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Notes and Comments

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Deeds—Construction—Use of Fee Simple Form Versus Intent To Convey Life Estate.

The recent case of *Oxendine v. Lewis*[1] demonstrates anew the danger in the attempted use of a printed fee simple form deed to convey other than a fee. In *Oxendine* the grantor inserted both before and after the metes and bounds description words that unequivocally showed an intent to convey only a life estate.[2] However, he had also inserted the word "her" before the word "heirs" in the printed premises, habendum, and warranty, thus completing the fee simple design of the form deed. Stating that where the granting clause, habendum, and warranty are in harmony repugnant clauses will be deemed surplusage, the court held that a fee had been conveyed.

Although in reaching its decision the court followed the more recent cases in this area,[3] the principle enunciated has not always been the law in North Carolina. In 1908 this state departed from the strict common law rule that the words in certain technical portions of the deed controlled the estate transferred.[4] The court, following the purport of G.S. § 39-1,[5] adopted the liberal view that the intention of the parties as gathered from the entire instrument was determinative.[6] Adhering to this view, the court allowed a life estate given by the habendum to take effect notwithstanding a fee simple was specified in the granting clause;[7] this holding was extended when the court held that words following the description which showed that only a life estate was in-

[1] 252 N.C. 669, 114 S.E.2d 706 (1960).

[2] In the blank space left for the description of the land he inserted the following: "A life estate in and to the following described tract of land, to wit: . . . . [Description of land followed.]

"It is distinctly understood . . . that the said Malinda Oxendine Hunt is to have a lifetime right and full control of the possession of the property herein conveyed, and the remainder, subject to said lifetime right, is retained by Roy Oxendine." *Id.* at 670, 114 S.E.2d at 707-08.

[3] Jeffries v. Parker, 236 N.C. 756, 73 S.E.2d 783 (1953); Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948).

[4] At common law a subsequent clause could not cut down a fee given in the granting clause. Hafner v. Irwin, 20 N.C. 570 (1839).

[5] N.C. Gen. Stat. § 39-1 (1950). The statute states: "When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

[6] Triplett v. Williams, 149 N.C. 394, 63 S.E. 79 (1908).

[7] *Ibid.*

tended to be conveyed would control the fee transferred in both the granting clause and the habendum.[8]

On the basis of the above decisions North Carolina was recognized as one of the leaders of the "modern view"[9] that if the intention of the parties was apparent from an examination of the four corners of a deed this intent would be given effect despite violation of any technical rules[10] of construction. This liberal view as applied in these earlier cases had two distinctive characteristics: first, the formal parts of a deed, both individually and collectively, were given no more weight in ascertaining the intent of the grantor than the non-formal parts; and second, there was a common sense recognition of the fact that in most instances the inserted words more aptly disclosed the intent of the grantor than did the formal printed parts. In regard to this last point, the court stated in *Jefferson v. Jefferson*[11] that to disregard the inserted matter

> would be to ignore a part of the need which in comparison with the more formal technical expressions used elsewhere might be considered the clearest expression of intent to be found in the instrument, and explanatory of its seemingly contradictory expressions.[12]

In 1948 this liberal rule was abandoned. Perhaps this was done because of difficulty in application, or perhaps in an effort to force more precise draftsmanship; whatever the reason, the court adopted the current view that where the more formal parts of the deed (granting clause, habendum, and warranty) are in harmony, no other language will be considered.[13] Consequently, our court no longer relies upon the valid principle that written words should be given effect over printed matter.

To the extent that the adoption of this strict rule may force more precise draftsmanship and deter the use of form deeds for purposes

[8] Jefferson v. Jefferson, 219 N.C. 333, 13 S.E.2d 745 (1941). In this case the court stated that, although not brought out by the record, it seemed probable that the draftsman used some printed form deed which he endeavored to adopt for his purposes. Thus the case is factually similar to *Oxendine*.

[9] Annot., 84 A.L.R. 1054, 1063 (1933); 2 ARK. L. REV. 114 (1947); 11 N.Y.U. INTRA. L. REV. 201 (1956).

[10] Some of these "technical rules" are: the regarding of the formal divisions of the deed as separate and independent, each with its special function, Troy & North Carolina Gold Mining Co. v. Snow Lumber Co., 170 N.C. 273, 87 S.E. 40 (1915); allowing the granting clause to prevail over other portions of the deed, Krites v. Plott, 222 N.C. 679, 24 S.E.2d 531 (1943); allowing the first of repugnant clauses to control, Bryant v. Shields, 220 N.C. 628, 18 S.E.2d 157 (1942).

[11] 219 N.C. 333, 13 S.E.2d 745 (1941).

[12] *Id.* at 338, 13 S.E.2d at 748.

[13] Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948). This raises the question of whether a deed can be divided into "formal" parts and "other" parts, or must every word be within one of the "formal" sections. The language of the principal case indicates that there may be parts of a deed which do not fall within any of the common law groupings.

other than those for which they are intended, the *Oxendine* holding is both commendable and understandable. Inequities may result,[14] but the mere fact that a rule results in an injustice in one particular case does not warrant discarding it. This rule would be suitable in the situation where the entire deed is handwritten or typed; in a case like the principal one, however, it would seem that the injustice outweighs the merits.

The dissent of Justice Bobbitt points out another danger inherent in *Oxendine*—a new interpretative problem has been bred. The rule that the granting clause will prevail when the habendum and warranty clauses are in harmony therewith presupposes a working knowledge of what is encompassed within the term "granting clause." This case highlights the need for a precise understanding of where the granting clause begins and ends, as here the words transferring a life estate were inserted immediately after the printed premises of the form deed and before the metes and bounds description; in previous cases the limiting words appeared after the description.[15]

There is a dearth of information in North Carolina as to exactly what constitutes the granting clause; this probably is a result of the fact that prior to *Oxendine* there had been no need to discuss the subject. Generally, the operative words of conveyance which appear in the premises are referred to as the "granting clause."[16] In the principal case, however, the court took the position that only the operative words *printed* in the premises could be considered within the granting clause, thus excluding the inserted material. *Artis v. Artis*[17] stated that "ordinarily the premises and granting clauses designate the grantee and *the thing*[18] *granted* . . . ."[19] Following this it would seem that when the inserted words are taken into consideration, the thing granted was

[14] Although the court may force lawyers to be more precise, it is not going to prevent a layman from using a form deed and trying to adopt it for his purposes. To require of the layman the same degree of skill that is required of the lawyer obviously will result in some injustice.

[15] In *Oxendine* limiting words appeared after as well as before the description.

[16] THOMPSON, A PRACTICAL TREATISE ON ABSTRACTS AND TITLES § 302 (2d ed. 1930).

[17] 228 N.C. 754, 47 S.E.2d 228 (1948).

[18] It is not clear whether the "thing" granted refers to the estate granted or to the land itself. Bryant v. Shields, 220 N.C. 628, 18 S.E.2d 157 (1942), on which the definition is based, seems to indicate that it refers to the actual land granted. However, for authority indicating that the granting clause designates the estate granted see BALLENTINE, THE PREPARATION OF CONTRACTS AND CONVEYANCES 73 (1929) ("interest conveyed"); BURBY, LAW REFRESHER—REAL PROPERTY 93 (1958) ("quantum of the estate"); 7 THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 3522 (perm. ed. 1939) ("interest conveyed"); SACKMAN, TITLES § 3.4 (1959) ("character of the estate conveyed").

[19] Artis v. Artis, 228 N.C. 754, 760, 47 S.E.2d 228, 232 (1948). (Emphasis added.)

not a described tract of land, but a "life estate in and to the following described tract of land."[20]

Oxendine points to the possible necessity that the court in the future may have to define the "granting clause" with some exactness. At the present various interpretative problems might arise in application of the *Artis-Oxendine* rule, such as: where the granting clause begins and ends, and therefore, whether or not particular words are included; whether a draftsman using a form deed can add to the printed granting clause, and if so, what is the result of conflicting words within the granting clause. Thus it is questionable whether the presumably desired result of certainty has yet been achieved.

H. MORRISON JOHNSTON, JR.

Federal Income Taxation—Non Taxable Gift Versus Taxable Compensation.

Frequently the taxpayer must decide whether a particular payment is the receipt of income in the form of compensation[1] or a non-taxable gift.[2] The decision is problematical, for the legal distinctions between them are nowhere clearly expressed. If the taxpayer cautiously classifies the receipts as compensation, he might increase his tax burden needlessly. Alternatively, his election to exclude such receipts from gross income faces possible challenge by the Commissioner of Internal Revenue.

