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Notes and Comments

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NOTES AND COMMENTS

Contracts—Offer and Counter-Offer Under the Uniform Commercial Code

In *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*,[1] plaintiff, a corporation doing business in New York, mailed a written order to defendant requesting emulsion for use as cellophane adhesive in "wet-pack spinach bags." Upon receiving plaintiff's order, defendant, a Massachusetts manufacturer, mailed an acknowledgment on which was printed in conspicuous type, "All goods sold without warranties, express or implied . . . ." The goods were shipped the following day. When vegetable bags produced with this emulsion failed to adhere, plaintiff brought suit for breach of implied warranty. Defendant contended that the contract expressly negated any warranties. The United States District Court for the District of Massachusetts directed a verdict for the defendant, and the First Circuit Court of Appeals affirmed holding section 2-207 of the Uniform Commercial Code,[2] as adopted by Massachusetts,[3] controlling.

The common-law rules for the formation of an informal contract require that all parties manifest assent to its terms.[4] An offer is a sufficient manifestation only when its terms are such that the promises and performances to be rendered by the parties are reasonably cer-

[1] 297 F.2d 497 (1st Cir. 1962).

[2] AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE [hereinafter cited as U.C.C.].

[3] MASS. GEN. LAWS ANN. ch. 106, § 2-207 (1958) provides: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale even though the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

[4] *E.g.*, Dodds v. St. Louis Union Trust Co., 205 N.C. 153, 170 S.E. 652 (1933). See generally RESTATEMENT, CONTRACTS § 20 (1932); 1 WILLISTON, CONTRACTS § 18 (3rd ed. 1957).

tain.[5] An acceptance is sufficient only if it complies exactly with the requirements of the offer;[6] otherwise it is a counter-offer.[7]

The drafters of the Uniform Commercial Code sought to revise the law of commercial sales transactions to conform with accepted commercial practices.[8] Accordingly, there are no comparable requirements of certainty in the provisions of the Code dealing directly with the formation of a contract for the sale of goods.[9] Such a contract "may be made in any manner sufficient to show agreement including conduct by both parties which recognizes the existence of such a contract,"[10] and agreement may be shown by establishing the existence of a bargain between parties from their language or "by implication from other circumstances including course of dealing or usage of trade or course of performance."[11] Once the existence of an agreement is established, the problem is to determine the legal obligation which results.[12]

Section 2-207 is one of the sections which aids in determining the extent of this "legal obligation." Subsection one provides that the formation of a contract is not prevented by the inclusion of additional terms in a definite expression of acceptance or a written confirmation, unless acceptance is made expressly conditional on inclusion of the additional or different terms. Subsection two provides that these additional terms are to be construed as proposals for addition to the contract and will not become a part thereof if their inclusion would materially alter the obligations of the parties.

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[5] *E.g.*, Yeager v. Dobbins, 252 N.C. 824, 114 S.E.2d 820 (1960). See generally RESTATEMENT, CONTRACTS § 32 (1932); 1 CORBIN, CONTRACTS § 22 (1950); 1 WILLISTON, *op. cit. supra* note 4, § 24.

[6] *E.g.*, Standard Sand & Gravel Co. v. McClay, 191 N.C. 313, 131 S.E. 754 (1926). See generally RESTATEMENT, CONTRACTS § 59 (1932); 1 CORBIN, *op. cit. supra* note 5, § 82; 1 WILLISTON, *op. cit. supra* note 4, § 77.

[7] *E.g.*, Northeastern Constr. Co. v. City of Winston-Salem, 83 F.2d 57 (4th Cir. 1936). See generally RESTATEMENT, CONTRACTS §§ 38, 60 (1932).

[8] "[T]he draftsmen of the Uniform Commercial Code . . . took the sensible position that no simple contract rule should control a sales contract unless it could be demonstrated that such a rule would be useful and efficacious in the commercial world of sales." HAWKLAND, SALES AND BULK SALES 1 (2d ed. 1958). See also Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950) (approving the validity of the drafters' premise); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950) (criticizing the validity of the premise).

[9] The provisions of the Code dealing directly with the formation of a contract for the sale of goods are sections 2-201 to 2-210.

[10] U.C.C. § 2-204(1).

[11] U.C.C. § 1-201(3).

[12] U.C.C. § 1-201(11).

In the principal case, plaintiff sought to invoke this section by urging that defendant accepted the terms of the order and thereby completed the agreement when it mailed the acknowledgment; that the attempted disclaimer of warranties was a proposal for addition to the contract materially altering the terms; and that this proposed addition never became part of the contract because express assent to its inclusion had never been given. The court found section 2-207 applicable but construed it to mean that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly . . . conditional on assent to the additional . . . terms.' "[13] Thus, if the additional terms in the response would materially alter the obligations of the parties there is no contract. The court pointed out that if the offeree's reply sets out conditions burdensome only to the offeror, and that if such a reply consummates a contract, there is no reason for the offeror to agree to the additional terms. It further concluded that if there is no reason for the offeror to accept such terms, there is no reason for the offeree to propose them and in the event he does, it must be because he does not intend to make a contract on the original terms proposed.

The court, therefore, limits section 2-207 to conform with results[14] commonly reached under common-law rules that an acceptance may include requests for addition to the contract,[15] and that silence may be a manifestation of assent if previous dealings or other circumstances are such that it would reasonably be interpreted as having that meaning.[16] An analysis of two earlier New York cases[17] illus-

[13] 297 F.2d at 500.

[14] See a collection of these results in 34 N.C.L. REV. 225 (1956).

[15] Carver v. Britt, 241 N.C. 538, 85 S.E.2d 888 (1955). See generally RESTATEMENT, CONTRACTS § 62 (1932).

[16] Vaughan's Seed Store, Inc. v. Morris April & Bros., 123 N.J.L. 26, 7 A.2d 868 (1939). See generally RESTATEMENT, CONTRACTS § 72(1)(c) (1932). The court agreed that section 2-207 changed the common law, but only to the limited extent of modifying "the strict principle that a response not precisely in accordance with the offer was a rejection and a counter-offer." 297 F.2d at 500.

[17] Nordic Trading Co. v. Imperial Forwarding Co., 197 Misc. 27, 96 N.Y.S.2d 745 (Spec. Term, N.Y.C., 1949) *aff'd mem.*, 197 Misc. 1042, 98 N.Y.S.2d 412 (Sup. Ct. 1950); Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). See also Catz Am. Sales Corp. v. Holleb & Co., 272 App. Div. 689, 74 N.Y.S.2d 485 (1947), *aff'd* 298 N.Y. 504, 80 N.E.2d 656 (1948). However, the problems in these cases are not exclusive to New York. See Gettier-Montanye, Inc. v. Davidson Granite Co., 75 Ga. App. 377, 43 S.E.2d 716 (1947); Schneider Constr. Co. v. Fraser Brick & Tile Co., 297 S.W.2d 298 (Tex. 1957); W. S. Hoge & Bro. v. Prince William Co-op. Exch., 141 Va. 676, 126 S.E. 687 (1925).

trates that though the common-law rules may prevent the enforcement of unintended contracts, they may also defeat the legal effectiveness of certain commercial bargains by which the parties have intended to impose binding obligations.

In *Nordic Trading Co. v. Imperial Forwarding Co.*[18] defendant sent a letter to plaintiff offering to purchase goods. Plaintiff confirmed on an order blank that contained the following printed provisions: "All orders are booked subject to availability of goods" and "We reserve the right to make part shipments against this order." Defendant objected to these printed clauses and refused to receive the goods even after assurance from plaintiff that the printed clauses were never intended to become part of the contract. In granting defendant's motion for judgment on the pleadings in an action for breach of contract, the court held that the writings of the parties had never manifested assent to the same terms. The fact that plaintiff did not intend the printed clauses to be incorporated in the contract made no difference because if the situation had been reversed, and if defendant had sued plaintiff, the latter could have relied on either clause as a defense.[19] Moreover, the Statute of Frauds prevented the enforcement of any agreement contrary to the terms of the order blank that might have been shown by the admission of oral testimony.

In *Poel v. Brunswick-Balke-Collender Co.*[20] defendant's agent made an oral offer to plaintiff, and plaintiff accepted in writing. Two days later, the agent sent one of defendant's standard order forms to plaintiff with the exact terms of the plaintiff's acceptance written on its face; however, one of the printed provisions of the standard order form required that acceptance of the order be acknowledged. Plaintiff did not acknowledge, and shortly before shipments were to begin, plaintiff received a letter from defendant cancelling the agreement. In an action for breach of contract, the court held that the order form was a counter-offer because it contained an

[18] *Supra,* note 17.

[19] Whatever ambiguity existed did not concern the meaning of the clauses, but rather the intent of the parties. In interpreting contracts courts give language its natural and appropriate meaning and will not admit evidence of what the parties may have thought the meaning to be. See Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1949); Richardson v. Travelers Ins. Co., 171 F.2d 699 (9th Cir. 1948); Campbell v. Rockefeller, 134 Conn. 585, 59 A.2d 524 (1948); Joliet Bottling Co. v. Joliet Citizens' Brewing Co., 254 Ill. 215, 98 N.E. 263 (1912).

[20] 216 N.Y. 310, 110 N.E. 619 (1915).

additional term requiring acknowledgment and that it was not for the court to say that such an addition was not material to the defendant. The court further said that plaintiff could not rely on defendant's cancellation letter as a memorandum of an oral agreement because such a contract would not have come into existence until plaintiff acknowledged, which it failed to do.

The decision in both cases required an interpretation of printed clauses which were probably not considered part of the bargain by either party at the time of attempted consummation of the contract. Moreover, neither court was concerned with enforcing the true intent of the parties. They purported to give effect to the manifestations of the parties while at the same time excluding evidence that might have shown the terms to which the parties actually assented. Such interpretations are based on the reasoning that when parties have reduced their intentions to writing, those intentions are going to be most accurately reflected by the writing itself.[21] Although this reasoning may be valid in most situations,[22] it is questionable whether it is applicable to the accepted commercial practice of using forms. These forms are drafted to protect the parties in any situation which might arise and do not necessarily reflect the intentions of the parties in any particular transaction. In such a situation agreements reached either orally or by informal correspondence are apt to reflect the intentions of the parties more accurately than forms containing standard printed clauses.

