941).

[38] "The second question of law involves the distinction between actions for false arrest or imprisonment and malicious prosecution. Corpus Juris, Vol. 25, p. 444, draws the distinction as follows: 'Put briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under due forms of law, whereas in the latter the detention is without color of legal authority.' The Court adopted the same view of the law in Rhodes v. Collins, 198 N. C. 23, 150 S. E. 492. *Clarkson,* J., said: 'False imprisonment is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause.'" Young v. Hardwood Co., 200 N. C. 310, 311, 156 S. E. 501, 502 (1931).

[39] "The tort of abuse of process is sometimes confused with malicious prosecution. In both, an injury is caused by the wrongful employment of legal process, but the two are definitely distinguishable. In malicious prosecution the gist of the injury is commencing an action or causing process to issue as an incident thereto, without justification. Malice, want of probable cause, and a termination of the proceeding adverse to the party who commenced it must be shown. On the other hand, an action for abuse of process lies not because the defendant has set process in motion but because he has misapplied or perverted it for a wrongful end after it has been issued." Note, 16 N. C. L. REV. 277, 278 (1938).

contractual relation between plaintiff's intestate and the defendants."[1]

The term "assumption of risk" is often confusing, as it is used by courts in different senses and in various situations. Assumption of risk means that the plaintiff has "consented to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk."[2] The basis of the defense is consent as expressed by mental willingness and not necessarily through a contractual relationship between the parties.[3] Although there is some authority to be found for confining the doctrine to cases arising out of the relation of master and servant,[4] or cases involving a contractual relationship between the parties,[5] the general trend seems to be toward the availability of the doctrine as a defense in situations where neither contractual relationship nor the relationship of master and servant exists,[6] under the general principle expressed in the maxim *volenti non*

[1] Goode v. Barton, 238 N. C. 492, 496, 78 S. E. 2d 398, 402 (1953). This note does not attempt to discuss the *adequacy* of the defense of assumption of risk, but is limited in its scope to a brief discussion of the *availability* of the doctrine as a defense in certain areas of the law.

[2] Mountain v. Wheatley, Foss v. Wheatley, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); Pierce v. Clemens, 113 Ind. App. 65, 46 N. E. 2d 836 (1943); Bull S. S. Line v. Fisher, 196 Md. 519, 77 A. 2d 142 (1950); Bouchard v. Sicard, 113 Vt. 429, 35 A. 2d 439 (1944); Emerick v. Mayr, 39 Wash. 2d 23, 234 P. 2d 1079 (1951); PROSSER, TORTS § 51, p. 377 (1941).

[3] Edwards v. Kirk, 227 Iowa 684, 288 N. W. 875 (1939); Bull S. S. Line v. Fisher, 196 Md. 519, 77 A. 2d 142 (1950); Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82 (1943); Fay v. Thrasher, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S. E. 57 (1937); Switzer v. Weiner, 230 Wis. 599, 284 N. W. 509 (1939); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 2511 (1946); PROSSER, TORTS § 51 (1941); Note, 26 TEMPLE L. Q. 206 (1952).

[4] Conrad v. Springfield Consol. R. Co., 240 Ill. 12, 88 N. E. 180 (1909) (*but cf.* Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. 2d 879 [1938]); Modlin v. Consumers Cooperative Ass'n., 172 Kan. 428, 241 P. 2d 692 (1952); Parker v. Grand Trunk Western R. Co., 261 Mich. 293, 246 N. W. 125 (1933); Peyla v. Duluth M. & I. R. R. Co., 218 Minn. 196, 15 N. W. 2d 518 (1944); Biskup v. Hoffman, 220 Mo. App. 542, 287 S. W. 865 (1926); Papakalos v. Shaka, 91 N. H. 265, 18 A. 2d 377 (1941); Dowse v. Maine Cent. R. R., 91 N. H. 419, 20 A. 2d 629 (1941); Rutherford v. James, 33 N. M. 440, 270 Pac. 794 (1928); Eddy v. Wells, 59 N. D. 663, 231 N. W. 785 (1930); Eldred v. United Amusement Co. *et al.*, 137 Ore. 452, 2 P. 2d 1114 (1931); Furbeck v. I. Gevurtzo & Son *et al.*, 72 Ore. 12, 143 Pac. 654 (1914).

[5] Edwards v. Southern Ry. Co., 233 Ala. 65, 169 So. 715 (1936); McGeever v. O'Byrne, 203 Ala. 266, 82 So. 508 (1919); Reed v. Zellers, 273 Ill. App. 18 (1933); Walsh v. Moore, 244 Ill. App. 458 (1927); Pittsburgh C. C. & Sd. Ry. Co. v. Hoffman. 57 Ind. App. 431, 107 N. E. 315 (1914); Goode v. Barton, 238 N. C. 492, 78 S. E. 2d 398 (1953); Schiller v. Rice, 151 Tex. 116, 246 S. W. 2d 607 (1952).