Recently the Supreme Court of the United States decided three cases involving the "gift versus compensation" issue.[3] The case of *Commissioner v. Duberstein*[4] grew out of a fairly common business situation. The taxpayer, president of a corporation and a business friend of one Berman, president of another corporation, supplied at Berman's request the names of potential customers for Berman's com-

[20] In *Oxendine* the court clearly did not consider the inserted material part of the granting clause, but there was a dissent as to this. Also, in *Oxendine* the majority merely laid down a rule of exclusion, which leaves much to be desired as to definiteness.

[1] INT. REV. CODE OF 1954, § 61(a): "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, and similar items. . . ."

[2] INT. REV. CODE OF 1954, § 102(a): "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."

[3] "The Government, urging that clarification of the problem typified by these two cases was necessary, and that the approaches taken by the Courts of Appeal for the Second and the Sixth Circuits were in conflict, petitioned for certiorari. . . . On this basis, and because of the importance of the question in the administration of the income tax laws, we granted certiorari. . . ." Commissioner v. Duberstein, 363 U.S. 278, 283-84 (1960).

[4] 363 U.S. 278 (1960).

pany. Berman offered to give the taxpayer a Cadillac car, but the taxpayer did not need or desire a car, nor had he expected compensation. Nevertheless, he reluctantly agreed to accept the car. He did not include the value of the car in his gross income. The Commissioner assessed a deficiency and the Tax Court affirmed. The Court of Appeals for the Sixth Circuit reversed.[5]

The case of *Stanton v. United States*[6] concerned the payment of a "gratuity" to an employee by his employer at the time of his resignation. The taxpayer had been employed approximately ten years as comptroller of a corporation and as president of its wholly owned subsidiary, receiving an annual salary of $22,500. The directors voted a gratuity of $20,000 in appreciation of his services, provided he relinquish all rights and claims to any benefits from the corporation's retirement and pension funds other than a return of his contributions to the fund. He was not required to furnish any services after his resignation. In a refund suit, the district court sitting without a jury found that the payments were a gift. The Court of Appeals for the Second Circuit reversed.[7]

The case of *United States v. Kaiser*[8] presented the question of whether payments by a labor union constitute a gift or taxable income to a striking non-member. The taxpayer was employed by the Kohler Company when the UAW called a strike at the company's plant in 1954. He was not a member of the union but he did support the strike. Having no other means of support and not being entitled to receive welfare aid, the taxpayer requested assistance from the union. In keeping with its policy of aiding both members and non-members in need, the union supplied food vouchers worth six dollars a week and nine dollars cash per week for rent. He was not required to picket but did so anyway. In a refund suit, a jury found that the union's assistance constituted a gift, but judgment notwithstanding the verdict was entered for the government on the ground that the assistance was income as a matter of law. The Court of Appeals for the Seventh Circuit reversed and reinstated the jury verdict.[9]

Decisions in these three cases were handed down by the Supreme Court on the same day, and in each case the decision was based upon a

[5] Duberstein v. Commissioner, 265 F.2d 28 (6th Cir. 1959). The court reasoned that the taxpayer had met his burden of proof that the payment was intended as a gift and not taxable compensation.

[6] 363 U.S. 278 (1960).

[7] Stanton v. United States, 268 F.2d 727 (2d Cir. 1959). The court reasoned that the taxpayer had not met the burden of proving that the commissioner was wrong in his determinatoin that the payment was taxable compensation.

[8] 363 U.S. 299 (1960).

[9] Kaiser v. United States, 262 F.2d 367 (7th Cir. 1958). The court reasoned that the payments were consistent with charity and thus constituted a gift and not taxable compensation.

concept of limited appellate review. The Court completely avoided a decision on the merits of the cases which would have helped to clarify the gift versus compensation issue. The Court pointed out that the trier of fact, being closer to the situation, could more properly decide the issue, and, where the trial is by a judge sitting without a jury, reversal should follow if, but only if, the decision is "clearly erroneous." But where there is a jury trial under proper instruction, the only determination to be made on appeal concerning this issue is whether the verdict can be supported on the evidence. This limitation would not, however, obviate appellate review upon other grounds.

In the *Duberstein* case the Court held that the Tax Court's finding for the Commissioner was not "clearly erroneous" and reversed the court of appeals. In the *Stanton* case the Court found that the district court's finding of a gift was so "sparse and conclusory" that it afforded no revelation of that court's concept of the determining facts and legal standard. Judgment of the court of appeals was vacated and the case remanded to the district court.[10]

In the *Kaiser* case it was found that the jury had been properly instructed and that there was evidence to support its decision for the taxpayer. The court of appeals' judgment was affirmed.

The Government had requested the Court to promulgate a new test to serve as a uniform standard for determination of what constitutes a gift, namely that gifts should be defined as transfers of property made for personal as distinguished from business reasons.[11] The Court unequivocally rejected this test, feeling that the varying fact situations of such cases render it impossible to apply a uniform standard and that the trier of fact, being closer to the situation, can apply its "experience with the mainspring of human conduct" to all the factors and determine when a transfer amounts to a gift. The Court also said that if a test was desirable, Congress was the proper body to establish one by an amendment to the code, as was done in the case of prizes and awards.[12] The Court then left the issue of gift versus compensation to be decided on a case-by-case basis.

In previous decisions dealing with gifts the Supreme Court has laid down some broad rules of thumb, and a review of them will indicate something of the rationale used by the Court in deciding cases involving this issue.

[10] Stanton v. United States, 186 F. Supp. 393 (E.D.N.Y. 1960). Upon retrial the district court judge found that the payment was a gift stating that the evidence showed that it was the employer's intention to make a gift.

[11] Commissioner v. Duberstein, 363 U.S. 278, 284 n.6 (1960).

[12] INT. REV. CODE OF 1954, § 74. This section, new in the 1954 code, removed prizes and awards from the gift versus compensation question and established separate tests for determination of the tax consequence upon receipt of a prize or award.

(1) Since the Internal Revenue Code definitely distinguishes between compensation on the one hand and gifts on the other, these terms are and were meant to be mutually exclusive. A transfer cannot be both a gift and a payment of compensation.[13]

(2) "Gifts" is a generic word of broad connotation which derives its meaning from the particular statute. In the Internal Revenue Code, it denotes the gratuitous receipt of financial advantages.[14]

(3) The payment for services, even though voluntary, is nevertheless compensation within the tax statute. The form of the payment is immaterial as is the fact that it may not be paid directly to the taxpayer.[15]

(4) If the payments to the employees of a business enterprise are made by persons interested in its success or the maintenance of the employee's good will and loyalty, there is an *inference* that the payments are intended as compensation.[16]

(5) The *lack* of any constraining force of a moral or legal duty or the lack of the incentive of any anticipated benefit other than the satisfaction which flows from the performance of a generous act is important but not determinative.[17]

(6) A gift is nonetheless a gift because inspired by gratitude for past faithful service of the recipient where it amounts to nothing more than the acknowledgment of an historical fact as a reason for making the gift.[18]

(7) The discharge of a legal obligation to make the payments for services rendered is in no sense a gift and it is irrelevant that the payor derives no economic benefit from these transfers.[19]

[13] Bogardus v. Commissioner, 302 U.S. 34, 39 (1937) (dictum). The payments were made by a corporation to employees of a predecessor corporation who were not retained in the employment of the new corporation. The payments were held to be gifts to the employees.

[14] Helvering v. American Dental Co., 318 U.S. 322, 330 (1943) (dictum). Partial forgiveness of back rent and cancellation of accrued interest on notes did not create taxable income to the debtor taxpayer when the forgiveness was found to be gratuitous. *But see* Commissioner v. Jacobson, 336 U.S. 28 (1949).

[15] Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 730 (1929) (dictum). Voluntary payment by the employer of the income taxes assessable against the employee constituted additional taxable income to such employee. For payments of property other than money see Commissioner v. Lo Bue, 351 U.S. 243 (1956), involving stock options and Neville v. Brodrick, 235 F.2d 263 (10th Cir. 1956), involving transfers of stock.

[16] Bogardus v. Commissioner, 302 U.S. 34, 41 (1937) (dictum).

[17] *Ibid.*

[18] *Id.* at 44.

[19] Robertson v. United States, 343 U.S. 711 (1952) (dictum). "In the legal sense payment of a prize to a winner of a contest is the discharge of a contractual obligation. The acceptance by the contestants of the offer . . . creates an enforceable contract. The discharge of legal obligations—the payment for services rendered or consideration paid pursuant to a contract—is in no sense a gift." *Id.* at 713.