The drafters of the Uniform Commercial Code intended the provisions of section 2-207 to determine the effect of these printed clauses.[23] If they involve no element of unreasonable surprise and if notice of objection to their inclusion is not seasonably given, the clauses will be incorporated in the contract.[24] Conversely, if their incorporation would result in surprise or hardship to the other party, they will not be incorporated unless expressly agreed to.[25] A party using forms may protect himself by providing in the form that the expression of acceptance is not effective unless the additional or different terms are assented to.[26]

[21] *E.g.*, Neal v. Marrone, 239 N.C. 73, 79 S.E.2d 239 (1953).
[22] Under the Code consistent additional terms may not be proven if the court finds that the writing was intended as a complete and exclusive statement of all the terms. U.C.C. § 2-202, comment 3.
[23] See U.C.C. § 2-207, comment 1.
[24] See U.C.C. § 2-207, comment 5.
[25] See U.C.C. § 2-207, comment 4.
[26] See U.C.C. § 2-207, comment 2.

The court in the principal case found the printed clauses in the acknowledgment to be the controlling expression of defendant's intent. By doing so, however, it ignores comment two of section 2-207 which prohibits such a finding when there is an agreement in existence between the parties at the time the acknowledgment is dispatched, unless the acknowledgment states that its expression of acceptance will not be effective until assent is given to the additional or different terms.[27]

At the end of 1960, the Uniform Commercial Code had been adopted in only six states;[28] since then, it has been enacted in twelve more.[29] Consequently, litigation concerning the interpretation of the Code is bound to increase. However, until considerable litigation has ensued, the only mutually applicable authority courts will have in interpreting it will be the comments which the drafters have appended to the various sections. Unless courts explain their decisions in terms of these comments, the uniformity of the law of commercial transactions which the Code contemplates[30] will not be realized.

WILLIAM EMMETT UNDERWOOD, JR.

Criminal Law—Procedure—Indictments—Principal Includes Accessory Before the Fact as Lesser Offense

The common law defines a principal in crime as a person who actually participates in the commission of a felony.[1] A principal in the first degree commits the crime either by his own hand or by the hand of his agent, and such principal must be actually or constructively present at the act. A principal in the second degree is present, actually or constructively, and aids or abets in the commission of

[27] The result reached by the court may have been contemplated by comment 2, but this is impossible to determine since the court did not consider the possibility that the relationship of the parties and their prior dealings indicated that an agreement may have been reached at the time the acknowledgment was dispatched.

[28] Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania and Rhode Island.

[29] Alaska, Arkansas, Georgia, Illinois, Michigan, New Jersey, New York, Ohio, Oklahoma, Oregon and Wyoming.

[30] Section 1-102(2) provides: "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

[1] There are no accessories to treason and misdemeanors at common law. I WHARTON, CRIMINAL LAW AND PROCEDURE § 102 (1957).

the crime but does not himself perpetrate it. An accessory before the fact procures, counsels or commands another to commit a felony but is not present, actually or constructively, at its commission.[2]

A sharp split of opinion concerning the law of principals and accessories divided the North Carolina Supreme Court in a recent decision, and this division reflects a general split of authority among other jurisdictions. In *State v. Jones*,[3] the court, by a four to three majority, held that accessory before the fact is a lesser included offense[4] in an indictment for murder. It seems worthwhile to examine the background of this decision and to ponder its ramifications.

The applicable North Carolina statutes,[5] augmenting the common law, provide that an accessory before the fact may be indicted and convicted of a "substantive felony" whether the principal shall or shall not have been previously convicted, and that the punishment for accessory before the fact of murder, arson, burglary, and rape shall be life imprisonment.

The North Carolina court laid the groundwork for the *Jones* opinion in its decision in *State v. Bryson*,[6] where it interpreted the statutes as implying that the common-law distinction between principal and accessory was abolished. This would indicate that the accused could be found guilty as a principal regardless of proof that he was not present at the criminal act. Indeed, the court in the *Bryson* case approved of this situation.[7]

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[2] *Id.* at §§ 102-10. See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

[3] 254 N.C. 450, 119 S.E.2d 213 (1961). For a brief discussion of this case, see *Criminal Law, Ninth Annual Case Law Survey*, 40 N.C.L. REV. 517 (1962).

[4] "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. GEN. STAT. § 15-170 (1953).

[5] N.C. GEN. STAT. §§ 14-5, -6 (1953).

[6] 173 N.C. 803, 92 S.E. 698 (1917).

[7] Upholding the trial court's refusal to instruct the jury that the accused could not be convicted as a principal if he was not present at the murder, the court said that it was "of opinion that the indictment and conviction of the prisoner in this case comes within the language and intent of Revisal, 3287, and 3269 [N.C. GEN. STAT. §§ 14-5, 15-170 (1953)], which made accessory before the fact the 'substantive felony,' and which are intended to destroy the technical distinctions which had so often led to such miscarriages of justice as would be caused here if the prisoner, who has been tried and convicted upon evidence of his active participation in causing the death of his wife by counseling, aiding and procuring his daughter to slay her, should be discharged of all liability." State v. Bryson, *id.* at 806, 92 S.E. at 699.

The *Bryson* court, faced with a problem of statutory interpretation, ap-

But apparently this is the only occasion when the court has expressly discounted the element of presence.[8] Even the principal case,[9] although relying on *Bryson* in holding that accessory is a lesser included offense, recognized that presence distinguishes a principal from an accessory. The accused in the *Jones* case was indicted and tried for murder. The court stated that since the crime of accessory before the fact was included in the indictment as a lesser offense, the trial judge should have instructed the jury as to the elements of accessory if evidence was offered tending to show that the accused procured, counseled or commanded the murder, *but was not present at its commission.* It would seem that if the distinction is abolished, no such instruction would be necessary inasmuch as the jury could convict as principal regardless of presence or absence.[10]

Two cases[11] decided prior to the *Bryson* case held that the distinction between accessory and principal was not abolished and, consequently, that accessory before the fact was not a lesser included offense. It should be pointed out that the *Bryson* court, although aware of the earlier decisions, was faced with a fact situation whereby the accused stood to receive a lighter sentence for second degree murder than he could have received as an accessory before the fact of first degree murder. The court reasoned that since the sentence imposed (20 years imprisonment) was less than that to which he

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parently concluded that "substantive felony" meant the offense of the principal. *Contra,* the Maine court's interpretation of a similar statute: "[T]he offense for which an accessory before the fact may be indicted and convicted is a substantive felony, a form of expression, which is general, and not meant to refer to either [principal or accessory] . . . . A substantive felony is that which depends upon itself, and is not dependent upon another felony, which is established by the conviction of the one, who committed it, alone." State v. Ricker, 29 Me. 84 (1848).

[8] *But see* State v. Bryson, *supra* note 7, at 806, 92 S.E. at 699, which cited State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889) as holding that the element of presence is not a prerequisite for a conviction as a principal. In the latter case the accused, armed with a rifle and concealed 150 yards behind his brother, who was lying in wait for the victim, was indicted and convicted as a principal. It seems, however, that the accused was constructively present and indictable, consequently, as a principal in the second degree. "A person is constructively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or is so situated as to be able to aid him, with a view, known to the other, to insure success in the accomplishment of the common enterprise." CLARK AND MARSHALL, LAW OF CRIMES § 167 (5th ed. 1952).

[9] State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961).

[10] *Cf.,* jury instruction in State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917).

[11] State v. Green, 119 N.C. 899, 26 S.E. 112 (1896); State v. Dewer, 65 N.C. 572 (1871).

was liable if he had been tried and convicted as an accessory before the fact (life imprisonment), the accused could not complain that he was not convicted as an accessory. In reaching this result the court apparently left the door open for future misunderstandings. While the strict, narrow holding of the *Bryson* case was that the accused could be convicted of second degree murder under an indictment for murder, whether or not he was *present* at the crime, the court three years later interpreted this to mean that accessory before the fact is a lesser included offense in an indictment for the principal's crime.[12]

This problem has arisen in North Carolina and elsewhere as a result of the enactment of statutes that have altered the common-law concepts of accessory and principal. Some jurisdictions have adopted statutes[13] which provide that the distinction between accessory before the fact and principal is abolished, while others have enacted statutes[14] which do not expressly abolish the distinction but at the same time provide the same punishment for both offenders. The North Carolina statutes would appear to occupy a third category.[15] We have seen that under their provisions the punishments for a principal and for an accessory before the fact are not necessarily identical. The matter of the abolition of the distinction in North Carolina is less clear.

Other jurisdictions have held[16] that statutes providing for the prosecution of accessories before the fact jointly with the principal, and for their trial regardless of whether or not the principal is tried, do not abolish the common-law distinction between accessory and principal. It has also been held[17] that the distinction is not abolished by statutes making one who aids, abets or procures another to commit a felony, guilty of a substantive crime. Despite a statute providing that their punishments are identical, it has been held[18] that

[12] State v. Simons, 179 N.C. 700, 103 S.E. 5 (1920) (dictum).

[13] See, *e.g.*, 18 U.S.C. § 2 (1950); CAL. PENAL CODE § 31 (1955); FLA. STAT. ANN. § 776.011 (Supp. 1961); N.Y. PENAL CODE § 2 (Supp. 1962); WASH. REV. CODE ANN. § 9.01.030 (1961).

[14] See, *e.g.*, CONN. GEN. STAT. § 54-196 (1958); GA. CODE ANN. §§ 26-602, -603 (1953); MASS. LAWS ANN. ch. 274, § 2 (1956); S.C. CODE § 16-1 (1952); W. VA. CODE § 6118 (1955).

[15] *But see* State v. Bryson, 173 N.C. 803, 806, 92 S.E. 698, 699 (1917), where the court seemed to consider North Carolina's statutes as among those abolishing the distinction.

[16] Able v. Commonwealth, 68 Ky. 698 (1869); State v. Ricker, 29 Me. 84 (1848); State v. Roberts, 50 W. Va. 422, 40 S.E. 484 (1901).

[17] State v. Ricker, *supra* note 16.

[18] Able v. Commonwealth, 68 Ky. 698 (1869); State v. Ricker, 29 Me. 84

the distinction between principal and accessory prevails. Conversely, it has been held[19] that a statute providing that accessories shall be punished in the same manner as the principal in effect makes principals of accessories before the fact.

The primary problem born of this controversy is that of the proper manner of drawing the indictment. The common-law rule is that an accessory before the fact in a felony case must be indicted as such and not as a principal.[20] But by virtue of statutes[21] in some jurisdictions it has been held[22] that an accessory before the fact may be indicted as though he were the principal without setting out the facts by which he advised, counseled, or procured another to commit the crime. In some instances the statutes[23] expressly provide that an accessory before the fact may or shall be indicted as a principal. But even in the absence of such a provision, where the distinctions between principals and accessories before the fact have been abolished, the indictment has been held[24] to have been properly drawn against a principal. By following the opinions in *State v. Simons*[25] and *State v. Jones*,[26] it is now permissible in North Carolina to draw an indictment against the accused as a principal and convict him thereunder as an accessory before the fact.