[6] Paul v. U. S., 54 F. Supp. 60 (E. D. La. 1943); Mountain v. Wheatley, Foss v. Wheatley, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); Hedding v. Pearson *et al.*, 76 Cal. App. 2d 481, 173 P. 2d 382 (1946); Doberrentz v. Gregory, 129 Conn. 57, 26 A. 2d 475 (1942); Jackson v. McMillan *et al.*, 64 Idaho 351, 132 P. 2d 773 (1943); Campion v. Landscape Co., 295 Ill. App. 225, 14 N. E. 2d 879 (1938); Bohnsack v. Driftmier, 243 Iowa 383, 52 N. W. 2d 79 (1952); McLeod Stores v. Vinson, 213 Ky. 667, 281 S. W. 799 (1926); Brown v. Waller, 8 So. 2d 304 (La. Ct. App., 2d Cir., 1942); Miner v. Conn. River R. R. Co., 153 Mass. 398, 26 N. E. 994 (1891); Landru v. Stensrud *et al.*, 219 Minn. 227, 17 N. W.

fit injuria—a principle broad enough to cover all cases where an injury results to plaintiff from a risk knowingly and willingly incurred.[7]

The doctrine had its earliest and most frequent application in master and servant cases.[8] The 1939 amendment to the Federal Employer's Liability Act abolished assumption of risk as a defense in actions brought under that statute, as did the various state Workmen's Compensation Acts.[9] These statutory bars to its availability as a defense have probably been responsible for the decline of its use in the courts.

In the last two decades, however, considerable litigation has arisen from injuries to spectators at athletic contests and other places of amusement. In jurisdictions allowing the doctrine, in its broader aspect, to be used as a defense, the courts have held that assumption of risk is available in these actions.[10] In these cases, proprietors of

2d 322 (1945) (although Minn. court in Peyla v. Duluth, 218 Minn. 196, 15 N. W. 2d 518 [1944], had said that in other than master and servant cases, assumption of risk is but a phase of contributory negligence, the earlier case was not referred to in this opinion); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Lake v. Enigh, 118 Mont. 325, 167 P. 2d 575 (1946); Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82 (1943); Bianchi v. South Park Presbyterian Church *et al.*, 123 N. J. L. 325, 8 A. 2d 567 (1939); McLean v. Studebaker Bros. Co. of N. Y., 221 N. Y. 475, 117 N. E. 951 (1917); Fay v. Thasher, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); Gargaro v. Kroger Groc. & Baking Co., 22 Tenn. App. 70, 118 S. W. 2d 561 (1938); Wilson v. Moudy, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938); Bouchard v. Sicard, 113 Vt. 429, 35 A. 2d 439 (1944); Tiller v. Norfolk & W. Ry. Co., 190 Va. 605, 58 S. E. 2d 45 (1950); Emerick v. Mayr, 39 Wash. 2d 23, 234 P. 2d 1079 (1951); Wright v. Valan, 130 W. Va. 466, 43 S. E. 2d 364 (1947); Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S. E. 57 (1937); Johnsen v. Pierce, 262 Wis. 367, 55 N. W. 2d 394 (1952); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 2511 (1946); PROSSER, TORTS § 51 (1941); Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); 38 AM. JUR., *Assumption of Risk* § 171 (1941).

[7] Hedding v. Pearson *et al.*, 76 Cal. App. 2d 481, 173 P. 2d 382 (1946); Edwards v. Kirk, 227 Iowa 684, 288 N. W. 875 (1939); McLeod Stores v. Vinson, 213 Ky. 667, 281 S. W. 799 (1926); Miner v. Conn. River R. Co. 153 Mass. 398, 26 N. E. 994 (1891); Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82 (1943); Fay v. Thrasher, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); Gargaro v. Kroger Groc. & Baking Co., 22 Tenn, App. 70, 118 S. W. 2d 561 (1938); Bouchard v. Sicard, 113 Vt. 429, 35 A. 2d 439 (1944); Walsh v. West Coast Coal Mines, Inc., 31 Wash. 2d 396, 197 P. 2d 233 (1948); Wright v. Valan, 130 W. Va. 466, 43 S. E. 2d 364 (1947); 1 SHEARMAN AND REDFIELD ON NEGLIGENCE § 135 (Rev. ed. 1941).

[8] PROSSER, TORTS § 51 (1941).

[9] 45 U. S. C. A. § 54 (1943); N. C. GEN. STAT. §§ 97-14, 15, 16 (1950).