(8) Payments to an employee by an employer to secure better services are plainly compensation.[20]

(9) "A gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses' . . . . And in this regard, the most critical consideration . . . is the transferor's 'intention' . . . . 'What controls is the intention with which payment, however voluntary, has been made.' "[21]

Applying these rules of thumb to the facts in the *Duberstein, Stanton* and *Kaiser* cases, there does not appear to be any way to question the conclusions of the respectvie triers of fact. That is not to say, however, that the conclusion would find universal acceptance, for these cases are close to the line and could have been decided either way. The Court seems to imply that it would have affirmed the decisions of the trier of fact even if these cases had been decided conversely in the first instance.

While decisions of the lower courts and the Tax Court in this area have been limited to the particular facts in each individual case, it is possible to indicate what elements of several basic situations have been more or less determinative in these decisions.[22] The cases from these courts fall into these categories: formal employer-employee relationships; reorganizations and sales of business; payments upon retirement; death benefits to the employee's family or estate; and informal business relationships.

In a formal employer-employee relationship, the payments are usually made pursuant to the employment contract. Such payments are compensation for services rendered even though no service is ever performed.[23] Additional payments above the employee's basic salary or wage are regarded as compensation as long as they bear a fixed relationship to the employee's length of service and present salary.[24] It does not matter what designation the employer has given these additional payments[25] or that the employer does not take a deduction for tax purposes.[26] The relationship is an indication that the payments were meant

[20] Commissioner v. Lo Bue, 351 U.S. 243, 247 (1956) (dictum). Here there was a stock option plan with an arrangement whereby an employer transferred valuable consideration to his employee for services. The employee taxpayer realized taxable gain upon exercising the option. Special treatment is given to employee stock option under section 421 of the 1954 code where, if the plan qualifies, the tax consequences will be different from that in the *Lo Bue* case.

[21] Commissioner v. Duberstein, 363 U.S. 278, 285-86 (1960) (dictum).

[22] This is not intended to be an exhaustive review of all cases in this area.

[23] George B. Lester, 19 B.T.A. 549 (1930). *Contra,* Estate of David R. Daly, 3 B.T.A. 1042 (1926).

[24] Painter v. Campbell, 110 F. Supp. 503 (N.D. Tex. 1953); N. H. Van Sicklen, Jr., 33 B.T.A. 544 (1935).

[25] Wallace v. Commissioner, 219 F.2d 855 (5th Cir. 1955); Thomas v. Commissioner, 135 F.2d 378 (5th Cir. 1943). *Contra,* Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929).

[26] Thomas v. Commissioner, *supra* note 25.

as compensation; and where it is absent, the court has held the payment to be a gift.[27] The one exception appears to be in the case of articles of small value given on special occasions where there arises a justifiable inference of gift. Thus the treasury has recently ruled that things of nominal value given by an employer to his employees at Christmas can be gifts even though they are used to promote good will and are deducted as business expenses.[28] But a wedding gift, in recognition of service, has been held to be compensation.[29] It would seem that wherever payments are made by an employer to his employee it is extremely doubtful that they can be treated as gifts, for it will be difficult, if not impossible, to rebut the presumption that the payments are intended as compensation for services, either past or future. An employer is in business for profit, not philanthropy, the courts seem to say.

Key employees often receive additional payments when a business is sold or undergoes reorganization. These payments are considered compensation where they bear a relationship to the length of service and previous salary scale[30] or where the transferor deducted them for tax purposes.[31] The theory is that the payments were intended as additional compensation for past services, and a deduction by the employer is treated as strong evidence of this intention. This inference has even attached to payments made to an employee when he resigned voluntarily.[32] Such an inference may be overcome only in very special circumstances. Where the payments were voted by the stockholders of the successor corporation, they have been treated as gifts on the theory that moral and legal obligation is lacking; and it did not matter that the stockholders of the successor corporation were essentially the same as those of the old corporation.[33]

Extra payments to employees at the time of their retirement, in recognition of their long and faithful service, have been held to be compensation for past services, especially where the employer takes a deduction in his return.[34] The reason for the employee's retirement does not matter.[35] There is, however, an exception in favor of clergymen who receive such payments in excess of contract provisions upon retirement, these being considered tokens of gratitude and appreciation

[27] Hoefle v. Commissioner, 114 F.2d 713 (6th Cir. 1940).
[28] Rev. Rul. 59-58, 1959-1 CUM. BULL. 17.
[29] Nickelsburg v. Commissioner, 154 F.2d 70 (2d Cir. 1946).
[30] Carragan v. Commissioner, 197 F.2d 246 (2d Cir. 1952); Poorman v. Commissioner, 131 F.2d 946 (9th Cir. 1942).
[31] Chauncey L. Landon, 16 B.T.A. 907 (1929).
[32] See Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926). *Contra,* Cunningham v. Commissioner, 67 F.2d 205 (3d Cir. 1933).
[33] Hall v. Commissioner, 93 F.2d 1005 (4th Cir. 1938).
[34] Willkie v. Commissioner, 127 F.2d 953 (6th Cir. 1942); Fisher v. Commissioner, 59 F.2d 192 (2d Cir. 1932).
[35] Ruth Jackson, 25 T.C. 1106 (1956); L. Gordon Walker, 25 T.C. 832 (1956).

and consequently gifts.[36] Under similar circumstances, the retirement benefits of an officer of a non-profit organization have been treated as a gift.[37] In summary it seems that an employee of a profit making organization as opposed to a non-profit or tax-exempt one will have difficulty sucessfully claiming that additional payments received due to reorganization, sale or retirement were gifts. The profit motive of business does not allow for much charity, and the inference that these were payments for past services as well as the evidence of the employer's deduction will be difficult to overcome. A non-profit organization, the courts imply, is more likely to have motives of charity.

Death benefits paid by an employer to the employee's family are compensation when paid pursuant to the employment contract[38] or where the payments are made as a general practice so as to become a moral obligation.[39] But if the benefits are entirely voluntary and the beneficiary has rendered no service, they can be considered gifts regardless of whether the employer has taken a deduction for the payments in his return.[40] Payments to the employee's estate are treated in the same way as payments to the family.[41] For 1954 and later years, section 101(b) of the 1954 Code will affect the taxation of these benefits. Under this section, up to $5,000 may be paid to the beneficiaries of a deceased employee free of income tax. Nothing in the way of a contract or plan is required to achieve this tax free status. But if the payments are gifts, they are not subject to the provisions of this section and are entirely excluded from taxation.[42]

The discussion of the lower court decisions up to this point has dealt with the formal employer-employee situation. There are also problems where this relationship does not exist. In this area the principle factor in determining the question of gift or compensation is whether the payments were made in a business context. Token payments received for friendly services, such as non-professional investment advice,[43] endorsement of a note,[44] and voluntary legal services[45] have been held to be gifts. But where the payment was given to the taxpayer as

[36] Abernethy v. Commissioner, 211 F.2d 651 (D.C. Cir. 1954); Mutch v. Commissioner, 209 F.2d 390 (3d Cir. 1954); Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949).

[37] Adams v. Riordan, 57-2 U.S. Tax. Cas. ¶ 9770 (D. Vt. 1957).

[38] Flarsheim v. United States, 156 F.2d 105 (8th Cir. 1946).

[39] Simpson v. United States, 261 F.2d 497 (7th Cir. 1958).

[40] United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960); United States v. Allinger, 275 F.2d 421 (6th Cir. 1960); Bounds v. United States, 262 F.2d 876 (4th Cir. 1958). *Contra*, Estate of Mervin G. Pierpont, 35 T.C. No. 10 (1960).

[41] Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951); Estate of Frank J. Foote, 28 T.C. 547 (1957).

[42] United States v. Reed, 277 F.2d 456 (6th Cir. 1960).

[43] Estate of Grace G. McAdow, 12 T.C. 311 (1949).

[44] Dupuy G. Warrick, 44 B.T.A. 1068 (1941).

[45] J. Marion Wright, 30 T.C. 392 (1958).

consideration for aid in furthering the business for the transferor and the payment bears a relationship to the value of the service rendered, it has been held to be compensation for services.[46] Also where the payment was to a taxpayer for services in arranging a business transaction between other individuals, and the transferor is one of these individuals, the payment is held to be compensation for services.[47] Tips[48] and rewards for special services[49] are payment for services. Legal fees shared by lawyers for handling a case are held to be compensation.[50] As might be expected, an allowance to a wife by her husband for acting as a housewife was not income for tax purposes.[51] In short, if there is a business connotation in the service and the payment bears a relationship to the value of the service, the payment is very likely to be classified as compensation.