(1848); State v. Lacoshus, 96 N.H. 76, 70 A.2d 203 (1950); State v. Patriarca, 71, R.I. 151, 43 A.2d 54 (1945); State v. Jennings, 158 S.C. 422, 155 S.E. 621 (1930); Pierce v. State, 130 Tenn. 24, 168 S.W. 851 (1914). State v. Patriarca, *supra*, raises an interesting point concerning limitation of actions. It holds that where a felony and being an accessory before the fact to a felony are regarded as distinct offenses, a statute excepting murder from a limitation of the time for instituting criminal prosecution cannot be regarded as also excepting a prosecution on the charge of being an accessory before the fact to the crime of murder, even though the statute provides that the accessory shall suffer the same punishment as the principal. People v. Mather, 4 Wend. 229, 21 Am. Dec. 122 (N.Y. 1830) is sometimes cited as opposing the Rhode Island case, but its opinion on this point is dictum.

[19] Buie v. State, 68 Fla. 320, 67 So. 102 (1914). Subsequent to this decision the Florida statute was rewritten, abolishing the distinction. See note 13 *supra*.

[20] 42 C.J.S. *Indictments and Informations* § 148 (1944).

[21] *E.g.*, COLO. REV. STAT. § 40-1-12 (1953); MICH. STAT. ANN. § 28.979 (1954); WASH. REV. CODE ANN. § 9.01.030 (1961).

[22] Newton v. People, 96 Colo. 246, 41 P.2d 300 (1935); People v. Knoll, 258 Mich. 89, 242 N.W. 222 (1932); State v. Cooper, 26 Wash. 2d 405, 174 P.2d 545 (1946).

[23] *E.g.*, IOWA CODE § 688.1 (1950); MICH. STAT. ANN. § 28.979 (1954); VT. STAT. ANN. tit. 13, § 4 (1958); VA. CODE § 18.1-11 (1950); WASH. REV. CODE ANN. § 9.01.030 (1961).

[24] People v. Bliven, 112 N.Y. 79, 19 N.E. 638 (1889).

[25] 179 N.C. 700, 103 S.E. 5 (1920).

[26] 254 N.C. 450, 119 S.E.2d 213 (1961).

A question still to be adjudicated, in the light of the North Carolina cases herein discussed, is the interesting one of former jeopardy. It was the common-law rules that prosecution as a principal did not forbid a subsequent prosecution as an accessory. Where it is considered that principal and accessory are distinct offenses and not different degrees of the same crime, the general rule is that an acquittal of one indicted as a principal is not a bar to a subsequent indictment against him as an accessory; and, conversely, an acquittal as an accessory is no bar to an indictment as a principal. On the other hand, jeopardy does attach when accessories may be indicted as principals.[27] However, the North Carolina court has indicated that it is at least sympathetic with the idea that jeopardy should attach, under the proper circumstances, when the offenses are separate and distinct.[28]

Where the courts do rule that jeopardy attaches upon the indictment of an accessory as a principal, it seems that, speaking for the accused, this rule is one salutary result of such changes in the common law as have been discussed in this note. Balancing this result is the possibility that the accused could be unduly burdened in preparing his defense in those jurisdictions, including North Carolina, where he may be convicted as an accessory before the fact under an indictment as a principal.

A reconsideration of the holding of the *Bryson* case, when the opportunity next presents itself, may be in order.[29] If the *Jones* case can be interpreted as maintaining the distinction between principal and accessory before the fact for purposes of the trial court's instruc-

[27] 22 C.J.S. *Criminal Law* § 294 (1961). *Contra,* People v. Mather, 4 Wend. 229, 21 Am. Dec. 122 (N.Y. 1830) (dictum).

[28] N.C. GEN. STAT. § 14-5 (1953) provides that "no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense." The *Bryson* court expressed the opinion that the proviso "gives force to the prisoner's motion for an absolute discharge and exemption from liability if it was error to try him for the substantive felony of murder in counseling, procuring, or commanding his daughter to slay her mother . . . ." State v. Bryson, 173 N.C. 803, 805-06, 92 S.E. 698, 699 (1917). But because the court found no error in the trial, the question was not adjudicated.

[29] The holding of the *Bryson* case was not disputed in the argument of the principal case before the court. Note also that in its appellate brief the state submitted that a charge of conspiracy would provide another means of arriving at a verdict of murder in the first degree. "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which may afterwards be done by any one of the others, in furtherance of such common design." State v. Jackson, 82 N.C. 565 (1880), quoted in Brief for the State, p. 8, State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961).

tions to the jury, this result still does not answer the important questions that arise in the area of former jeopardy. Perhaps the General Assembly may see a need to revise our law of principals and accessories, as numerous other legislatures have done.[30] A clarification is needed to remove the state of uncertainty that now exists.

WILLIAM R. HOKE

Evidence—Presumptions and Burden of Proof—Agency—Motor Vehicles—Identifying Markings

In 1947 the North Carolina Supreme Court in *Carter v. Thruston Motor Lines Inc.*,[1] held that proof of identifying markings on a commercial vehicle, taken in conjunction with adequate evidence of negligent operation of the vehicle, was not sufficient to sustain the necessary inferences of ownership, agency, and scope of employment[2] to make out a prima facie case of respondeat superior liability against the party suggested by the markings as being the owner. A note writer in this *Review* at that time[3] suggested that the difficulties of proof frequently confronting plaintiffs in respect of ownership, agency, and scope, as illustrated in that case, might well justify judicial adoption of a rule by which the master-servant relationship and scope of employment would be inferred from proof of ownership. The court did not do so, but the legislature in 1951 enacted such a rule in G.S. § 20-71.1,[4] which contained the additional element of inferring ownership from proof of registration.

Whatever the intention of the legislature, the language of this statute, that proof of the basic facts of ownership or agency shall "be prima facie evidence" of the inferred essential facts invoking vicarious liability, has proved a somewhat illusory weapon for plaintiffs. Since it is couched in the language of prima facie evidence, and not of presumption, and since it does not in terms shift the burden of proof to the defendant, it has quite predictably[5] been construed to have no

[30] See statutes cited notes 13 and 14 *supra*.

[1] 227 N.C. 193, 41 S.E.2d 586 (1947).

[2] Scope of employment will hereafter be referred to as "scope."

[3] Note, 25 N.C.L. REV. 491 (1947).

[4] N.C. GEN. STAT. § 20-71.1 (1953).

[5] Interpretative difficulties are inevitable whenever a statute uses the terms "prima facie evidence," or "presumption," without further directive as to what if any effect is intended to be had upon pleading burden, burden of proof, and probative force by virtue of the operation of statutory prima facie evidence or presumptions. There is no unanimity as to (1) the distinctions, if any, between prima facie evidence and presumption as concepts; (2) their

other effect than to provide immunity against a motion to nonsuit at the conclusion of plaintiff's evidence.[6] It does not have the effect of shifting to defendant any more than the administrative burden of going forward with the evidence.[7] Upon the offering of uncontradicted evidence which directly opposes the inferred facts of agency and scope, the defendant is entitled to a peremptory instruction[8] in

effect upon the burden of proof when only these terms are used; (3) what probative force, if any, is created thereby for jury consideration. See generally Gausewitz, *Presumptions,* 40 MINN. L. REV. 391 (1956); McBaine, *Burden of Proof: Presumptions,* 2 U.C.L.A.L. REV. 13 (1954).

On the first point, Wigmore criticizes the widespread synonymous usage of the terms prima facie evidence and presumption in the interest of accurate terminology and clear doctrinal analysis. 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940). The North Carolina court has equated "presumption of fact" with prima facie evidence, both as to constituent elements and as to consequences. See, *e.g., In re* Will of Wall, 223 N.C. 591, 27 S.E.2d 728 (1943). But this court also recognizes and applies a "presumption of law," which has different consequences in the material respects herein noted from the presumption of fact, or prima facie evidence. See, *e.g., In re* Will of Wall, *supra.*

On the second and third points, two "schools" with powerful protagonists have evolved. The Wigmore position, following Thayer, is that the burden of proof in the ultimate sense "never shifts" by virtue of even a "true" presumption's operation. 9 WIGMORE, EVIDENCE § 2489 (3d ed. 1940). On the other hand, Professor Morgan takes the position that a true presumption should shift the risk of non-persuasion and require a meaningful instruction to that effect to the jury. MORGAN, BASIC PROBLEMS OF EVIDENCE 17-41 (1954). UNIFORM RULE OF EVIDENCE 14, reflecting influence from both schools, announces a hybrid approach by which the ultimate burden shifts only if the basic facts of the presumption "have any probative value as evidence of the presumed fact." The basic divergence is reflected among various courts. The North Carolina court, following its conceptual distinctions, has traditionally held the "presumption of law" to effect a shift of the risk of non-persuasion and require an instruction to that effect, but has denied these consequences to the "presumption of fact." See generally Speas v. Merchants Bank & Trust Co., 188 N.C. 524, 125 S.E. 398 (1924); McCormick, *Charges on Presumptions and Burden of Proof,* 5 N.C.L. REV. 291, 295-97 (1927). Thus, judicial announcement in a North Carolina opinion of approval of a "presumptive rule" can be followed in the same opinion by a rejection of a "presumptive rule" in favor of a "prima facie rule" with no illogic if the first presumptive rule is understood to refer to a presumption of fact and the second to a presumption of law. Unexplained, such a juxtaposition is ambiguous and misleading. See note 18 *infra.*

[6] Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). Although the statute has only the limited effect pointed out in text, it must be kept in mind that prior to its passage plaintiffs on this proof in this type of case had no chance of getting to the jury. See Carter v. Thurston Motor Lines, Inc., 227 N.C. 193, 41 S.E.2d 586 (1947) and text at note 1.

[7] Knight v. Associated Transp., Inc., No. 171, N.C. Sup. Ct., October 10, 1962.