[10] Uline Ice, Inc. v. Sullivan *et al.*, 187 F. 2d 82 (D. C. Cir. 1950); Thurman *et al.*, v. Ice Palace *et al.*, 36 Cal. App. 364, 97 P. 2d 999 (1939) (ice hockey); Quinn *et al.*, v. Recreation Park Ass'n *et al.*, 3 Cal. 2d 725, 46 P. 2d 144 (1935) (baseball); Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. 2d 879 (1938); Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N. E. 2d 1 (1936) (ice hockey); Modec v. City of Eveleth, 224 Minn. 556, 29 N. W. 2d 453 (1947) (ice hockey); Wells v. Minneapolis Baseball & Ath. Ass'n., 122 Minn. 327, 142 N. W. 2d 706 (1913) (baseball) (*cf.* Peyla v. Duluth, M. & I. R. R. Co., 218 Minn. 196, 15 N. W. 2d 518 [1944]); Page v. Unterreiner, 106 S. W. 2d 528 (Mo. App. 1937) (golf; this case does not refer to Biskup v. Hoffman, 220 Mo. App. 542, 287 S. W. 865 [1926], wherein the court held that the doctrine of assumption of risk was not applicable in absence of relationship of master and servant, nor to Crane v. Kan. City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S. W. 1076 [1913] wherein it was held that plaintiff, injured by foul ball at a baseball game, was precluded from recovery by his own con-

premises in which athletic events are held are required to use ordinary and reasonable care for the protection and safety of patrons, and the doctrine is applied if plaintiff is known to have an appreciation and knowledge of the hazard.[11] In the words of Mr. Justice Cardozo, "The timorous may stay at home."[12]

Another area in which the doctrine is finding greater application concerns automobile guest cases. Of course, in jurisdictions where the rule is applied only in its limited form the defense is not available in these cases.[13] But where the doctrine prevails in the more general and extensive aspect, the defendant may avail himself of the defense of assumption of risk as a bar to plaintiff's recovery.[14] In jurisdictions allowing the assumption of risk as a defense, and having a guest statute limiting liability to cases of the driver's gross negligence or wanton misconduct, the doctrine has been applied with effectiveness.[15] The elements of assumption of risk by a guest are (1) a hazard or danger inconsistent with the safety of the guest, (2) knowledge and apprecia-

tributory negligence "if it cannot be said that he assumed the risk"); Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N. W. 2d 90 (1943) (ice hockey); Ingersoll v. Onondaga Hockey Club, 245 App. Div. 137, 281 N. Y. S. 505 (3d Dep't 1935) (ice hockey); Povanda v. Powers, 152 Misc. 75, 272 N. Y. S. 619 (Sup. Ct. N. Y. Cty. 1934) (golf); Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 166 N. E. 173 (1929) (amusement park ride called "The Flopper"); Benjamin v. Nernberg, 102 Pa. Super. 471, 157 Atl. 10 (1931); Douglas *et al.* v. Converse, 248 Pa. 232, 93 Atl. 955 (1915) (polo); James v. Rhode Island Auditorium, 60 R. I. 405, 199 Atl. 293 (1938) (ice hockey); Keep v. Alamo City Baseball Co., 150 S. W. 2d 368 (Tex. Civ. App. 1941) (*cf.* Schiller v. Rice, 151 Tex. 116, 246 S. W. 2d 607 [1952]); Kavafian v. Seattle Baseball Club, 105 Wash. 215, 181 Pac. 679 (1919) (baseball).

[11] See cases cited note 10 *supra;* Note, 26 TEMPLE L. Q. 206 (1952) (pointing out distinction drawn by some courts between ice hockey games and baseball games, based on theory that sport of baseball and possibility of being hit by ball is more commonly known to general public than the game of ice hockey and its incidents of danger).

[12] Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 166 N. E. 173, 174 (1929).

[13] Goode v. Barton, 238 N. C. 492, 78 S. E. 2d 398 (1953).

[14] Mountain v. Wheatley, Fox v. Wheatley, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); Doberrentz v. Gregory *et al.*, 129 Conn. 57, 26 A. 2d 475 (1942); Bohnsack v. Driftmier, 243 Iowa 383, 52 N. W. 2d 79 (1952); White v. McVicker, 216 Iowa 90, 246 N. W. 385 (1933); Brown v. Waller, 8 So. 2d 304 (La. App., 2d Cir., 1942); Landru v. Stensrud *et al.*, 219 Minn. 227, 17 N. W. 2d 322 (1945); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82 (1943); Woodman v. Peck, 90 N. H. 292, 7 A. 2d 251 (1939); Fay v. Thrasher, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); Gill v. Arthur, 69 Ohio App. 386, 43 N. E. 2d 894 (1941); Wilson v. Moudy, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938); Bouchard v. Sicard, 113 Vt. 429, 35 A. 2d 439 (1944); Johnsen v. Pierce, 262 Wis. 367, 55 N. W. 2d 394 (1952).