In conclusion it can only be reiterated that there are no clearly defined meanings for the terms "gifts" and "compensation" as used in the Internal Revenue Code nor is it probable that they will ever be clearly defined.[52] The Supreme Court in the principal cases did not attempt to resolve the definitional problems. As a result, there is no clear cut course for the taxpayer to follow, no precise rule for the tax lawyer to apply. If, a transfer of money or other property is contemplated, and a gift is intended, there are several precautions the observance of which might insure the completion of a gift and not the creation of taxable compensation within the meaning of the Internal Revenue Code. (1) The term "gift" should be used and such terms as "bonus," "salary," and "honorarium" should be avoided in any formal letters or resolutions concerning the payment. (2) References to any services which the donee might have rendered should be avoided. (3) If the transferor is a corporation, the transfer should be ratified by the stockholders. (4) The use of a salary schedule and length of service should be avoided when deciding upon the amount of payment. (5) The use of any reference to possible future payment or to a general practice of making such payments should be avoided. (6) A deduction for tax purposes for these payments should not be taken.

FRANCIS N. MILLETT, JR.

[46] Alford J. Williams, Jr., 29 B.T.A. 892 (1934).
[47] Lundsford v. Commissioner, 62 F.2d 740 (6th Cir. 1933).
[48] Roberts v. Commissioner, 176 F.2d 221 (9th Cir. 1949).
[49] O.D. 602, 3 CUM. BULL. 93 (1920). Reward for the prevention of a bank robbery was held to be compensation.
[50] Mertz v. Hickey, 162 F.2d 403 (2d Cir. 1947); Friedman v. Commissioner, 130 F.2d 305 (4th Cir. 1942).
[51] Rosa E. Burkhart, 11 B.T.A. 275 (1928).
[52] Such lack of clear definition is also evident in other areas of income tax, for example, the problem of "interest versus dividends." See John Kelly Co. v. Commissioner, 326 U.S. 521 (1946).

Negligence—Common Carriers—Degrees of Care.

In *Jackson v. Stancil*[1] actions for wrongful death and personal injuries were consolidated against the pilot and the owner of an air-taxi to recover for damages sustained when the plane crashed while landing. Plaintiffs alleged that the pilot had committed specific acts of negligence and that the owner was a common carrier of passengers. The trial judge charged the jury that the defendants, being "carriers," owed the plaintiffs as passengers "the highest degree of care . . . consistent with the practical operation and conduct of its business . . . ."[2] On appeal the supreme court pointed out that in North Carolina it is only the common carrier which has the highest degree of care imposed upon it, not the contract carrier, and ordered a retrial on the issue of whether the defendant was a common or a contract carrier.

By way of dictum the court said that the phrase "highest degree of care" does not relate merely to the quantum or degree of care required to measure up to the standard of ordinary care but that it instead establishes a different and higher standard[3] by which the common carrier's conduct is measured.[4]

[1] 253 N.C. 291, 116 S.E.2d 817 (1960).

[2] *Id.* at 296, 116 S.E.2d at 821.

[3] Justice Bobbitt, dissenting, regards the highest degree of care as descriptive of the *duty* of carriers (common or contract) depending upon the circumstances. He said: "In respect of air travel, ordinary or due care, namely care commensurate with the known or foreseeable dangers, is no less than the highest degree of care consistent with the practical operation and conduct of the business." 253 N.C. 291, 305, 116 S.E.2d 817, 827 (1960). It seems apparent that Justice Bobbitt would not agree with the majority that a different *standard* is applicable in common carrier cases.

It should also be noted that the charge given by the trial judge in the principal case clearly made no attempt to create a different standard for the jury to apply. The trial judge instructed the jury to measure the carrier's duty by "what is called 'the rule of the prudent man,'" and stated that the defendants would be guilty of negligence only "if they failed to do what a person of ordinary prudence would have done to perform the duty imposed upon them by law." Record, p. 113.

[4] This appears to be the first time the North Carolina court has explicitly said that the duty to exercise the highest degree of care is to be measured by a standard other than the standard of due care under all the circumstances as tested by what the reasonable and prudent man would have done. In prior cases our court has treated the problem more as one of defining the duty which is owed. Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 351, 90 S.E.2d 710, 714 (1956); Jenkins v. City Coach Co., 231 N.C. 208, 56 S.E.2d 571 (1949) (by implication); Humphries v. Queen City Coach Co., 228 N.C. 399, 404-05, 45 S.E.2d 546, 549-50 (1947) (concurring opinion); White v. Chappel, 219 N.C. 652, 665, 14 S.E.2d 843, 852 (1941) (dissenting opinion). Accordingly in application the standard has been that of the reasonable and prudent man. See Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956); Jenkins v. City Coach Co., 231 N.C. 208, 56 S.E.2d 571 (1949); Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947); White v. Chappel, 219 N.C. 652, 14 S.E.2d 843 (1941); Cates v. Hall, 171 N.C. 360, 88 S.E. 524 (1916); Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906) (dictum). See generally, as to various statements of the duty by the North Carolina court, Note, 17 N.C.L. REV. 453 (1939).

It can be seen, however, that the result in the principal case would have been the same whether the instruction was deemed to relate to the duty or to a different

While the majority of American jurisdictions hold that the common carrier owes its passengers the highest degree of care,[5] few courts have explicitly stated, as has North Carolina in the principal case, that a difference in standards is involved. Instead, most of the courts have treated the difference in the degree of care owed by a common carrier as relating merely to the *duty* imposed by law.[6] Moreover, in many cases, because of the court's brief and perfunctory statement of the issue, it is impossible to determine whether a difference in standards was actually within the court's contemplation or whether the court envisioned only a difference in duty within the usual standard, that of due care.[7]

In some cases the language used to state the duty shows that no difference in standards is involved.[8] An early North Carolina opinion gave the following statement of the duty:

> [T]he carrier is required to exercise that high degree of care . . . which a prudent man would use in view of the nature and risks of the business, or, in general, the highest degree of care, prudence, and foresight . . . which the situation and circumstances demand in view of the character and mode of conveyance, and which a prudent man engaged in the business as usually conducted would employ . . . .[9]

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standard since the record was found to be inadeqaute to establish defendant's status as a common carrier as a matter of law. This note is concerned chiefly with the implications raised by the court's discussion of standards of care.

[5] "It is a well settled rule of law that a carrier owes to a person in a passenger status the duty to exercise the highest degree of care . . . ." Ortiz v. Greyhound Corp., 275 F.2d 770, 773 (4th Cir. 1960). See generally 10 AM. JUR. *Carriers* § 1245 (1937); 13 C.J.S. *Carriers* § 678(a) (1939). Various similar emphatic phrases are used by the courts to state the degree of care, such as "the utmost care and diligence," "the utmost caution characteristic of very careful men," "extraordinary care and caution," or simply "a high degree of care." See generally 10 AM. JUR. *Carriers* § 1246 (1937); 13 C.J.S. *Carriers* § 678(a) (1939).

[6] *E.g.*, Krentzman v. Connecticut Co., 136 Conn. 239, 70 A.2d 133 (1949); Johnson v. Kansas City Pub. Serv. Co., 265 S.W.2d 417 (Mo. 1954); Nix v. Gulf, Mobile & Ohio R.R., 362 Mo. 187, 240 S.W.2d 709 (1951); Centofani v. Youngstown Municipal Ry., 157 Ohio St. 396, 105 N.E.2d 633 (1952); Gedney v. Clark, 201 Ore. 67, 268 P.2d 357 (1954); Werlein v. Milwaukee Elec. Ry., 267 Wis. 392, 66 N.W.2d 185 (1954).

[7] The North Carolina court clearly recognizes the distinction between the terms "duty" and "standard." The opinion in the principal case said: "The difference between ordinary care and the highest degree of care as these terms are applied in carrier cases is, in final analysis, largely a difference in the degree of duty, but it also involves a difference in standards." 253 N.C. at 297, 116 S.E.2d at 822. This distinction will be preserved in this note.

[8] *E.g.*, Black & White Cab Co. v. Doville, 221 Ark. 66, 251 S.W.2d 1005 (1952); Ken-Ten Coach Lines v. Siler, 303 Ky. 263, 197 S.W.2d 406 (1946); North Carolina cases cited note 4 *supra*.

[9] Marable v. Railroad, 142 N.C. 557, 562-63, 55 S.E. 355, 357 (1906). And in Humphries v. Queen City Coach Co., it is said that " 'ordinary care,' when that term is used in defining the duty a transportation company owes to its passengers, means 'the highest degree of care consistent with the practical operation and conduct of its business.' One is the standard and the other is the degree of care

The implication to be derived from these cases is that no different standard is intended but that "the highest degree of care" refers to the quantum of care due under the circumstances as measured by the rule of the prudent man.