[8] Travis v. Duckworth, 237 N.C. 471, 75 S.E.2d 309 (1953). "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its

his favor as a matter of right[9] even absent any special request.[10]

In a recent case[11] plaintiff, suing the owner of a tractor-trailer unit for damages for personal injuries sustained in a highway collision, offered as sole proof of ownership, agency, and scope of employment, identifying markings which suggested defendant's ownership. Held, that this evidence constitutes prima facie proof of ownership, agency, and scope, but does not shift to the defendant the burden of proof in the ultimate sense of the risk of non-persuasion.[12]

Since G.S. § 20-71.1 was not in play in this case because of failure to comply with the then applicable one year provision,[13] this decision, expressly overruling *Carter v. Thruston Motor Lines Inc.*,[14] makes available a new method, independently of that statute,[15] for supplying

existence even though he offers no evidence tending to contradict that offered by plaintiff. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. [Citations omitted.] Such an instruction differs from a directed verdict as that term is used by us. A verdict may never be directed when the facts are in dispute. The judge may direct a verdict only when the issue submitted presents a question of law based upon admitted facts." Chisholm v. Hall, 255 N.C. 374, 376-77, 121 S.E.2d 726, 728 (1961). It might be considered that plaintiff still has received substantial aid from the statute since defendant must produce evidence to justify the peremptory instruction, and since presumably the plaintiff, though unprepared to meet it, is protected as to its truthfulness by the sanction of perjury. This sanction may well be a weak reed considering the frequently shadowy line between agency and bailment. See Travis v. Duckworth, *supra*.

[9] Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

[10] In further clarification of the statute's effect it was held to establish a mere rule of evidence and not to eliminate the necessity of pleading both agency and negligence. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954).

[11] Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). The result reached in the principal case is in accord with the weight of authority. *E.g.*, Barber Pure Milk Co. v. Holmes, 264 Ala. 45, 84 So. 2d 345 (1955); Robinson v. Greyhound Lines, Inc., 257 Ill. App. 278 (1930). See generally Annot., 25 A.L.R.2d 167 (1952).

[12] The trial judge, considering that Virginia law as to the burden of proof applied in view of the Virginia locus of the collision, charged the jury, in correct application of Virginia law, that the effect of this evidence was to shift the burden of proof in the ultimate sense to the defendant. This was held error for the *lex fori* rather than the *lex loci* applies to these "procedural matters." The court then rejected the Virginia rule in favor of that pointed out in text.

[13] N.C. Sess. Laws 1951, ch. 494 removed by N.C. Sess. Laws 1961, ch. 975.

[14] 227 N.C. 193, 41 S.E.2d 586 (1947).

[15] Presumably, in a similar case arising where G.S. § 20-71.1(a) could be invoked, a more or less academic question could be presented as to the mechanics of operation of the rule of *Knight* within the framework of G.S. § 20-71.1(a). That is, will evidence of identifying markings supply the proof of ownership contemplated by G.S. § 20-71.1(a) so as thereupon to invoke the operation of that statute, to create a "prima facie case" by its very terms,

the hiatus in available proof of ownership, agency, and scope.[16] But it was soon made clear that this method is to be of no greater service to plaintiffs than are the inferences allowed by G.S. § 20-71.1, as construed. For, on new trial of the *Knight*[17] case, the trial court was held to have committed error when it charged the jury in effect that the prima facie rule announced on first appeal had the effect of shifting the burden of proof in the ultimate sense to the defendant.[18]

It may well be that the legislature intended by G.S. § 20-71.1 to favor the plaintiff's over-all chances of success in this type case in a more substantial way than merely to provide nonsuit immunity

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or, will the rule of *Knight* continue to operate independently of that statute, as it did in the *Knight* case? That this is a purely academic speculation is indicated by the point, developed in text, that the prima facie rule of *Knight* is perfectly corollary to the prima facie rule of the statute as interpreted.

[16] It is interesting to note although the statute does not go as far as the court was asked to go in *Thurston* the court in *Knight* went beyond what the statute provided by inferring agency and scope solely from identifying markings without necessity of proof of ownership or registration.

Quaere whether the judicial extension of *Knight* raises a constitutional question. If in a subsequent case the court determines that the judicial inference of *Knight* is in effect provided for in the statute such a decision might well run into the settled rule that in order for a statutory presumption to be held valid there must be some "rational connection" between the fact to the proof of which the presumption is attached and the ultimate fact to be established. Mobile J. & K.C. R.R. v. Turnipseed, 219 U.S. 35 (1910). The judicial extension moves proof of the necessary basic fact on which the inferences are predicated one step further back from the critical fact of agency. McCormick is of the opinion that statutory presumptions in regard to civil cases will not be straight-jacketed to the extent that presumptions in criminal cases are. McCormick, Evidence § 313 (1954).

[17] Knight v. Associated Transp., Inc., No. 171, N.C. Sup. Ct., October 10, 1962.

[18] Any confusion in the trial judge's instructions may fairly be traced to some rather ambiguous language in the first *Knight* opinion in referring to presumptions and prima facie cases: "In our opinion, the presumptive rule, which is generally recognized throughout this country, is a just one, and well-nigh necessary if those who happen to be injured by the negligent operation of such equipment are to have the protection to which they are justly entitled. Therefore, we hold that the evidence of the plaintiff in the trial below was sufficient to make out a prima facie case, and the defendant's motion for judgment as of nonsuit was properly overruled. However, since the court below used the Virginia presumptive rule in charging the jury, and we now are adopting the prima facie rather than the presumptive rule, we think the defendant is entitled to a new trial, and it is so ordered." Knight v. Associated Transp., Inc., 255 N.C. 462, 467-68, 122 S.E.2d 64, 69 (1961).

When the court in the first *Knight* opinion distinguished between prima facie cases and presumptions, it failed to make its further traditional distinction between presumptions of law and of fact. See note 5 *supra*. Presumably, the court sought to distinguish the presumption of law, not the presumption of fact, from the prima facie case on the ground that the former shifts the burden of proof in the ultimate sense. Failure to maintain and reiterate this doctrinal analysis in which two kinds of presumptions are recognized can lead to the confusion indicated by the trial judge's instructions.

upon proof of the basic facts of ownership or registration. If so, experience has demonstrated that the only way to accomplish this with certainty is by a statutory provision expressly placing upon the defendant the burden of proof in the ultimate sense.[19]

Until such time as a change of this type is made plaintiffs' counsel must realize that exclusive reliance on either the inference created by the present statute or the judicial inference adopted in the *Knight* case is apt to lead into a trap. The total effect of either inference is merely to take the plaintiff past a possible nonsuit at which point it vanishes leaving him naked in respect of evidence to substantiate his claim and open to an adverse verdict via a peremptory instruction in favor of the defendant.

The best weapons with which a plaintiff's attorney can arm himself to combat the problem of adducing ultimately effective proof on these frequently elusive elements are not the statutory inference nor the judicial inference of *Knight,* but rather, extensive investigation to discover more direct evidence of the ultimate facts of agency and scope, pleadings[20] designed to force admissions of both agency and

[19] Massachusetts has a statute which in terms goes beyond the mere creation of a prima facie or presumptive rule to specify that the result of the prima facie case of agency and scope made out shall be to shift the burden to the defendant as an affirmative defense. MASS. ANN. LAWS ch. 231, § 85A (1956). If a policy decision is made that more drastic leverage should be given plaintiffs in respect of their ability to adduce ultimately effective proof on these elements, this type statute must be used to insure the critical aspect of shifting of burden of proof.

[20] Good technical drafting and the code itself require that allegations of each material fact be separately stated. N.C. GEN. STAT. § 1-122 (1953). This may frequently force admission of the critical facts of agency and possibly scope, whereas if the same allegations are lumped in with other allegations, a defendant may frequently, by use of a negative pregnant form of denial, avoid admission with impunity.

The principal case would appear to furnish a rather good example of pleading in a manner which increases the probability of the defendant's use of a negative pregnant form of denial which, if unchallenged, successfully avoids having to deny directly under verification the narrow facts of ownership and agency. In a single paragraph the complaint alleged ownership, agency and scope and all the facts leading up to the accident. The corresponding paragraph in the answer reads: "The defendant denies that a tractor-trailer unit, owned by it and being driven by one of its employees in the course of his employment in a southerly direction on U.S. Highway #306, negligently and carelessly crossed the center line of said highway and struck the left fender of the tractor-trailer unit in which the plaintiff was riding and continued to strike the left side of the tractor and trailer, thereby knocking the plaintiff violently about the cab of said tractor, resulting in serious and painful injuries to the plaintiff, or that a vehicle of the defendant collided in any way with the truck in which the plaintiff was a passenger; that as to the other allegations of paragraph III of the complaint, this defendant has no knowledge or information sufficient to form a belief as to the truth

scope, and extensive use of the available discovery procedures.[21] In view of the fact that in some instances even the combination of extensive investigation and artfully drawn pleadings and discovery procedures may not supply the ultimately effective proof of these elements, a statute expressly shifting the burden of proof to defendant may be required.

MACK B. PEARSALL

Federal Income Taxation—Alimony and Support Payments—Effect of Contingent Reduction Provisions in Property Settlements

The 1961 decision of the United States Supreme Court in *Commissioner v. Lester*[1] provides for simplicity of interpretation and certainty of tax consequences where property settlement agreements incident to divorce or separation are subject to contingent alteration. Prior to 1942, a taxpayer who was divorced or legally separated from his wife was generally not entitled to deduct alimony from gross income.[2] The Revenue Act of 1942[3] changed this by requiring a wife[4] to include in gross income "periodic" payments received from her husband made in discharge of a marital duty.[5] A complimentary

or falsity of the same, and the same are therefore denied." Record, p. 4, Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). Conceivably, if the plaintiff had alleged ownership, agency, and scope in separate paragraphs an admission of one or more then might have been forced.

[21] N.C. GEN. STAT. §§ 1-568.1-.27 (1953).

[1] 366 U.S. 299 (1961), *affirming* 279 F.2d 354 (2d Cir. 1960), *reversing* 32 T.C. 1156 (1959).

[2] Douglas v. Willcuts, 296 U.S. 1, 8 (1935); Gould v. Gould, 245 U.S. 151, 153 (1917). Alimony was deductible from gross income when the divorce decree, settlement agreement, and state law operated as a complete discharge of liability for support. Helvering v. Fitch, 309 U.S. 149, 156 (1940); Helvering v. Fuller, 310 U.S. 69 (1939).

[3] 56 Stat. 798 (1942).

[4] For purposes of simplicity it is assumed the husband is paying alimony or support; however, the statute covers a situation in which a wife is required to pay alimony to the husband. Elinor Stewart Sokol, 7 T.C. 567 (1946); Int. Rev. Code of 1939, § 3797(a)(17) (now INT. REV. CODE OF 1954, § 7701(a)(17)).