[15] Mountain v. Wheatley, Foss v. Wheatley, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); Doberrentz v. Gregory *et al.*, 129 Conn. 57, 26 A. 2d 475 (1942); Pierce v. Clemens, 113 Ind. App. 65, 46 N. E. 2d 836 (1943) (this court distinguishes between "assumption of risk" and "incurred risk," limiting "assumption of risk" to contractual relations and applying doctrine of "incurred risk" where the relation is non-contractual); Bohnsack v. Driftmier, 243 Iowa 383, 52 N. W. 2d 79 (1952); Bouchard v. Sicard, 113 Vt. 429, 35 A. 2d 439 (1944).

tion of the hazard by the guest, (3) acquiescence or a willingness to proceed in the face of danger.[16]

The general recognition by the courts of the distinction between assumption of risk and contributory negligence has come about fairly recently. The Virginia court, in distinguishing between the two terms, said: "The essence of contributory negligence is carelessness; of assumption of risk, venturousness."[17] The Ohio court expressed the distinction: "Assumption of risk embraces a mental state of willingness whereas contributory negligence is a matter of conduct."[18] Sometimes courts do not make the distinction, holding that in cases other than master and servant and contract, assumption of risk is but a phase of contributory negligence.[19] In actions involving assumption of risk, it is sometimes said that the terms may be used interchangeably, as assumption of risk is the practical equivalent of contributory negligence.[20]

The North Carolina court has not recognized the distinction, consistently holding that

> If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger constitutes contributory negligence . . . and where a person *sui juris* knows of a dangerous condition and voluntarily goes into a place of danger, he is guilty of contributory negligence which will bar his recovery.[21]

In *Norfleet v. Hall*,[22] where plaintiff was a guest in defendant's automobile and was injured in a collision due to defendant's excessive speed, the Supreme Court referred to and did not allow a defense of assumption of risk. Mr. Justice Stacy, in his dissent, declared that

[16] Pierce v. Clemens, 113 Ind. App. 65, 46 N. E. 2d 836 (1943); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Johnsen v. Pierce, 262 Wis. 367, 55 N. W. 2d 394 (1952); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 2511 (1946); 1 SHEARMAN AND REDFIELD ON NEGLIGENCE § 135 (1941); Note, 37 MARQUETTE L. REV. 35 (1953).

[17] Tiller v. Norfolk & W. Ry. Co., 190 Va. 605, 612, 58 S. E. 2d 45, 48 (1950); Hunn v. Windsor Hotel Co., 119 W. Va. 215, 217, 193 S. E. 57, 58 (1937).

[18] Fay v. Thrasher, 77 Ohio App. 179, 66 N. E. 2d 236, 241 (1946).

[19] Warlich v. Miller *et al.*, 73 F. Supp. 593 (W. D. Pa. 1947) (*cf.* Rauch v. Penn. Sports & Enterprises, 237 Pa. 632, 81 A. 2d 548 [1951]); McGeever v. O'Byrne, 203 Ala. 266, 82 So. 508 (1919); Peyla v. Duluth M. & I. R. R. Co., 218 Minn. 196, 15 N. W. 2d 518 (1944); Bogen v. Bogen, 220 N. C. 649, 18 S. E. 2d 162 (1941); Singletary v. A. C. L. R. Co., 217 S. C. 212, 60 S. E. 2d 305 (1950).

[20] Bogen v. Bogen, 220 N. C. 649, 18 S. E. 2d 162 (1941); Wilson v. Moudy, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938).

[21] Dunnevant v. Southern Railway Co., 167 N. C. 232, 233, 234, 83 S. E. 347, 348 (1914); Groome v. Statesville, 207 N. C. 538, 540, 177 S. E. 638, 639 (1934); Gordon v. Sprott, 231 N. C. 472, 476, 57 S. E. 2d 785, 788 (1950); Bogen v. Bogen, 220 N. C. 649, 18 S. E. 2d 162 (1941).

[22] 204 N. C. 573, 169 S. E. 143 (1953).

the case "runs counter to the doctrine of *volenti non fit injuria*," and Mr. Justice Brogden, also dissenting, made the comment, "It is rather difficult to be reconciled to the idea that a person can recover damages for being bitten by his own dog."

In *Bogen v. Bogen*,[23] another guest case, wherein plaintiff testified that she and her husband started on an auto trip from Columbus, Ohio, through North Carolina to Washington, D. C., to Philadelphia and back to Columbus, and that she had theretofore had to remonstrate with her husband about his careless and reckless driving 365 days in the year, the court said:

> The . . . conclusion that she thereby committed a primary act of negligence conclusively evidencing a want of due care for her own safety contributing to her own injury seems to us to be inescapable. . . . That this is the necessary result of such conduct is sustained by the authorities in other jurisdictions. Some treat it under the doctrine of assumption of risk and some as contributory negligence. By whatever name it may be called, the consensus of opinion expressed in these authorities is to the effect that one who voluntarily places himself in a position of peril known to him fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril.[24]

In *Bruce v. Flying Service*,[25] an action for wrongful death of plaintiff's intestate in a plane crash, the defendant contended in the Supreme Court that plaintiff's intestate had assumed the risk. The court reversed the granting of a nonsuit on the ground that there was some evidence of negligence which should have been submitted to the jury. In the course of its opinion, the court said:

> Under the evidence the plea of assumption of risk is not tenable. . . . The pleas of assumption of risk and contributory negligence are both affirmative and require a showing on the part of the defendant to be considered at all; and to prevail as a matter of law, as to either, it must plainly appear from the evidence that a reasonable mind could draw no other inference.[26]

In *Erickson v. Baseball Club, Inc.*,[27] plaintiff sued for damages for injuries sustained when hit by a foul ball while he was attending a

[23] 220 N. C. 649, 18 S. E. 2d 162 (1941).
[24] *Id.* at 651, 18 S. E. 2d at 164.
[25] 231 N. C. 181, 56 S. E. 2d 560 (1951).
[26] *Id.* at 187, 188, 56 S. E. 2d at 564.
[27] 233 N. C. 627, 65 S. E. 2d 140 (1951).

baseball game. The court held a nonsuit proper, evidently on grounds of assumption of risk, and said:

> Anyone familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve danger to spectators. And where a spectator, with ordinary knowledge of the game of baseball, on finding all screened seats filled, proceeds to sit in an unscreened stand, as did the plaintiff under the circumstances of this case, he thereby accepts the common hazards incident to the game and *assumes the risk* of injury, and ordinarily there can be no recovery for an injury sustained as a result of being hit by a batted ball. . . . Thus, it would seem that the plaintiff, with full knowledge of all the dangers of the occasion, voluntarily *assumed the risk* of his situation, or failed to exercise due care to protect himself from the natural dangers incident to his situation. And no other reasonable inference being deducible from the evidence, the motion for nonsuit was properly allowed.[28] (Italics added.)

In an earlier case involving a similar set of facts, the court held a nonsuit proper on the basis that the failure to place a roof over bleacher seats or to erect a wire in front thereof was not negligence on the part of those responsible for the operation of the ball park.[29]

The statement by the court in the principal case is supported by its earlier decisions. In *Morrison v. Cannon Mills Co.*,[30] plaintiff, a truck driver for a transportation company, was injured while unloading caustic soda which he had delivered to defendant's plant. Defendant contended that plaintiff was aware of the dangers involved and that there was no water available nearby, but that he undertook to make the disconnecting operation by himself with knowledge, obtained from past experience, of the manner in which it could be safely done. The court stated that it should be noted at the outset that there was no relation of master and servant or of employer-employee existing between the defendant and the plaintiff and that there was no contractual relation existing between the plaintiff or his employer and the defendant.

In a still earlier decision,[31] in a case where plaintiff's intestate was killed in an explosion at a filling station owned by defendant oil company and leased to defendant employer of the deceased, the court held

[28] *Id.* at 629, 630, 65 S. E. 2d at 141, 142.
[29] Cates v. Exhibition Co. & City of Durham, 215 N. C. 64, 1 S. E. 2d 131 (1938).
[30] 223 N. C. 387, 26 S. E. 2d 857 (1943).
[31] Broughton v. Oil Co., 201 N. C. 282, 159 S. E. 321 (1931).

that as between plaintiff and defendant oil company, assumption of risk by plaintiff's intestate was not available as a defense because there was no contractual relation between the parties.

Thus it is seen that the court's statement in the principal case is in accord with previous North Carolina decisions. But in confining the doctrine of assumption of risk as a separate defense to contract cases and master and servant relationships, while in all other areas considering it as a phase of contributory negligence, North Carolina does not follow the general trend of American decisions.

NAOMI E. MORRIS

Workmen's Compensation Act—Accidents Arising Out of and In the Course of the Employment—Street Risks—Dual Employment

Deceased was employed by the city as cemetery caretaker-salesman. In addition he was allowed to take private employment as a sexton. In this dual capacity he regularly visited local funeral homes to solicit business. On one such trip, while crossing the street, he was struck by an automobile and killed. In awarding compensation the Commission concluded that death resulted from an accidental injury which arose out of and in the course of the employment. The Supreme Court, in a unanimous decision, affirmed, stating that the Commission was correct in its determination that while decedent was paid by others for digging graves, this was related to his general duties as "caretaker," and the employee status, as distinguished from that of an independent contractor, was properly established.[1]

The heart of North Carolina's Workmen's Compensation Act is expressed in the formula "arising out of and in the course of the employment."[2] In interpreting this section our court holds that (1) "in the course of employment" relates to the time, place, and circumstances under which the accidental injury occurs, and (2) "arising out of the employment" refers to the origin or the cause of the injury.[3] This formula has kept the Act within the limits of its intended scope of providing compensation benefits for industrial injuries rather than "branching out into the field of general health insurance."[4] The Act is to be liberally construed to effectuate the legislative intent and no strained nor technical construction should be given to defeat this purpose.[5] Whether or not an accident arose out of the employment is