The language used by other courts in discussing the highest degree of care doctrine is incompatible with the standard of ordinary care and implies a difference in standards.[10] For example in *Hill v. Texas, N.M. & Okla. Coaches, Inc.*,[11] the court said that the duty of the common carrier is "to exercise such a high degree of foresight . . . and prudence . . . as would be used by very cautious, prudent and competent men."[12] And in *Christoff v. Noto*[13] it was said: "The degree of care which [a common carrier] . . . owes to a passenger is a high degree of care, not ordinary care, such as one driver—one pedestrian owes to another."[14]

In some jurisdictions statutes have been enacted which define the care owed by a common carrier. When the statute is strongly worded and unambiguous in declaring a higher standard,[15] the courts must give recognition to the legislative intent.[16] If on the other hand the statute will admit of the interpretation that it is merely declarative of the common law,[17] it is not necessarily regarded as creating a different standard. Thus in *Johnson v. Santa Fe Trail Transp. Co.*,[18] the court held that the statute related only to the duty, which was to be measured by the standard of ordinary care. The court said: "[I]t was his duty under the statute to exercise that degree of care and caution of an

necessary to measure up to the standard." 228 N.C. 399, 404-05, 45 S.E.2d 546, 549-50 (1947) (concurring opinion).

[10] *E.g.*, Christoff v. Noto, 327 Mich. 514, 42 N.W.2d 732 (1950); Austin v. St. Louis & S.F. R.R., 149 Mo. App. 397, 130 S.W. 385 (1910); Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948); Hill v. Texas, N.M. & Okla. Coaches, Inc., 153 Tex. 581, 272 S.W.2d 91 (1954).

[11] 153 Tex. 581, 272 S.W.2d 91 (1954).

[12] *Id.* at 584, 272 S.W.2d at 92.

[13] 327 Mich. 514, 42 N.W.2d 732 (1950).

[14] *Id.* at 516-17, 42 N.W.2d at 733.

[15] See GA. CODE ANN. § 18-204 (1935) which declares: "A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers, but is not liable for injuries to them after having used such diligence"; and GA. CODE ANN. § 105-202 (1956) which declares: "In general, extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons exercise under the same or similar circumstances . . . . The absence of such diligence is termed slight negligence."

[16] See Delta Air Lines, Inc. v. Mullirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

[17] OKLA. STAT. ANN. tit. 13, § 32 (1951) reads as follows: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." MONT. REV. CODES ANN. § 8-405 (1947) is identical in langauge. These are typical of such statutes which have been held merely declarative of the common law. See Taillon v. Mears, 29 Mont. 161, 169, 74 Pac. 421, 423 (1903).

[18] 206 Okla. 455, 244 P.2d 576 (1952).

ordinarily prudent person *whose duty it was to exercise the highest degree of care.*"[19]

A minority of American courts have held that negligence is incapable of division into degrees, and that since there can be no slight or gross negligence there can be no slight or extraordinary care. On this premise these courts refuse to recognize any standard other than due care under all the circumstances as measured by the rule of the prudent man.[20] They hold that negligence, by definition, excludes liability for conduct that is reasonable under the circumstances and that the rule of the prudent man is the only standard by which the jury can intelligently determine reasonableness.

The minority view appears logically to be the sounder[21] because while "the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances,"[22] the standard itself would seem invariable and applicable to all negligence cases since it involves a consideration of every fact, condition and circumstance existing in the particular case. Considering the broad requirements of the standard of ordinary care,[23] any standard which exacts more than ordinary care would, it has been said,[24] "require more

[19] *Id.* at 458, 244 P.2d at 579-80; *accord*, G. A. Nichols Co. v. Lockhart, 191 Okla. 296, 129 P.2d 599 (1942); Chicago, R.I. & P. Ry. v. Shelton, 135 Okla. 53, 273 Pac. 988 (1929). See also Riskin v. Northern Pac. Ry., 350 P.2d 831 (Mont. 1960), where the Montana statute is cited as merely defining the carrier's *duty*.

[20] *E.g.*, Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing*, 188 Ind. 525, 124 N.E. 737 (1919); Chicago & Calumet Dist. Transit Co. v. Stravatzakes, 156 N.E.2d 902 (Ind. App. 1959); Bannister v. Berkshire St. Ry., 301 Mass. 598, 18 N.E.2d 342 (1938); Nadeau v. Fogg, 145 Me. 10, 70 A.2d 730 (1950); Raymond v. Portland Ry., 100 Me. 529, 62 Atl. 602 (1905); McLean v. Triboro Coach Corp., 302 N.Y. 49, 96 N.E.2d 83 (Ct. App. 1950); Stierle v. Union Ry., 156 N.Y. 70, 50 N.E. 419 (Ct. App. 1898); Picket v. Rochester Transit Corp., 274 App. Div. 1088, 86 N.Y.S.2d 177 (1949); Barbato v. Vollmer, 273 App. Div. 169, 76 N.Y.S.2d 528 (1948); O'Brien v. New York Ry., 185 App. Div. 867, 174 N.Y. Supp. 116 (1919).

[21] Most writers support this view. See 1 BEVEN, NEGLIGENCE 15 (4th ed. 1928); 2 HARPER & JAMES, TORTS 945-46 (1956); PROSSER, TORTS § 33 (2d ed. 1955); SALMOND, TORTS § 125 (12th ed. 1957); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 98 (1909); WINFIELD, TORTS 494 (6th ed. 1954); Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4 (1928).

[22] Rea v. Simowitz, 225 N.C. 575, 579, 35 S.E.2d 871, 874 (1935).

[23] In Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing*, 188 Ind. 525, 124 N.E. 737 (1919), the court stated the requirements of the standard of ordinary care as follows: "the party owing the duty to use ordinary care must take into consideration the character and extent of the dangers incident to the business . . . he must regard the conditions and the circumstances which surround and attend it . . . he must foresee every danger that a person of reasonable foresight would anticipate, and he must take every means of guarding against such dangers that reasonable judgment and prudence would suggest . . . ." *Id.* at 526, 124 N.E. at 738. See also for the requirements of the law's reasonable and prudent man, 2 HARPER & JAMES, TORTS § 16 (1956); PROSSER, TORTS § 31 (2d ed. 1955).

[24] Union Traction Co. v. Berry, *supra* note 23.

care than a person of ordinary intellectual endowments would be capable of exercising."[25]

Few of the courts which have attempted to establish a different standard in common carrier cases have undertaken to explain the standard in significant detail.[26] As in the principal case, courts do not say how the standard is to be explained, in what terms, or how such standard compares with that of the prudent man whose conduct is reasonable in view of all the circumstances.

Since the negligence action is founded on a breach of legal duty, it is the function of the court to declare and explain the duty which the law imposes.[27] In the ordinary negligence case the defendant's duty is explained in terms of how the reasonable man would have acted in similar circumstances. In the common carrier cases, however, the courts do not resort to analogy but simply rest on a statement of an abstraction—the highest degree of care. The problem becomes one of imagining in any real sense how the defendant should have acted, or in other words, of determining what in addition to all that is "reasonable" is to be expected of the defendant. It is thus a question of whether or not the higher standard is capable of intelligent application by the jury.[28]

In spite of the short-comings of the majority view, both in legal theory and practical application, it has been suggested[29] that it has at least one salutary effect. By describing the common carrier's duty in

[25] *Id.* at 526-27, 124 N.E. at 737-38.

[26] In explaining the higher standard courts have generally found it sufficient to intimate to the jury that they are to require "something more" or "something different" than would be required of an ordinary individual. See, *e.g.*, Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948) ("higher than that which is ordinarily required of an ordinary individual").

[27] N.C. GEN. STAT. § 1-180 (1953) provides that the trial judge "shall declare and explain the law arising on the evidence given in the case." The provision is mandatory. Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941). The chief purpose of a charge is to help the jury understand the case clearly and arrive at a correct verdict. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957). For this reason "the courts have been rather meticulous, especially in the matter of negligence, in requiring that the law be explained in its connection with the facts in evidence." Smith v. Safe Bus Co., 216 N.C. 22, 23, 3 S.E.2d 362, 363 (1939). The statement of general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute. Hauser v. Forsyth Furniture Co., 174 N.C. 463, 93 S.E. 961 (1917). Without substantial compliance with the statute there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Smith v. Kappas, *supra*. See generally, Paschal, *A Plea For A Return To Rule 51 of the Federal Rules of Civil Procedure in North Carolina*, 36 N.C.L. REV. 1 (1957). *Quaere* whether a standard incapable of intelligent application by the jury, if so determined, would be grounds for reversal under the statute.

[28] See Union Traction Co. v. Berry 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing* 188 Ind. 525, 124 N.E. 737 (1919) wherein it is determined that such a standard is incapable of a definition which would enable a jury to apply it intelligently.