[5] Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 71), provided "periodic payments . . . received . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under . . . a written instrument . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any such periodic payment which the terms of the . . . written instrument fix, in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband."

provision allowed a husband to deduct from gross income payments his wife was required to include.[6]

If the decree or agreement provides for a single sum payable to the wife for the support of herself and minor children of the marriage, with no allocation of the payment between the parties, no difficulty is experienced. The wife is clearly taxable on the entire sum.[7] Where the agreement or decree makes a provision for the minor children in a definite sum or proportion, it is just as clear that the wife is not taxable on this amount.[8] However, in agreements where the husband attempts to make flexible provision for both a wife and minor children, subject to reduction as the wife's household becomes smaller, the payments have not always been clearly allocable between alimony and child support. The *Lester* decision settled this problem by holding that before any of the payment is excluded from the wife's income the agreement must specify a sum certain or a percentage of the payment which is fixed for child support.[9]

The Tax Court,[10] with supporting decisions in the First,[11] Seventh,[12] and Ninth[13] Circuits, held that if there were a reasonable indication or inference that any portion of a payment was intended to be payable for child support then such portion was not includible in the gross income of the wife. In *Eisinger v. Commissioner*,[14] a decision exemplary of the Tax Court approach, the agreement pro-

[6] Int. Rev. Code of 1939, § 23(u), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 215). The statute was enacted to relieve the husband from the burden of paying alimony plus the higher taxes which were anticipated during the war. It was envisioned that in many instances the husband would not have enough money to make both payments. H.R. REP. No. 2333, 77th Cong., 2d Sess. 46 (1942).

[7] Joslyn v. Commissioner, 230 F.2d 871 (7th Cir. 1956); see Richard P. Prickett, 18 T.C. 872 (1952). The same result follows regardless of the amount actually expended on the minor children by the wife. Constance B. Kirby, 35 T.C. 306 (1960); Frances Hummel, 28 T.C. 1131 (1957); Henrietta S. Seltzer, 22 T.C. 203 (1954); Dora H. Moitoret, 7 T.C. 640 (1946).

[8] John W. Harris, 30 P-H Tax Ct. Mem. 1167 (1961); Earl S. Douglass, 30 P-H Tax Ct. Mem. 245 (1961); Martha J. Blyth, 21 T.C. 275 (1953), *acq.*, 1954-1 CUM. BULL. 3.

[9] Lester v. Commissioner, 366 U.S. 299, 303.

[10] Russell W. Boettiger, 31 T.C. 477 (1958), *acq.*, 1959-1 CUM. BULL. 3; Harold M. Fleming, 14 T.C. 1308 (1950); Warren Leslie, Jr., 10 T.C. 807 (1948). *But see* Elsa B. Chapin, 16 P-H Tax Ct. Mem. 782 (1947) (contingent reduction only if wife remarried).

[11] Metcalf v. Commissioner, 271 F.2d 288 (1st Cir. 1959).

[12] Mandel v. Commissioner, 185 F.2d 50 (7th Cir. 1950).

[13] Eisinger v. Commissioner, 250 F.2d 303 (9th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958). *Cf.* Feinberg v. Commissioner, 198 F.2d 260, 263 (3d Cir. 1952) (dictum).

[14] *Supra* note 13.

vided for specified reductions in weekly payments when a child reached his majority or died. The agreement also provided that all payments should cease upon the wife's remarriage and, in lieu thereof, the husband was to pay the wife a certain amount for the support of each child until he attained his majority or died. The court held that the agreement "earmarked" with sufficient clarity the portions intended for the support of minor children and alimony, and that when such amounts could be readily determined without reference to contingencies which might never occur, then such part of the periodic payment was sufficiently "fixed" within the meaning of section 22(k) of the Internal Revenue Code of 1939.[15]

The Second Circuit adopted a stricter view in *Weil v. Commissioner*.[16] The only reduction there was contingent upon the wife's remarriage. The court held that such a contingency did not sufficiently allocate an amount payable for the support of minor children, and that "sums are 'payable for the support of minor children when they are to be used for that purpose only' . . . . [T]he wife must have no independent beneficial interest therein."[17]

Baker v. Commissioner[18] was a forecast of how the Second Circuit would rule when a computation based on contingencies was involved. In that case the taxpayer was obligated to pay his wife a stipulated monthly sum, with no principal sum named in the agreement. The payments were to cease in six years or if the wife should remarry or die before the end of that period. The Commissioner and the Tax Court disallowed a deduction for periodic alimony payments on the theory that they could calculate the principal sum.[19] The Second Circuit reversed, and held that arriving at a principal sum by calculation might be a sound principal if there were no contin-

[15] See note 5 *supra*.

[16] 240 F.2d 584 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957).

[17] *Id.* at 588; *accord*, Hirshon's Estate v. Commissioner, 250 F.2d 497 (2d Cir. 1957) (per curiam). As a result of *Weil* and *Eisinger*, Rev. Rul. 59-93, 1959-1 CUM. BULL. 22, was issued, stating that the Internal Revenue Service would follow the *Weil* decision only in situations factually similar (reductions contingent only upon wife's remarriage). To determine if a portion of the payments made in accordance with a divorce decree or separation agreement is alimony or payable for child support, the rationale of *Eisinger* would be followed.

[18] 205 F.2d 369 (2d Cir. 1953); *accord*, Burton v. United States, 139 F.Supp. 121 (D. Utah 1956).

[19] Only "periodic" payments are considered alimony under the statute. Payments which are considered "installments" on a principal sum, dischargeable in 10 years or less, are not considered alimony. See Barrett v. United States, 296 F.2d 309, 310 (5th Cir. 1961); Int. Rev. Code of 1939, § 22(k) (now INT. REV. CODE OF 1954, § 71(c)).

gencies involved; however, there was present a stipulated cessation of the payments if the wife remarried or died. The possibility that either of these contingencies might occur before termination was sufficient reason to doubt the validity of the calculation.[20]

In accord with the Second Circuit is the Sixth Circuit decision of *Deitsch v. Commissioner*,[21] in which the court held that the term "fix" as used in section 22(k) was not ambiguous and that "It therefore must be construed in its usual sense of 'to assign precisely . . . to make definite and settled.' "[22] Thus the decisions in the Second and Sixth Circuits clearly departed from the view of the Tax Court and the First, Seventh, and Ninth Circuits.

In order to resolve this conflict in the circuits, the Supreme Court granted certiorari in *Commissioner v. Lester*.[23] The agreeement there provided for a monthly sum payable to the wife for both alimony and child support, subject to reduction on occurrence of specified contingencies. All payments were to cease on the death of either husband or wife, or upon her remarriage. Should either of the children die, become emancipated, or marry, the payments were to be reduced by one-sixth. The husband had deducted the entire payment as alimony.

The Commissioner disallowed a portion of that deduction on the grounds that a reasonable inference could be drawn that one-sixth of each payment was intended to be "payable for" support of a minor child. The Tax Court[24] agreed with the Commissioner and held that if it is clear from the terms of the agreement that a portion of the payment is to be applied for the support and maintenance of minor children, then such amount should be considered as a sum "fixed" as payable for child support.

On appeal, the Second Circuit[25] looked to the complete discretion

[20] *Compare* Davidson v. Commissioner, 219 F.2d 147 (9th Cir. 1955) *with* Eisinger v. Commissioner, 250 F.2d 303 (9th Cir. 1957). In *Davidson* the Ninth Circuit cited *Baker* and arrived at the conclusion that since no principal sum was stated the payments were periodic and includible in the wife's gross income.

[21] 249 F.2d 534 (6th Cir. 1957). The agreement here provided for reductions in monthly payments as each child reached the age of 18. Payments were to cease altogether if both children should die or become emancipated. *Accord,* Ashe v. Commissioner, 288 F.2d 345 (6th Cir. 1961) (wife had discretion in use of entire payment) (decided under both the 1939 and 1954 Codes). *But see* Budd v. Commissioner, 177 F.2d 198 (6th Cir. 1947) (per curiam).

[22] Deitsch v. Commissioner, *supra* note 21, at 536.

[23] 366 U.S. 299 (1961).

[24] Jerry Lester, 32 T.C. 1156 (1959).

[25] Lester v. Commissioner, 279 F.2d 354 (2d Cir. 1960).

the wife retained in the use of the money and held the entire payment to be alimony.[26] The fact that, as the size of the family diminished, the periodic payments were reduced in a fixed amount did not necessarily mean that the wife's discretionary power had been diminished. In reversing, the court held that if the agreement itself did not declare a portion of the payment to be for the support of minor children, then Congress intended to tax the wife on the entire payment.

The Supreme Court agreed with the Commissioner and the Tax Court that the contingent reductions relating to the death, emancipation, or marriage of the children might be a reasonable indication of an intention by the parties to provide for the minor children, but found that such a view is inconsistent with the further provision for a complete cessation of the payments should the wife remarry. The Court felt that this provision raised an equally sufficient indication that the parties intended the entire payment to be alimony. To resolve this inconsistency, the Court resorted to the Committee Reports of the House and Senate on the Revenue Act of 1942.[27] As originally proposed, section 22(k) provided that for the husband to be taxable on any part of the payment, such part must be "specifically designated" as payable for child support. This was changed to "fixed" in the final draft of the statute in order to obtain more "streamlined language."[28] The Court held that it was the intention of Congress that "the agreement must expressly specify or 'fix' a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income."[29]

The Court has devised two tests to determine if any or all of a periodic payment is "payable for" child support. The agreement

[26] She retained control over the disposition of the payments, and could allocate the money between herself and the minor children as she thought best. "Indeed such a construction [the Tax Court's] would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself." *Id.* at 357.

[27] H.R. REP. No. 2333, 77th Cong., 2d Sess. 71, 73 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 83, 86 (1942). The Court found that the statute was enacted to resolve inconsistencies and uncertainties in the application of the federal revenue laws because of varying restrictions on the use of unspecified child support money among the several states, and to relieve the husband of the burden of paying both alimony and the tax thereon.

[28] *Hearings Before Senate Committee on Finance on H.R. 7378,* 77th Cong., 2d Sess. 48 (1942).

[29] Commissioner v. Lester, 366 U.S. 299, 303. The resort to legislative history seems justified in the light of the ambiguity of the statute when applied to agreements of this type. See Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940); White v. United States, 305 U.S. 281, 292 (1938).

must either (1) expressly state a sum certain or (2) give a percentage of the payment which is payable for child support. The determination of the sum allocated for this purpose cannot be left to inference or conjecture.[30]

The decision will probably result in a reduction in the quantity of tax litigation in the alimony-support area since it is now clear to the draftsman how agreements must be drawn to include periodic alimony payments in a wife's gross income, or to exclude a portion from her gross income if that is desirable.[31] The decision is also a guide for construction of agreements drawn in the past, since it is clear that contingent provisions in property settlement agreements are no longer subject to the "reasonable indication" approach of the Commissioner.[32] Hardships will be created since *Lester* does apply to agreements drawn when there was confusion as to the correct manner of placing the tax burden on the intended party. The tax burden has undoubtedly shifted in many instances, entitling the husband to a refund, while creating a tax deficiency for the wife. This deficiency will be limited to the period open under the statute of limitations, usually three years.[33] The husband may file a refund claim for the period open under the statute as applicable to him.[34]

[30] "It is not enough to say that the sum can be computed." Commissioner v. Lester, *supra* note 29, at 307 (concurring opinion).