[1] Hinkle v. Lexington, 239 N. C. 105, 79 S. E. 2d 220 (1954).
[2] N. C. GEN. STAT. § 97-2 (f) (1950).
[3] Sweatt v. Board of Education, 237 N. C. 653, 75 S. E. 2d 738 (1953); Withers v. Black, 230 N. C. 428, 53 S. E. 2d 668 (1949); Walker v. Wilkins, Inc., 212 N. C. 627, 194 S. E. 89 (1937); Davis v. North State Veneer Corp., 200 N. C. 263, 156 S. E. 859 (1931).
[4] Duncan v. Charlotte, 234 N. C. 86, 91, 66 S. E. 2d 22, 25 (1951).
[5] Johnson v. Hosiery Co., 199 N. C. 38, 155 S. E. 728 (1930). But as pointed

a mixed question of law and fact[6] and when supported by competent evidence, the findings of fact by the Industrial Commission, on a claim properly constituted under the Act, are conclusive on appeal.[7]

The court early recognized the necessity of interpreting and applying the above formula largely on the facts of each particular case and that general definitions excluding or embracing certain acts as causative factors within its terms would be unsatisfactory.[8] Three years after the adoption of the Act one writer concluded that "with few exceptions, the North Carolina cases have reflected a disposition toward a liberal construction of the section 'arising out of and in the course of employment,' but not a disposition toward the 'radically liberal' attitude adopted by some jurisdictions."[9] It is the purpose of this note to determine if this liberal trend of interpretation has continued.

In the principal case the court established the causal relation of the accident to the employment to bring it within the statutory formula "arising out of and in the course of the employment," found the employee status properly established, and affirmed the findings of the Commission that "when as an incident of the employment and in the performance of a duty connected with it, as shown by the established custom, the decedent crossed the street enroute to a funeral home, the hazard of the journey may properly be regarded as within the scope of the Act."[10]

A difference of opinion arises in the application of the formula "arising out of and in the course of the employment" to embrace a fatal accident in the street as a hazard of the employment.[11] Many states

out by Justice Barnhill in Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137 (1944): "This rule is . . . one, benefiting the injured party only in those cases where the act applies. It cannot be invoked to determine when the Act does apply. The doctrine of liberal construction arises out of the Act itself, and relates to cases falling within the purview of the Act. Until it is adjudicated affirmatively that the employer-employee relationship existed at the time of the accident no interpretation of the Act—liberal or otherwise—comes within the scope of judicial inquiry." *Ibid,* p. 19.

[6] Matthews v. Carolina Standard Corp., 232 N. C. 229, 60 S. E. 2d 93 (1950).

[7] Fox v. Mills, Inc., 225 N. C. 580, 35 S. E. 2d 869 (1945).

[8] Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930).

[9] Note, 10 N. C. L. REV. 373 (1932).

[10] "The usual test for determining whether the relationship between the parties is that of employer and employee or independent contractor is whether the employer has the right to control the workmen with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material or determinative of the relationship whether the employer actually exercises the right to control." Hinkle v. Lexington, 239 N. C. 105, 79 S. E. 2d 220 (1954). This test was earlier set out in Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137 (1934). The result in the *Hinkle* case is not surprising even though it is quite plausible that when he was killed he was en route in his capacity as an independent contractor. Neither the Commission nor the Court seem to have considered as decisive that this trip may have been made solely in pursuance of his duties as "lot salesman."

[11] J. E. Porter Co. v. Industrial Commission, 301 Ill. 76, 133 N. E. 652 (1922); Capital Paper Co. v. Conner, 81 Ind. App. 545, 144 N E. 474 (1924); Hinkle v.

refuse compensation for injuries incurred from "street risks" on the theory that an injury to an employee while using the street does not arise out of the employment *for the risk of such injuries are common to everyone using the streets and are not peculiar to the employment* (Italics supplied).[12] North Carolina appeared to be in this category when, in 1938,[13] the court reversed the lower court and re-instated the findings of the Commission that where the street risk was common to all the neighborhood and was not incidental to the employment it did not arise out of the employment.[14] Evidence was that employee, who worked irregularly, had gone to the employer's plant to do a job. As he was leaving he was called to the aid of the night watchman. In crossing the street to aid the watchman he slipped on a fruit peel and was injured. There is prior authority, however, for the rule that an employee may recover where he suffered a street injury when as part of

Lexington, 239 N. C. 105, 79 S. E. 2d 220 (1954) (apply the formula) : Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325 (1915) (refuse to apply the formula). For a more complete discussion of street risks see HOROWITZ, WORKMEN'S COMPENSATION (1944) 95-99.

[12] Note, 23 N. C. L. REV. 159 (1945).

[13] Lochey v. Cohen, Goldman & Co., 213 N. C. 356, 196 S. E. 342 (1938).