[29] See 2 HARPER & JAMES, TORTS § 15.4 (1956).

terms of the highest degree of care, the jury is impressed with the peculiar hazards and the unusual advantages inherent in that calling. It may be that these courts feel constrained to emphasize the most significant circumstance—defendant's being a common carrier—in the most conclusive way possible, in a legal rule or definition. This approach certainly seems to slight the opportunity courts have of describing all the circumstances in as great detail as deemed necessary and suggests taking the easy "way out."

It is submitted that the proposition that a common carrier owes its passengers the highest degree of care should be put to the jury *not* in terms of a standard of conduct different from that imposed on others, but rather in terms of what was reasonable and proper in view of the duty owed and *all* the conditions and circumstances of the particular case. A charge of this nature would accord with the universally accepted legal concept of the prudent man and at the same time make intelligible to the lay triers of fact what precisely they are to decide.[30]

JOHN H. P. HELMS

Sales—Disclaimer of Implied Warranty Void Because Against Public Policy.

In *Henningsen v. Bloomfield Motors, Inc.*[1] the Supreme Court of New Jersey considered the effect of disclaimer and limitation of liability clauses contained in a standard automobile warranty.[2] The plaintiff purchased an automobile from a local dealer as a gift for his wife. A warranty was set forth in fine print on the reverse side of the sales contract, together with a stipulation that there were no warranties, either express or implied, except as provided for in the agreement.[3] The disclaimer was contained in the following words: "[T]his warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities . . . ."[4] In addition, the following

[30] The charge by the trial judge in the principal case would have this effect. See note 3 *supra*.

[1] 32 N.J. 358, 161 A.2d 69 (1960).

[2] The warranty is the uniform warranty adopted by the Automobile Manufacturers Association. It is used by all the major automotive manufacturers in the sale of new automobiles. Thus, well over 90% of new car sales were covered by this warranty and disclaimer. See *Id.* at 390, 161 A.2d at 87.

[3] The express warranty provided: "The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective. . . ." *Id.* at 367, 161 A.2d at 74. (Emphasis by the court.)

[4] 32 N.J. at 367, 161 A.2d at 74.

provision appeared in small print on the front side of the contract:

> The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized . . . .
>
> I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature . . . .[5]

Within two weeks after the delivery of the automobile the plaintiff's wife had an accident while driving it due to a mechanical failure. Actions against the manufacturer and the dealer were brought by the wife[6] for the personal injuries and by the husband for property damages, each alleging a breach of implied warranty. The defendants contended that the disclaimer barred any recovery except for the replacement of parts. The court, however, found that the disclaimer was void as being against public policy and allowed recovery.

The implied warranty of merchantability arose in order to alleviate the harsh results of the rule of *caveat emptor*.[7] Whereas the latter allowed the vendee virtually no recourse against a seller of defective goods, the implied warranty placed upon the vendor the duty to provide goods which were at least capable of being used for the purpose in-

[5] *Id.* at 366, 161 A.2d at 73-74.

[6] Privity of contract is generally required for recovery on an implied warranty. State *ex rel.* Bond v. Consolidated Gas, Elec. Light & Power Co., 146 Md. 390, 126 Atl. 105 (1924). However, some courts have recognized an exception where the product is noxious or dangerous. Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). Although this exception is generally found in cases involving food and drugs, the court in the principal case pointed out that the harmful potential of a defective automobile was analogous and held that the implied warranty ran with the sale of the automobile from the manufacturer to the ultimate consumer. The court went further toward eliminating entirely the requirement of privity in this "dangerous products" area by holding that the warranty extended to the purchaser's wife, who was not a party to the contract, on the grounds that it was reasonably anticipated that she would be a user of the automobile. This was carried even further in a dictum to the effect that the warranty extends to other "members of his family, and to other persons occupying or using it with his consent." 32 N.J. at 414, 161 A.2d at 100. *Query* how much further a court holding an occupant could recover on an implied warranty would have to go in order to allow a pedestrian injured by an automobile to recover on the same theory.

In Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960), the operator of construction equipment, an employee of the vendee in the sales contract, brought suit for personal injuries against the vendor, alleging breach of warranty. *Held:* An employee is not in privity, and therefore cannot maintain an action against the seller. Thus, North Carolina would apparently not join the New Jersey court in holding that the warranty ran to those using the automobile with the consent of the owner.

With respect to the requirement of privity see 30 N.C.L. REV. 191 (1952); 37 N.C.L. REV. 205 (1959); 7 RUTGERS L. REV. 420 (1953); 27 U. CINC. L. REV. 124 (1958).

[7] Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 543 (1925).

tended.[8] Consequently, a disclaimer began to be inserted in sales contracts to enable the vendor to sell goods without liability based on implied warranty.[9]

It is generally held that a vendor may contract away liability arising from an implied warranty,[10] and this right is sanctioned by the Uniform Sales Act.[11] However, since implied warranties arise to protect the buyer, courts have generally held that disclaimers must be strictly construed against the seller and must be express in their terms.[12] Effective disclaimers may be found in varying forms, but it is often difficult to distinguish between some disclaimers which have been held binding[13] and others which were ineffective because they were not sufficiently express.[14] For example, in *Bekkevold v. Potts*,[15] involving the sale of a tractor and trailer, the disclaimer "no warranties have been made in reference to said motor vehicle by the seller to the buyer unless expressly written hereon at the date of purchase" was held ineffective. Yet in *Butts v. Groover*,[16] concerning the sale of a truck, the provision that "no warranties, express or implied, and no representations, promises or statements have been made by seller unless indorsed hereon in writing" was held an effective disclaimer.

Disclaimers of implied warranty which would be sufficiently express

[8] McConnell v. Jones, 228 N.C. 218, 44 S.E.2d 876 (1947); Ashford v. H. C. Shrader Co., 167 N.C. 45, 83 S.E. 29 (1914). *Cf.* UNIFORM SALES ACT § 15(1).

[9] See Comment, 23 MINN. L. REV. 784 (1938).

[10] 77 C.J.S. *Sales* § 317 (1952).

[11] UNIFORM SALES ACT § 71. "Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract of sale." The act has been enacted into law into thirty-three states, the District of Columbia, and the Panama Canal Zone. 1 UNIFORM LAWS ANNOTATED, *Sales*, at 7 (Supp. 1960).

[12] Roberts Distrib. Co. v. Kaye-Halbert Corp., 126 Cal. App. 2d 664, 272 P.2d 886 (Dist. Ct. App. 1954); Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933); Deere & Webber Co. v. Mock, 71 N.D. 649, 3 N.W.2d 471 (1942).

[13] "The above guarantee is in lieu of and excludes all other guarantees, warranties, obligations or promises, express or implied, by contract or by law . . . ." Sears, Roebuck & Co. v. Lea, 198 F.2d 1012 (6th Cir. 1952). "[I]t is understood and agreed that Greening-Smith Company shall not be held responsible for productiveness and, or, quality of the undersigned's crops." Buckley v. Shell Chemical Co., 32 Cal. App. 2d 209, 89 P.2d 453 (Dist. Ct. App. 1939). "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, or any seeds sent out, and will be in no way responsible for the crop . . . ." Lumbrazo v. Woodruff, 256 N.Y. 92, 175 N.E. 525 (1931).

[14] "This contract contains the entire agreement between Seller and Buyer; there are no other representations, warranties or covenants by either party." Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202 (1954). "This Contract becomes the entire agreement between the Buyer and Seller and will contain all representations and agreements." Torrance v. Durisol, Inc., 20 Conn. Supp. 62, 122 A.2d 589 (Super. Ct. 1956). The product is "not guaranteed in any way." McPeak v. Boker, 236 Minn. 420, 53 N.W.2d 130 (1952).

[15] 173 Minn. 87, 216 N.W. 790 (1927).

[16] 66 Ga. App. 20, 16 S.E.2d 894 (1941).

in their terms to bar recovery may nevertheless be rendered ineffective. A purchaser is, as a general rule, deemed to have notice of and to have assented to all the terms of the contract, including the disclaimer.[17] However, in recognition of the complexities of modern business contracts in which the disclaimer is placed in the body of the contract, some jurisdictions have adopted the rule that the seller must have actually called the attention of the purchaser to the disclaimer clause.[18] This rule is readily applied where the disclaimer is hidden in the contract and calculated to escape attention.[19] It would seem to be applicable to the facts of the principal case, thus providing an alternative solution without considering the public policy question.