[31] If none of the payment to the wife is fixed as child support, none of it can be applied to determine if the husband is entitled to a dependency exemption deduction. INT. REV. CODE OF 1954, § 152(b)(4).

[32] *Lester* has been followed by the Tax Court in Lindley S. Bettison, 30 P-H Tax Ct. Mem. 946 (1961); Robert E. Dolan, 30 P-H Tax Ct. Mem. 898 (1961); Estelle D. Deininger, 30 P-H Tax Ct. Mem. 1153 (1961). In *Bettison* the payments were reduced upon the wife's remarriage. The Tax Court held that the agreement did not "fix" the amount remaining after reduction as payable for child support. Even though the inference was present that the husband was paying the money to support minor children, the agreement did not expressly state a sum certain or percentage which was payable for child support. In *Bettison* the reduced payments were made under the same provision as the full payment. *Quaere,* if the agreement provided, as in *Eisinger,* that all payments of alimony to the wife were to cease, and in lieu thereof, a stipulated smaller sum to be paid for the support, maintenance, and education of minor children? A more equitable solution might be to include the full payment in the wife's gross income until the contingent reduction provisions mature. At this time if the reduced payment is more clearly identified as payable for the support of minor children, it should not be deductible by the husband.

[33] INT. REV. CODE OF 1954, § 6501(a). However, if the taxpayer has omitted from gross income an amount in excess of 25% of the amount stated in the return, the government's allowable period for assessment is extended to six years. INT. REV. CODE OF 1954, § 6501(e)(1)(A). The period may be extended by agreement of the parties before expiration of the statutory period. INT. REV. CODE OF 1954, § 6501(c)(4).

[34] INT. REV. CODE OF 1954, § 6511(a).

For closed years, if any are involved, it would seem that the husband's possibility of redress is only that available through mitigation of the statute of limitations.[35]

While *Lester* creates some problems of hardship, the benefits of simplicity of interpretation and certainty of tax consequences are much to be desired in applying the federal revenue laws. The decision has also settled a confusing conflict of circuit court authority in construing property settlement agreements containing contingent reduction provisions in the event of death or remarriage of the wife, death of the husband, or because minor children become of age, die, or marry. These factors may justify the triumph of form over substance *in this instance,* but no extension of that approach is advocated, either in the federal tax field or other branches of the law.[36]

MARION A. COWELL, JR.

Federal Income Taxation—Leases—Amortization of Ground Rents

Not infrequently a taxpayer will purchase real property subject to an outstanding lease. In many instances the lessee will have erected improvements on the leased land. By virtue of having made a capital investment in those improvements and avowedly retaining ownership of them until the termination of the lease, the lessee is entitled to an annual depreciation deduction.[1] In cases where both these fac-

[35] In cases where the parties are "related taxpayers" under the statute, for instance when the wife is beneficiary under an alimony trust, there appear to be possibilities of mitigation. Eleanor B. Burton, 1 T.C. 1198 (1943); Katharine C. Ketcham, 2 T.C. 159 (1943), *aff'd,* 142 F.2d 996 (2d Cir. 1944); INT. REV. CODE OF 1954, §§ 1311-1314. See generally 2 MERTENS, FEDERAL INCOME TAXATION ch. 14 (rev. 1961); Scheifly, *The Operation of Sections 1311-1314,* 13 U. So. CAL. 1961 TAX INST. 509; Annot., 54 A.L.R.2d 538 (1957).

The doctrine of res judicata applies to tax litigation when the case concerns the same issue for the same tax year, while for subsequent years the doctrine of collateral estoppel applies. Commissioner v. Sunnen, 333 U.S. 591 (1948); Tait v. Western Md. Ry., 289 U.S. 620 (1933). See generally 10 MERTENS, FEDERAL INCOME TAXATION ch. 60 (rev. 1958); Griswold, *Res Judicata in Federal Tax Cases,* 46 YALE L.J. 1320 (1936-37); Annot., 92 L.ED. 913 (1948).

[36] No cases have been found construing the applicable North Carolina statutes. However, since the laws are extremely similar, especially in the provisions relating to deductibility of child support payments, the need for clarity, certainty, and conformity in the construction and application of revenue laws, both state and federal, should lead the courts of North Carolina to adopt the rule in *Lester.* See N.C. GEN. STAT. §§ 105-141(a), -141.2, -147(21) (1958).

[1] Duffy v. Central R.R. of N.J., 268 U.S. 55 (1925); Hotel Kingkade v. Commissioner, 180 F.2d 310 (10th Cir. 1950).

tors are present the purchase price, which is unavoidably determined to some extent by the ground rent[2] yielded by the outstanding lease, may well reflect a premium over what would be paid for a similar tract of land without a favorable lease.[3] Has the purchaser in such event acquired only non-depreciable land, or has he acquired in addition a wasting asset[4] in the right to receive future ground rent? If the wasting asset is part of his investment will he be able to amortize, over the unexpired term of the lease, that portion of the purchase price attributable to this right?

In *World Publishing Co. v. Commissioner*[5] the Eighth Circuit held that the taxpayer acquired a wasting asset in these ground rents, and would be allowed to amortize, over the remaining life of the lease, that portion of the purchase price allocable to this wasting asset. There the taxpayer bought land which the vendor-lessor had leased for a term of fifty years for an annual rental of $28,500. At the time of the purchase there were twenty-eight years remaining in the term. The purchaser paid $700,000 for the land and outstanding lease. He contended that the difference between the total purchase price and the fair market value of the land was paid for the right to receive future rentals;[6] since this was a wasting asset, he should be allowed

[2] The phrase 'ground rent' or 'ground rentals' means the money received under a lease for the use of the land alone. This term as used in this note is to be distinguished from the term ground rent as used in Maryland, Pennsylvania, and Michigan meaning an interest in land. A typical example of a Maryland, Pennsylvania, or Michigan ground rent is where *A* conveys to *B* and his heirs and assigns in fee simple, with the provision that *B* and his heirs and assigns pay annual rent forever to the grantor, his heirs and assigns. Pronzato v. Guerrina, 400 Pa. 521, 524 n.1, 163 A.2d 297, 298 n.1 (1960). Ground rent, as an interest in land, is distinct and separate from the land out of which it issues. Marburg v. Mercantile Bldg. Co., 154 Md. 438, 442, 140 Atl. 836, 838-39 (1928).

[3] A favorable lease is one in which the reserved rentals are greater than the rentals which could be obtained currently on the same premises. Conversely, in an unfavorable lease the reserved rentals are less than the rentals which could have been obtained if the purchaser were in a position to lease the property to another in the current market. See Rubin, *Depreciation of Property Purchased Subject to a Lease*, 65 HARV. L. REV. 1134 (1952).

[4] A wasting asset is intangible property, as compared with depreciable, tangible property, which is characterized by a progressive loss of value extending over a series of taxable years. Due to the passage of time, a wasting asset will eventually become worthless, either because it stops producing income, as does a patent, or the very thing ceases to exist, as does the right to receive rent in the principal case. See 512 W. Fifty-Sixth St. Corp. v. Commissioner, 151 F.2d 942, 944 (2d Cir. 1945).

[5] 299 F.2d 614 (8th Cir. 1962).

[6] Here the fair market value of the land was $400,000. The difference of $300,000 is the amount attributable to the right to receive ground rents.

to amortize or depreciate[7] the difference over the remaining life of the lease.[8]

The question of whether one, who acquired land subject to an outstanding lease, had the right to amortize, first arose where the taxpayer was an heir or devisee of the lessor. In such a situation the courts have repeatedly denied the heir or devisee the right to amortize or depreciate.[9] The courts reasoned that since neither the devisor nor devisee had any capital investment in the leasehold, there was no depreciable interest which could be acquired by the devisee.[10]

Commissioner v. Moore,[11] involving a devise of property subject to an outstanding lease, was the first case to allow amortization of

[7] While depreciation and amortization are basically the same, there is the distinction that the former applies to tangible property and the latter to intangible property. Since rentals are intangible, amortization is the proper designation for the deduction allowance. It should be noted that throughout the opinion in *World Publishing*, the court makes no distinction between amortization and depreciation. While both are methods which enable the taxpayer to recover his investment, depreciation allows a more rapid write-off in the earlier years. Amortization over the life of the property is in effect a form of depreciation known as the straight line method. That is, the same amount is deducted each year. See Treas. Regs. § 1.167(b)-1 (1962). But there is another method of depreciation called the declining balance which allows for the first year a 150% deduction of the applicable straight line rate. See Treas. Regs. § 1.167(b)-2 (1962). For example, under the straight line method, if the first year's deduction was $100 for property with an adjusted basis of $1000 and a useful life of 10 years, then the deduction under the declining balance method for the first year would be $150. In three years the deduction allowed under the former method would be $(3 \times \$100) = \$300$, while under the latter method it would be $385.88. This allowance of 150% of the straight line rate is applicable to new or used property acquired after December 31, 1953. Rev. Rul. 60-8, 1960-1 CUM. BULL. 113; Rev. Rul. 57-352, 1957-2 CUM. BULL. 150.

[8] INT. REV. CODE OF 1954, § 167(a) provides as a depreciation deduction, an allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence of property held for the production of income.)

[9] See, *e.g.*, Schubert v. Commissioner, 286 F.2d 573 (4th Cir.), *cert. denied*, 366 U.S. 960 (1961); Goelet v. United States, 266 F.2d 881 (2d Cir. 1959); First Nat'l Bank v. Nee, 190 F.2d 61 (8th Cir. 1951); Commissioner v. Pearson, 188 F.2d 72 (5th Cir. 1951); Friend v. Commissioner, 119 F.2d 959 (7th Cir.), *cert. denied*, 314 U.S. 673 (1941).