[14] Somewhat analagous to the street risk cases are those which involve so called "Acts of God." It is universally held that injury due to lightning, windstorms, earthquake, freezing, sunstroke, and exposure to contagious disease arise out of the employment if the employment increases the risk of this particular harm. Some courts accept a showing that the risk was an actual risk of the particular employment regardless of whether it is greater or less than that of the general public. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 51 (1952). An exception to the rule that the employment must increase the risk is the holding that if the harm, though initiated by an act of God, takes effect through contact of the employee with any part of the premises, the causal connection with the employment is shown. Caswell's Case, 305 Mass. 500, 26 N. E. 2d 328 (1940). The reasoning that the particular risk encountered was not peculiar to the employment has led to illogical results. Netherton v. Lightning Delivery Co., 32 Ariz. 350, 258 Pac. 306 (1927) (the presence of a driver on a high hill rejected as a showing of any special risk when he was struck by lightning while making a delivery). Generally, however, courts take judicial notice that lightning is attracted to high places and structures. Trucks Ins. Exchange v. Ind. Acc. Comm., 77 Cal. App. 2d 461, 175 P. 2d 884 (1947). Another case refused compensation where a workman froze his hands while shoveling snow. The court stated that he was not, by reason of his occupation, exposed to a special or peculiar danger from freezing greater than that shared by other persons in the same locality. Consumers Co. v. Industrial Commission, 324 Ill. 152, 154 N. E. 423 (1926). The obvious answer is that the general public is not out shoveling snow in twenty degree below weather. "The very work which the deceased was doing . . . exposed him to a greater hazard from heat stroke than the general public was exposed to for the simple reason that the general public were (*sic*) not pushing wheelbarrow loads of sand in the hot sun on that day." American Gen. Insur. Co. v. Webster, 118 S. W. 2d 1082 (Tex. Civ. App. 1938).

The majority of courts have discarded the "peculiar or increased risk" doctrine, and have substituted either the "actual risk" doctrine where the test is, was the injury a risk of the employment, or the "position risk" doctrine adopted by a few courts, that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed him in the position where he was injured. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 43 (1952).

his employment, he was sent for material with which to work.[15] In at least two cases[16] the Commission has arrived at a conclusion contra to that of the *Lochey* case and allowed recovery where the employee received a street injury, when his employment required his presence in the street.[17]

Ostensibly, then, North Carolina is in accord with the majority rule that if the employment occasions the employee's use of the street, the risks of the street are the risks of the employment and it is immaterial whether the nature of the employment involves continuous or only occasional exposure to its dangers.[18] Whether North Carolina will go so far as to adopt the "position risk" doctrine, that an injury arises out of the employment if it would not have occurred but for the fact that the condition and obligation of the employment placed the claimant in the position where he was injured, is doubtful. This doctrine seems but a refinement of the "but for" rule which is inconsistent with the requirement of a causal relation between the employment and the injury, and which is almost universally rejected.[19]

Recent cases[20] indicate that North Carolina, in accord with the majority,[21] will resist the expansion of the Compensation Act into the general field of health insurance by re-emphasizing the necessity for a clear showing of a causal relation between the work and the injury. Thus, in *Sweatt v. Board of Education,*[22] the court reversed the Commission's grant of compensation where the deceased had served both as principal of a public school and as superintendent of an adjacent orphanage, and was killed by a resident of the orphanage who was also

[15] Massey v. Board of Education, 204 N. C. 193, 167 S. E. 2d 695 (1933). Evidence showing that deceased, a janitor, when sent to purchase cleaning materials was struck and killed while crossing the street, held sufficient to show that the injury was from an accident arising out of and in the course of the employment.

[16] Clinton v. Shuford National Bank, 9304 (Workmen's Compensation Case) (Sept. 1940). Employee enroute to pick up mail slipped on oil on the street. Recovery allowed. *Accord,* Walker v. Piedmont Publishing Co. (Nov. 1940).

[17] The expansion of the "street risk" doctrine is perhaps well justified when we consider the dangers of a city street as depicted by the New York Court of Appeals. See, Matter of Katz v. Kadans & Co., 232 N. Y. 420, 134 N. E. 330 (1922).

[18] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 77 (1952).

[19] *Ibid,* p. 43.

[20] Sweatt v. Board of Education, 237 N. C. 653, 75 S. E. 2d 738 (1953); and Duncan v. Charlotte, 234 N. C. 86, 66 S. E. 2d 22 (1951). In the latter case, deceased, a member of the city fire department, died of a coronary occlusion while on his annual vacation. The Commission awarded compensation on the basis of a 1949 amendment which included certain diseases within coverage of the Act as to active members of a fire department. Reversed by the court as repugnant to Article 1, sect. 7 of the North Carolina Constitution which forbids conferring exclusive or special emoluments on certain men or groups of men.

[21] Larson points out that 41 states require a clear showing that the injury is within the formula "arising out of and in the course of the employment" to be compensable. THE LAW OF WORKMEN'S COMPENSATION 41 (1952).