The court in the principal case recognized that the doctrines of strict construction and actual notice have been used to avert the effects of an express disclaimer,[20] yet it reached the same result by holding this disclaimer to be "so inimical to the public good as to compel an adjudication of its invalidity."[21] However, the court did not predicate its decision on the more customary public policy consideration of danger to the public.[22] Rather, it took the view that a disclaimer which the purchaser had to accept due to his unequal bargaining position amounted to a contract which had not been fairly procured and was thus against public policy.

Only one decision has been found in which the North Carolina court has held that an express disclaimer would bar recovery. In this decision, *J. I. Case Threshing Mach. Co. v. McClamrock*,[23] the court held that a disclaimer prevented the purchaser of a piece of agricultural equipment from proving inferior quality as a defense to the vendor's suit for the purchase price. The court stated that "personal property may be sold with or without warranty, and . . . from an express stipulation that the property is not warranted a warranty will not be implied."[24]

[17] *E.g.*, Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N.W.2d 51 (1945).

[18] Stracener v. Nunnally Bros. Motor Co., 11 La. App. 541, 121 So. 617 (1929); St. Louis Cordage Mills v. Western Supply Co., 54 Okla. 757, 154 Pac. 646 (1916); Black v. B. B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930).

[19] Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 48 S.E.2d 653 (1948).

[20] 32 N.J. at 392, 161 A.2d at 87.

[21] *Id.* at 404, 161 A.2d at 95.

[22] In Linn v. Radio Center Delicatessen Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (New York City Munic. Ct. 1939), there was an express disclaimer of any warranties on the sale of baked goods. The plaintiff was injured by a tack impounded in a cookie and sued for breach of implied warranty. The court refused to allow the disclaimer to be set up as a bar to the action, stating that it "must be recognized that the health of the public is of the highest importance to the community and it is against natural justice and good morals to permit an individual or corporation to manufacture food containing dangerous foreign substances and to escape the consequences of his act by a disclaimer. To permit such a disclaimer to be effective would be against sound public policy." *Id.* at 880, 9 N.Y.S.2d at 112.

[23] 152 N.C. 405, 67 S.E. 991 (1910).

[24] *Id.* at 407, 67 S.E. at 992.

Thus it appears that the North Carolina court recognizes that disclaimers may be effective.

It is apparent, however, that a disclaimer would not preclude a recovery of the purchase price by the buyer should the seller furnish non-merchantable goods. In *Williams v. Dixie Chevrolet Co.*,[25] involving the sale of an automobile, the court stated that the purchaser could recover for want of consideration if the car were not fit for its intended use due to the defect. The court said, "The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration."[26] Of course, if the terms of the disclaimer apply only to quality, it will in no way affect an implied warranty of merchantability.[27]

The New Jersey court appears to be the first to declare this standard automobile disclaimer void.[28] Courts of other jurisdictions have given the disclaimer its full effect[29] and have held that it does not violate public policy.[30] It would seem, however, that the prior cases have not met the real problem as seen by the New Jersey court—that while a disclaimer of warranty should be available to parties who choose so to contract, the imposition of these conditions by virtually all automobile manufacturers does not result in a freely bargained for and fairly obtained agreement. It is submitted that the solution to this problem can only be found by invoking the doctrine of public policy.

ROBERT B. BLYTHE

Torts—Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff.

In *Williamson v. Bennett*[1] the defendant negligently drove her automobile into that of the plaintiff; plaintiff did not see what had struck her, but thinking that she had killed a child on a bicycle[2] she became frightened. Plaintiff came to a stop and then saw that an automobile and not a child had collided with her. Though plaintiff suffered no immediate

[25] 209 N.C. 29, 182 S.E. 719 (1935).
[26] *Id.* at 31, 182 S.E. at 721.
[27] Hall Furniture Co. v. Crane Mfg. Co., 169 N.C. 41, 85 S.E. 35 (1915).
[28] Another provision of the warranty has been attacked. In Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N.W. 152 (1920), the court stated, in a dictum, that it was against "every conception of justice" to allow the manufacturer to be the sole judge as to whether parts were so defective as to be replaceable.
[29] Shafer v. Reo Motors, 205 F.2d 685 (3rd Cir. 1953); L. R. Cooke Chevrolet Co. v. Culligan Soft Water Serv., 282 S.W.2d 349 (Ky. 1955); Hall v. Everett Motors, Inc., 165 N.E.2d 107 (Mass. 1960).
[30] Brokerick Haulage, Inc. v. Mack-International Motor Truck Corp., 1 App. Div. 2d 649, 153 N.Y.S.2d 127 (Sup. Ct. 1926).

[1] 251 N.C. 498, 112 S.E.2d 48 (1960).
[2] About a month before the accident plaintiff's brother-in-law had killed a child on a bicycle when she rode into the side of his car. 251 N.C. at 500, 112 S.E.2d at 49.

physical injury, later in the day she became nervous and otherwise mentally upset, which condition became steadily worse. She subsequently complained that the corner of her mouth was drawn, her tongue swollen, her left side numb, and her swallowing and sleeping impaired. A psychiatrist testified that her condition was a conversion reaction[3] caused by the accident; he further stated that prior to this the plaintiff had a more than ordinary proneness to neurosis.[4] The jury found that defendant's negligence had proximately caused plaintiff's injury and awarded her $4,000 damages. In reversing the award the supreme court held that defendant's negligence was not the proximate cause of plaintiff's harm.

Courts in the United States have enunciated a variety of reasons for denying recovery for physical injury induced by fright. Some courts[5] have held that the physical consequences of fright were not the proximate result of defendant's negligence because those consequences were not foreseeable. The better rule would appear to be that it need only be shown that defendant's negligent act was likely to cause harm to the plaintiff. When such is the case, defendant should be liable not only for foreseeable injuries but for all harm resulting therefrom in an unbroken chain of causation.[6] The negligent defendant should take his victim as he finds him;[7] thus whether the injury results directly, as through contact, or indirectly, as through fright, liability would ensue.

Some courts[8] have held that since there can be no recovery for fright alone there can be none for the consequences of fright. However, as stated previously, if the defendant's conduct is negligent, *i.e.*, if it was

[3] This is a reaction where emotional and psychological nervousness or anxiety is so intense that it is converted into a physical symptom. The reaction can also be described as a post-traumatic neurosis, *i.e.*, the neurosis will appear after the trauma. Trauma in this sense need not be a physical injury but may be a forceful psychological effect. Humphreys v. Delta Fire & Cas. Co., 116 So. 2d 130 (La. 1959).

[4] The doctor said further that the plaintiff's symptoms were typically those of a conversion reaction and that the plaintiff was not malingering.

[5] *E.g.*, Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896).

[6] Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909). Seitz, *Duty and Foreseeability Factors in Fright Cases*, 23 MARQ. L. REV. 103, 108-09 (1939); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 270-72 (1921); *cf.* Reynolds v. Murph, 241 N.C. 60, 84 S.E.2d 273 (1954); Hart v. Curry, 238 N.C. 448, 78 S.E.2d 170 (1953). *Contra*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Oehler v. Bamberger & Co., 4 N.J. Misc. 1003, 135 Atl. 71 (Sup. Ct.), *aff'd*, 103 N.J.L. 703, 137 Atl. 425 (Ct. Err. & App. 1926).

[7] Nelson v. Black, 266 P.2d 817 (Dist. Ct. App.), *rev'd on other grounds*, 43 C.2d 612, 275 P.2d 473 (1954); Flood v. Smith, 126 Conn. 644, 13 A.2d 677 (1940); see Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958). *Contra*, Spade v. Lynn & Boston R.R., *supra* note 6; Oehler v. Bamberger & Co., *supra* note 6.

[8] St. Louis, I.M. & S. Ry. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *Contra*, Chiuchiolio v. New England Tailors, 84 N.H. 329, 150 Atl. 540 (1950).

reasonably foreseeable that injury would result, then the character of the causal connection should be irrelevant.[9]

Other courts have denied recovery on policy grounds; they have stated that a flood of litigation would result if a cause of action were recognized.[10] Notwithstanding these warnings the expected flood of cases has not developed in those jurisdictions which recognize an action,[11] and the overwhelming majority of recent decisions have rejected this argument.[12]

As some opinions state[13] the apprehension of fraud is probably the reason motivating most courts which deny recovery.[14] This policy would be just only if *all* the claims were fictitious. If any claims are meritorious, it is the duty of the courts to furnish a remedy for them.[15] The ultimate answer to the fraud argument must lie in the courts' belief in the ability of our juries to distinguish true from fraudulent claims.[16]

North Carolina has had few cases involving negligently inflicted fright with resulting physical injury. Several cases have involved injury resulting from fright induced by negligently executed dynamite

[9] "The fundamental vice of the court's opinion is that it assumes that the plaintiff is alleging her fright as the ground for her recovery, and is alleging the physical consequences merely in aggravation of the damages to be recovered, whereas the fact is that she has alleged and proved her physical injury as her ground of action and . . . the fright merely to show the causal-connection between . . . negligence and her physical injury. The opinion shows a complete inability to distinguish between fright as the injury . . . and fright as a necessary link in the chain of causation . . . ." BOHLEN, TORTS 265-66 (1926).