[10] The general situation with the heir or devisee was that he acquired the real property or an interest in it which was subject to an outstanding lease. He contended that since the estate tax valuation of the property and lease operated to furnish a new basis for determining gain or loss from the sale or other disposition of the property, and to the extent that depreciable property entered into it, for the depreciation of the property, then he should be allowed a basis for depreciation of the property he acquired. The court rejected this reasoning by saying unless the property is depreciable, the statutory provisions providing a basis for depreciation are irrelevant. These provisions only provide a basis upon which depreciation is to be computed and does not create or amplify depreciability. First National Bank v. Nee, *supra* note 9, at 64; Schubert v. Commissioner, *supra* note 9, at 579.

[11] 207 F.2d 265 (9th Cir. 1953), *cert. denied*, 347 U.S. 942 (1954).

the right to receive ground rents—limited, however, to the premium.[12] In *Moore* the court's decision reflected the true contentions of the taxpayer; that is, he was not trying to depreciate or amortize the improvements built by the lessee, but rather his interest in the rentals.[13] In *World Publishing* there is the factual difference, which *Friend v. Commissioner*[14] intimated might result in allowing the taxpayer to amortize, that the taxpayer invested money in what he considered to be income producing property.

The commissioner based his attack on the fact that the purchaser in *World Publishing* acquired only what the original lessor had, and this had not included any depreciable interest in the lessee-constructed building.[15] In support of this argument he relied on the inheritance

[12] There is no real difference in the premium approach and the valuation approach used in the principal case. Using the valuation approach, the taxpayer is allowed to amortize the difference between the total purchase price and the fair market value of the land. With the premium approach the amortizable deduction is that amount, in excess of the value of the land, which a purchaser would be willing to pay to get a return equal to the amount of the existing rentals.

Under the valuation approach, the amount to be amortized is easily ascertained by subtracting the fair market value of the land from the total purchase price. That figure is $300,000. Since he paid $700,000 to get a return of $28,500 a year, the rate of return is about 4%. Since the premium could be calculated by comparing the capitalized value of the future rentals for the remaining years under the lease, as it existed when the heir or devisee acquired the property, with the capitalized value of an identical lease made presently, the question is what amount in addition to the value of the land would a purchaser pay to receive $28,500 annually? Based on a 4% return, this can be calculated as follows: 4% × Total Price = $28,500. This figure is again $700,000. Since the value of the land was $400,000, the additional amount is what the purchaser would pay, and is the amount allowed to be amortized.

[13] The taxpayer in Friend v. Commissioner, 119 F.2d 959 (7th Cir. 1941), made the same contention. But there the court said to be entitled to depreciation or amortization the taxpayer must have made an investment in the leasehold, and, since the taxpayer denied that there had been any cost to the estate in the acquisition of these leases, there can be no loss to be recovered by amortization or depreciation.

The right to receive rent for twenty-eight years in *World Publishing* is analogous to patents or copyrights. With a patent which has a finite life of seventeen years, a taxpayer, should he buy the patent, would enjoy the income it produces for all seventeen years. In Buckwalter v. Commissioner, 61 F.2d 571 (6th Cir. 1932), it was held that a patent is a wasting asset which may be amortized over its life where it is used in the taxpayer's trade or business or when it is held for the production of income. After this time the patent would be worthless. In *World Publishing*, assuming the value of the land remained stable, at the end of the lease the property would only be worth $400,000. Here the passage of time not only eliminates further income—it reduces the value of the investment.

[14] 119 F.2d 959 (7th Cir. 1941).

[15] The lower courts properly agreed with the commissioner that the heir or devisee had no present depreciable interest in the building or other im-

cases which held that neither the decedent nor his successor has any interest in the leasehold. In *Schubert v. Commissioner*,[16] it was held that an heir or devisee cannot acquire a larger interest than that of the decedent. The court in *World Publishing* rejected this argument on grounds that it is illogical to allow a purchaser to depreciate where the vendor-lessor is the builder, but to deny the purchaser the deduction where the lessee is the builder. This approach may result in further confusion, because the purchaser is not trying to depreciate the improvements themselves, but is instead, seeking to amortize his investment made for the future ground rentals. Where the building or other improvements are erected by the lessee who retains the title until the termination or default of the lease, notwithstanding the decision in the principal case, the rule remains that the purchaser (or heir) is not entitled to depreciate these improvements.[17] Since the purchaser or heir acquired no interest in the improvements, he is not concerned with their useful life.[18] The building could be destroyed or condemned long before the expiration of the lease and still the lessee would have to pay the annual rent for the full term. Likewise, had there been no improvements made by the lessee, the result in *World Publishing* would have been the same.

In arriving at the amount which the taxpayer is allowed to amortize there is an additional factor to be considered. Should the useful life of the building exceed or be shorter than the unexpired term of the lease, the fair market value[19] of the building at the time of the

provements made by the lessee, but were in error when they concluded that the devisee had no interest that could be depreciated or amortized. When the estate was evaluated for estate tax purposes, the capitalized value of the future rentals was included in the gross estate. The devisee had an interest in the right to receive the rentals.

[16] 286 F.2d 573 (4th Cir. 1961).

[17] Since the taxpayer is amortizing his investment in the right to receive rentals, and not the improvements made by the lessee, the right to depreciate them is left to the lessee. In the principal case, the court said: "What is significant is that each taxpayer . . . meets the statutory requirements for depreciation. To allow each to recover his own, and separate, investment is not, as is suggested, to permit duplication at the expense of the revenues and is not to permit one taxpayer to depreciate another's investment. That each is concerned with the same building is of no relevance." 299 F.2d at 622.

[18] Useful life is that period of time during which the depreciable property will be reasonably useful to the particular taxpayer in his trade or business. Treas. Regs. § 1.167(a)-1(b) (1962).

[19] The lessor's interest in the building on the date of surrender is the fair market value of the building and not its adjusted base. This is especially true in the case where the life of the lease exceeds the useful life of the building, because the adjusted base may vary according to the method of depreciation the lessee employs. See note 8 *supra*. The determination of the

termination of the lease must be figured in the total purchase price in order that the amount to be amortized can be computed. In the principal case the parties stipulated that the useful life of the building did not exceed the remaining term of the lease. Since the taxpayer is trying to arrive at an estimated value of the building for the purpose of computing the amount to be amortized, the fair market value of the building at the end of the lease will not be sufficient for his present needs. A building worth so much in the future will not be worth the same at the present time. To arrive at the correct amount, it is necessary to know what a building would be worth to a buyer today when he would be unable to enjoy possession until a later date. This would be the discount value, and is the amount one would pay presently for the future right of possession. It is suggested that the decision should be limited to the extent that the maximum amount allowed to be amortized should not be greater than the difference between the total price and the fair market value of the land increased by the discount value of the building.

The decision in the principal case may affect another issue which was not raised. If amortization of the wasting asset is correct when the purchaser buys and retains the ground subject to a lease, what are the results should he sell or exchange his right to receive future rentals? In *Hort v. Commissioner*[20] a devisee acquired land subject to an outstanding lease. During a period of depression, he and the lessee agreed that for a stipulated sum the lessee could surrender the lease. The Court held that this payment was a substitute for future rentals, and, as such, was a recognized gain. As a result of the principal case, if the taxpayer is allowed to amortize that portion of the purchase price allocable to the right to receive future rentals, it would seem that he could treat the amount received on the sale of this right, to the extent of its then adjusted basis,[21] as a return of capital and not as gain of any character. Any amount received in excess of the adjusted basis would be recognized gain.

Should the Supreme Court of the United States eventually ap-

amount of the lessor's interest is necessary in order to compute how much he will be able to amortize. This is not to be confused with what the lessor's basis would be, or whether such improvements would be considered as income or not. INT. REV. CODE OF 1954, § 1019 provides that the basis of the lessor's real property shall not be increased or diminished by reason of his acquiring the lessee-made improvements on the termination of the lease.

[20] 313 U.S. 28 (1941).

[21] The adjusted basis for the lessor would be cost of the building minus depreciation deductions allowed to the lessee. See Treas. Regs. § 1.1011-1 (1962).

prove the ruling in the principal case, its holding would permanently lay to rest the commissioner's contention, suggested by *Schubert*, that one cannot obtain more rights than one's devisor or vendor had. As pointed out in *World Publishing* the problem should be analyzed on the basis of what the taxpayer has rather than what a prior lessor may have had. From this point of view *World Publishing* and *Moore* are in accord.

BORDEN R. HALLOWES

Insane Persons—Involuntary Commitment Procedures—Due Process

North Carolina's statutory commitment procedure has been put together in a piecemeal manner[1] and does not readily conform to any pattern of laws applicable in other jurisdictions.[2] The General Assembly, recognizing the special problems concerning care of the mentally ill, has constantly striven to modernize the old law.[3] In what has appeared to be cognizance of this endeavor, the court has taken judicial notice of the fact that commitment of a mentally ill person involves a procedure unlike any other.[4]

For example, in the case of *In re Harris*,[5] the court overruled previous decisions[6] and enlarged the writ of habeas corpus to the

[1] See N.C. GEN. STAT. §§ 122-35.1 to -68.1 (1958), as amended, N.C. GEN. STAT. §§ 122-36 to -68.1 (Supp. 1961).

[2] For graphic comparisons of all state procedures see LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 44-106 (1961); Ross, *Commitment of the Mentally Ill; Problems of Law and Policy*, 57 MICH. L. REV. 945, 1008-16 (1959). Nonconformity by North Carolina is not in itself damning, for there is little conformity between the states as to any type of commitment procedure. See LINDMAN & MCINTYRE, *supra;* Ross, *supra.* An attempt to gain uniformity was made in 1950 by the preparation of a "Draft Act" which was sent to all the state governors as a working model to be adapted to local needs and conditions. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITILIZATION OF THE MENTALLY ILL (Public Health Service Pub. No. 51, 1951). Approximately ten states have adopted the Draft Act in whole or in part. Slovenko & Super, *Commitment Procedures in Louisiana*, 35 TUL. L. REV. 705 n.2 (1961).

[3] There have been over forty changes since 1958 dealing with mental health. See N.C. GEN. STAT. ch. 122 (Supp. 1961). Twenty-two of these deal directly with commitment procedures. See N.C. GEN. STAT. §§ 122-36 to -91 (Supp. 1961).

[4] Involuntary commitment proceedings are, strictly speaking, neither a civil action nor a special proceeding. *In re* Cook, 218 N.C. 384, 11 S.E.2d 142 (1940). This "creates a problem only in the minds of those who are not familiar with the distinction between a hospitalization proceeding and a criminal or civil trial." Whitmore, *Comments on a Draft Act for the Hospitalization of the Mentally Ill*, 19 GEO. WASH. L. REV. 512, 524-25 (1951).

[5] 241 N.C. 179, 84 S.E.2d 808 (1954).