[22] 237 N. C. 653, 75 S. E. 2d 738 (1953).

a student of the public school, after deceased had reprimanded him for violation of orphanage rules. The court denied compensation, even though the reprimand was administered by the principal while conducting study hall in the school, and he was killed while sitting at his desk making out school reports. In reversing, the court determined that deceased had not reprimanded the boy in his capacity as principal but in his capacity as superintendent of the orphanage.[23] It is patent from the record that the death of deceased occurred in the course of his employment, but the essential element of causation is lacking. It appears, then, that where claimant was serving in a dual capacity North Carolina requires a clearer showing of a causal relationship between the injury and the particular employment from which he seeks compensation.[24] Had the "position risk" doctrine been adopted in *Sweatt v. Board of Education*[25] compensation would have been allowed, for the obligation of the employment placed the deceased in his general supervisory position in the school that night and it was in that position and in that place that he was killed.

In effectuating the intent of the legislature a court is justified in refusing to adopt such doctrines as that of "position risk" and in requiring a clear showing of a causal relation. In carrying out this intent a well balanced concept of the nature of Workmen's Compensation is indispensible to a proper understanding of current cases and to a proper interpretation of the Act. One author[26] has observed that almost every major error that can be noted in the development of the compensation law, whether judicial or legislative, can be traced either to im-

[23] The findings of the Commission were that "as principal, deceased reprimanded the student for a violation of the rules . . . The student, as a result of the reprimand, became angry, obtained a gun and killed Sweatt. The rule violated was formulated by the orphanage. This, however, is of no importance. The reprimand was administered by the deceased as principal of Union Mills High School to a student in that school. It cannot be said that in administering the reprimand the deceased went beyond his employment as principal. The deceased came to his death as a result of an injury by accident arising out of and in the course of his employment by the defendants as principal of the Union Mills High School." *Ibid* at 655. However, the Supreme Court determined that the record was insufficient as a matter of law to sustain the finding of the Commission.

[24] Deceased served as deputy, employed by the sheriff, and as jailer, employed by the county. Compensation was denied when it was shown that he was killed while trying to make an arrest two doors from the rear of the jail. Gowens v. Alamance County, 216 N. C. 107, 3 S. E. 2d 339 (1939). (The Act did not then treat deputies as employees of the county). Earlier, in Gowens v. Alamance County, 214 N. C. 18, 197 S. E. 538 (1938), the Supreme Court had remanded the case to the Commission for a finding specifically whether the injury was in the course of his employment as jailor. The Commission had determined that the injury was within the scope of his employment. The court overruled this finding and concluded that the attempted arrest was clearly outside the scope of his employment as jailer.

[25] 237 N. C. 635, 75 S. E. 2d 738 (1953).

[26] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION (1952).

portation of tort ideas and the concept of proximate cause,[27] or the attempt to compare with general health insurance and the failure to appreciate the social policy expressed by the enactment of the Act.

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.[28]

One may conclude today that the North Carolina court's interpretation of the formula "arising out of and in the course of the employment" and its attitude in applying the Act is a continuation of that earlier found to exist: "a disposition toward a liberal construction but not toward the radically liberal attitude adopted by some jurisdictions."[29] The result of the *Hinkle* decision is again indicative that the court is effectively carrying out the policy of the legislature in its interpretation of the Workmen's Compensation Act.

JAMES ALBERT HOUSE, JR.

[27] In the *Lochey* case, *supra,* the court said the injury must be traced to the employment as a contributing proximate cause. This test is said to be obsolete. "But the requirement of proximate or legal cause is out of place in compensation law . . . Arising out of the employment does not mean exactly the same thing as legally caused by the employment. It is true, as many courts have said, that 'arising' has something to do with causal connection; but . . . when you speak of an event arising out of the employment the . . . moving force is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion . . . In tort law the beginning point is always a person's act, and the act causes certain consequences. In Workmen's Compensation law, the beginning is not an act at all; it is a relation, or condition, or situation—namely, employment ... Finally, 'proximate cause' or 'legal cause' is out of place in compensation law because . . . it is a concept which is in itself thoroughly suffused with the idea of fault . . . The primary test of 'legal' or 'proximate cause' . . . is foreseeability, which is the 'fundamental basis of the law of negligence' . . . There is nothing in the theory of compensation liability which cares whether the employer foresaw particular kinds of harm or not. . . ." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION pp. 45-47 (1952).

[28] *Ibid,* at p. 5.

[29] Nemeth v. University of Denver, —— Colo. ——, 257 P. 2d 423 (1953). This is an example of what might be called the "radically liberal attitude adopted by some jurisdictions." Claimant, a student regularly enrolled in the University, was granted compensation for an injury suffered in football. The court found that he was an employee of the University as a result of his employment in jobs on the campus which were dependent on his playing football. "In the instant case the employment . . . so far as Nemeth was concerned, was dependent on his playing football. Under the record the Commission and the District Court may have properly concluded as they did determine that Nemeth was an employee of the University and sustained an accidental injury arising out of and in the course of his employment." *Ibid,* p. 427. This does not seem an unreasonable conclusion.