[10] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). Other cases have allowed recovery and have controverted this statement: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 43 So. 205 (1916); Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907).

[11] Hambrook v. Stokes Bros., [1925] 1 K.B. 141, 158; Goodhart, *The Shock Cases and Area of Risk,* 16 MODERN L. REV. 14, 24 (1953); Smith, *Relation of Emotions to Injury and Disease; Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 211 n.47 (1944).

[12] "The fear of the successful prosecution of fraudulent claims . . . has not impressed the majority of judges . . . as is evidenced by the fact that of the twenty jurisdictions which considered this problem for the first time during the present century, seventeen have granted the right of recovery." Second Annual Report of the Law Revision Commission, *Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock,* State of New York 375, 379-80 (1936).

[13] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022 (1905).

[14] See generally Note, *Fright and the Court's Fear of Fraud,* 23 PENN. B.A.Q. 203 (1952).

[15] Dulieu v. White & Sons, [1901] 1 K.B. 669, 681; Note, *Mental Disturbance in the Law of Torts—A Problem of Legal Lag,* 6 WES. RES. L. REV. 384, 386 (1955); 15 CHI.-KENT L. REV. 323, 326 (1937).

[16] Alabama Fuel & Iron Co. v. Balodoni, 15 Ala. App. 316, 73 So. 205 (1916); Seitz, *Relational Fact Situation and Emotional Make-Up as Holding Solution to Problems in Fright Cases,* 20 B.U.L. REV. 676, 679 (1940); see Nelson v. Black, 266 P.2d 817 (Dist. Ct. App.), *rev'd on other grounds,* 43 C.2d 612, 275 P.2d 473 (1954); Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486 (1953).

blasting.[17] Though these cases contain language[18] that would logically apply to the fact situation in *Williamson,* the court in *Williamson* distinguished the dynamite cases on the basis of the strict liability imposed on one using a dangerous instrumentality. The court has allowed recovery for mental anguish with resulting physical injury in cases of willful infliction of mental anguish,[19] browbeating bill collectors,[20] negligent handling of dead bodies,[21] and negligent transmission of death messages.[22] *Williamson,* however, did not discuss these cases.[23]

The holding in *Williamson* probably was based on the established North Carolina position that one cannot recover damages for mental anguish arising from fear for the safety or well-being of another.[24] The cause of plaintiff's conversion reaction was fear for the safety of a non-existent[25] child. The North Carolina rule, however, heretofore has been based on the situation where the physical injury *precedes* the mental anguish and the mental anguish is sought to be established as an element of damages—as where the plaintiff is physically injured and worries over his inability to support his children. Decisions in other jurisdictions[26] are in conflict as to whether recovery should be allowed for injury caused by fear for the safety of another where the mental anguish is not an element of damages for a concededly compensable injury but is rather the vehicle which creates the injury itself.

It also seems possible that in *Williamson* the court denied recovery on the theory that the plaintiff's neurosis was an intervening cause which

[17] Arthur v. Henry, 157 N.C. 438, 73 S.E. 211 (1911); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N.C. 536, 42 S.E. 983 (1902).

[18] *"The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when 'out of tune' cause excruciating agony.* We think the general principles of torts support a right of action for physical injuries resulting from negligence, *whether wilful or otherwise,* none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter . . . ." Kimberly v. Howland, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906). (Emphasis added.)

[19] May v. Western Union Tel. Co., 157 N.C. 416, 72 S.E. 1059 (1911).

[20] Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).

[21] Morrow v. Cline, 211 N.C. 254, 190 S.E. 207 (1937). See also, for a discussion of quasi-property rights, 30 N.C.L. REV. 299 (1952).

[22] Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943).

[23] For an excellent discussion of similar cases see PROSSER, TORTS 43-44 (2d ed. 1955).

[24] Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Ferebee v. Norfolk So. R.R., 163 N.C. 351, 79 S.E. 685 (1913), *aff'd,* 238 U.S. 269 (1915).

[25] This would seem to be a step beyond fear for the safety of another person.

[26] Denying recovery: Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). Allowing recovery: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

broke the connection between defendant's negligence and plaintiff's injuries. The court stated that "the defendant's negligence was not that cause which 'in natural and continuous sequence, unbroken by any new and independent cause,' produced plaintiff's injury."[27] The more logical view would seem to be that even if the neurosis were an intervening cause it was not a controlling cause; defendant's negligence was the actual cause of plaintiff's fright, but for which fright plaintiff's latent neurosis would not have resulted in injury.[28]

At least one court has stated[29] that a defendant is under no duty to foresee that a person is extraordinarily susceptible to injury. Another court[30] has made liability depend on whether or not the defendant had knowledge of plaintiff's abnormal susceptibility. The majority of those jurisdictions[31] which allow recovery, however, have held that if defendant's negligent conduct was likely to injure an average person then defendant also would be liable for injury to the specially susceptible.

Although the opinion in *Williamson* discussed the entire area of damages for mental anguish and physical injuries resulting therefrom, pointing out the confusion and contradictions among other courts,[32] it

[27] 251 N.C. at 507, 112 S.E.2d at 54.

[28] Hall v. Excelsior Steam Laundry Co., 5 La. App. 6 (1925); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); Padgett v. Colonial Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958); *cf.* Hanford v. Omaha & C.B. St. Ry., 113 Neb. 423, 203 N.W. 643 (1925); Hall v. Coble Dairies, Inc., 234 N.C. 206, 67 S.E.2d 63 (1951); Riggs v. Akers Motor Lines, 233 N.C. 160, 63 S.E.2d 197 (1951).

[29] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).

[30] Oehler v. Bamberger & Co., 4 N.J. Misc. 1003, 135 Atl. 71 (Sup. Ct. 1926), *aff'd*, 103 N.J.L. 703, 137 Atl. 425 (Ct. Err. & App. 1926).

[31] Flood v. Smith, 126 Conn. 644, 13 A.2d 677 (1940); Humphries v. Delta Fire & Cas. Co., 116 So. 2d 130 (La. 1959); Hall v. Excelsior Steam Laundry Co., 5 La. App. 6 (1925); Sutton Motor Co. v. Crysel, 289 S.W.2d 631 (Tex. 1956); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 260-61 (1944). See generally, 22 ST. JOHN'S L. REV. 135 (1947).

[32] Jurisdictions which deny recovery for negligently inflicted fright with resulting physical injury, in the absence of some exception to their general rule, include: Arkansas—Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920); Illinois—Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Iowa—Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913); Kentucky—Morse v. Chesapeake & Ohio Ry., 117 Ky. 11, 77 S.W. 361 (1903); Maine—Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 Atl. 16 (1921); Massachusetts—Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Michigan—Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Missouri—Strange v. Missouri Pac. Ry., 61 Mo. App. 586 (1895); New Jersey—Legac v. Vietmeyer Bros., 7 N.J. Misc. 615, 147 Atl. 110 (1929); New York—Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Ohio—Miller v. Baltimore & O. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Pennsylvania—Ewing v. Pittsburgh, C., C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892).

States allowing recovery for negligent infliction of fright with resulting physical injury are: Alabama—Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); California—Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Connecticut—Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Georgia—Goddard v. Walters, 14 Ga. App. 722, 82 S.E. 304 (1914); Kansas—Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 Pac. 103 (1928); Louisiana—

is doubtful that the court's holding can be interpreted as firmly placing North Carolina in the list of jurisdictions denying recovery for a physical injury resulting from negligently inflicted fright.

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Laird v. Natchitochas Oil Mill Inc., 10 La. App. 191, 120 So. 692 (1929); Maryland—Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Montana—Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Nebraska—Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931); New Hampshire—Chiuchiolio v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Oregon—Salmi v. Columbia & N. R.R., 75 Ore. 200, 146 Pac. 819 (1915); Rhode Island—Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); South Carolina—Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958); South Dakota—Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); Tennessee—Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Texas—Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Virginia—Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Washington—Cherry v. General Petroleum Corp., 172 Wash. 688, 21 P.2d 520 (1933); West Virginia—Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Wisconsin—Pankopf v. Henkley, 141 Wis. 146, 123 N.W. 625 (1909). This footnote is a corrected version of the state by state breakdown found in Second Annual Report of the Law Revision Commission, *Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock,* State of New York 375, 392 n.34, 406 n.80 (1936), and in McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 14 n.40, 16 n.43 (1949).