[6] *E.g., In re* Chase, 193 N.C. 450, 137 S.E. 305 (1927).

extent that it now provides for a judicial determination as to the person's sanity at the time that the writ is issued,[7] while also serving its historical purpose of testing the legality of the original detention. This means simply that no commitment is "final."[8] Now the writ can be used in the form of an appeal,[9] thus acting as a further safeguard to prevent the continuing incarceration of a person of sane mind.

In the recent case of *In re Wilson*,[10] the petitioner was indeterminately committed to a mental hospital through the use of North Carolina's "standard" procedure:[11]

(1) Filing of an affidavit before the clerk of the superior court requesting an examination of an alleged mentally ill[12] person;[13]

(2) Issuance of an order by the clerk directing two physicians to personally examine the proposed patient.[14]

(3) Certification by the physicians, service of notice to the proposed patient, and the conducting of a hearing by the clerk;[15]

(4) Upon determination by the clerk that the person is in need of care and treatment, commitment to a mental hospital for an observation period;[16]

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[7] N.C. GEN. STAT. § 17-33(2) (1958) provides for release "Where, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to be discharged." The court stated that the "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards' . . ." within the meaning of the statute and held that the petitioner was entitled to be released. 241 N.C. at 181, 84 S.E.2d at 809.

[8] This is used in the context that a person committed has no means of release except by will of the hospital authorities or some other nonjudicial authority.

[9] Hiatt v. Soucek, 240 Iowa 300, 36 N.W.2d 432 (1949).

[10] 257 N.C. 593, 126 S.E.2d 489 (1962).

[11] This procedure is not to be confused with admittance by medical certification as provided in N.C. GEN. STAT. § 122-62.1 (Supp. 1961) or emergency commitment as provided in N.C. GEN. STAT. § 122-57 (Supp. 1961).

[12] "[A]n illness which so lessens the capacity of the person to use his customary self control, judgement, and discretion in the conduct of his affairs, and social relations as to make it necessary and advisable for him to be under treatment, care, supervision, guidance, or control." N.C. GEN. STAT. § 122-35.1 (1958).

[13] N.C. GEN. STAT. § 122-42 (1958).

[14] N.C. GEN. STAT. § 122-43 (Supp. 1961). The physicians cannot be related by blood or marriage to the proposed patient or directly connected with the hospital of commitment. *Ibid.*

[15] N.C. GEN. STAT. § 122-46 (Supp. 1961).

[16] *Ibid.* The period is originally for sixty days. This may be extended another four months upon request of the hospital authorities and by order of the clerk. N.C. GEN. STAT. § 122-46.1 (Supp. 1961). This procedure was followed in the principal case. 257 N.C. at 594, 126 S.E.2d at 489.

(5) At the end of the observation period, filing of a report by the hospital authorities stating their conclusions;[17]

(6) Indeterminate commitment ordered by the clerk if the "facts may warrant."[18]

After more than two years of treatment a writ of habeas corpus was filed. The writ challenged the legality of the petitioner's confinement on the grounds that indeterminate commitment, following the observation period, without benefit of a prior notice and right to a second hearing, violated her rights under article I, section 17 of the constitution of North Carolina, and under the due process clause of the 14th amendment to the Constitution of the United States.[19] The court agreed with this line of reasoning and held that the petitioner was being deprived of her liberty without benefit of due process of law.[20] As interpreted it would appear that this adherence to strict due process requirements has placed a considerable barrier in the path of future advances in realistic mental health legislation.

There is a split of authority with regard to due process requirements[21] and the mentally ill person's right to notice and hearing. The majority[22] holds that commitment without judical authority,[23] and thus without notice and hearing, does not violate procedural due process, if there is an immediate right of appeal,[24] or provisions

[17] N.C. GEN. STAT. § 122-46.1 (Supp. 1961).

[18] *Ibid.*

[19] 257 N.C. at 595, 126 S.E.2d at 490-91.

[20] *Id.* at 597, 126 S.E.2d at 492. The court interpreted the power granted the clerk to indeterminately commit "as the facts may warrant" under N.C. GEN. STAT. § 122-46.1 (Supp. 1961) to mean that the patient must first be given notice and a right to a hearing. Thus the court upheld the constitutionality of the statute but condemned the interpretation.

[21] For a complete and intricate analysis of this subject see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criterion,* 66 YALE L.J. 319 (1957).

[22] Kadish, *A Case Study in the Significance of Procedural Due Process—Institutionalizing the Mentally Ill,* 9 WESTERN POLITICAL Q. 93, 111 (1956); *Hearings Before the Subcommittee on Constitutional Rights on the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. 92-3 (1961) [hereinafter cited as 1961 *Hearings*].

[23] A procedure is not judicial unless the court has discretion to determine whether or not an individual should be committed. "The mere fact that a judge must sign a hospitalization order or make a perfunctory examination of the hospitalization papers has not been sufficient to classify the procedure as judicial." LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 23.

[24] Payne v. Arkebauer, 190 Ark. 614, 80 S.W.2d 76 (1935); *Ex parte* Scudamore, 55 Fla. 211, 46 So. 279 (1908); *In re* Bryant, 214 La. 574, 38 So. 2d 245 (1948); Dowdell, Petitioner, 169 Mass. 387, 47 N.E. 1033 (1897); *accord, In re* Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).

for filing a writ of habeas corpus that will test the question of sanity.[25] The minority requires notice and right to a hearing.[26] Most of the minority decisions are distinguishable on the grounds that adequate review procedures were not available.[27] It should be noted that in *all* the cited cases the question before the court was whether or not notice and the right to a hearing is required prior to indeterminate commitment *without* benefit of a prior observation period or prior hearing, both of which were present in *Wilson.*

There has been no prior case law in this jurisdiction concerning this particular point except *In re Boyette.*[28] There the court held unconstitutional a statute permitting a judge to commit a person to a mental hospital after acquittal from a homicide case on the grounds of insanity. The statute in question provided no means of release except by act of the General Assembly. The decision was based on the propositions that the statute provided for no hearing before commitment, and that after commitment there were no provisions for judicial review.

Much of the *Boyette* decision was based upon the latter proposition.[29] It is important to note that at the time of this decision the writ of habeas corpus had not been enlarged[30] and that a person so

[25] Hammon v. Hill, 228 Fed. 999 (W.D. Pa. 1915); Paul v. Longino, 197 Ga. 110, 28 S.E.2d 286 (1943); Hiatt v. Soucek, 240 Iowa 300, 36 N.W.2d 432 (1949); People v. Terrance, 11 N.Y.2d 362, 229 N.Y.S.2d 737, 183 N.E.2d 752 (1962); *Ex parte* Dagley, 35 Okla. 180, 128 Pac. 699 (1912); *In re* Crosswell, 28 R.I. 137, 66 Atl. 55 (1907); McMahon v. Mead, 30 S.D. 515, 139 N.W. 122 (1912).

[26] *In re* Lambert, 134 Cal. 626, 66 Pac. 851 (1901); *In re* Wellman, 3 Kan. App. 100, 45 Pac. 726 (1896); State *ex rel.* Blaisdell v. Billings, 55 Minn. 467, 57 N.W. 794 (1893); State *ex rel.* Fuller v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954). Barry v. Hill, 98 F.2d 222 (D.D.C. 1938) has been frequently cited supporting the minority rule but is distinguishable on the grounds that a commitment statute was not involved.

[27] Ross, *supra* note 2, at 977. The only case that is not clearly distinguishable is State *ex rel.* Fuller v. Mullinax, *supra* note 26. An anomaly of the minority rule is that in some instances the mentally ill person is not required to be actually present at the hearing. *In re* Wellman, *supra* note 26. In line with this reasoning are cases upholding the valadity of substitute notice. See, *e.g.,* Okerberg v. People, 119 Colo. 529, 205 P.2d 224 (1949) (notice to guardian *ad litem*); *In re* Mast, 217 Ind. 28, 25 N.E.2d 1003 (1940) (notice to attorney). *Contra,* Hunt v. Searcy, 167 Mo. 158, 67 S.W. 206 (1902). For states that have statutory provisions utilizing substitute notice see LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 49-51. As to this possibility in North Carolina—*quaere.*

[28] 136 N.C. 415, 48 S.E. 789 (1904).

[29] *Id.* at 423-25, 48 S.E. at 792-93.

[30] With an enlarged writ other courts have held this type of statute constitutional. *E.g., In re* Clark, 86 Kan. 539, 121 Pac. 492 (1912); *Ex parte* Brown, 39 Wash. 160, 81 Pac. 552 (1905).

committed had no means of placing the question of his sanity before any judicial authority.[31] Thus the court in *Wilson* was not bound by precedent.[32]

The court in *Wilson* by refusing to alleviate strict due process restraints in the area of commitment has definitely placed North Carolina in the bare minority. Due process is not so inflexible as to prevent special procedure for special needs.[33] The Supreme Court of the United States has stated that "it would be unwise to construe due process to meaning the strict application of notice and hearing,"[34] but instead should be "adapted to the end to be attained."[35]

What then is the "end to be attained"? The basic consideration should be to serve the medical welfare of the sick while still protecting their rights.[36] In failing to take judicial notice of North Carolina's

[31] *Boyette* has been cited mainly for the proposition that although a person has been committed via defective procedural due process, and thus entitled to discharge, he may temporarily be detained while proper proceedings are initiated to recommit. *E.g.*, Barry v. Hill, 98 F.2d 222 (D.D.C. 1938). This procedure has been highly recommended. 1961 *Hearings* 334. It is interesting to note that this procedure *was not* followed in *Wilson* although there had been ample evidence for a finding that the petitioner was dangerous to herself or others. 257 N.C. at 595, 126 S.E.2d at 490.

[32] See also Petition of Doyle, 16 R.I. 537, 18 Atl. 159 (1889) in which a statute was held unconstitutional that did not permit a hearing prior to commitment. After this decision the writ of habeas corpus was enlarged, as North Carolina has done, and the court ruled that this cured the defect of lack of notice and hearing prior to commitment. *In re* Crosswell, 28 R.I. 137, 66 Atl. 55 (1907). The Missouri court, holding in State *ex rel.* Fuller v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954) that commitment by certification of two physicians violated due process even though provisions for appeal and an enlarged writ were available seems to have been based on precedent. For severe criticisms of this case see 68 HARV. L. REV. 549 (1955) and 31 N.D.L. REV. 94 (1955).

[33] As previously noted the majority of courts that have passed on the question of due process requirements in the commitment field have relaxed the need for notice and hearing. Cases cited notes 24-25 *supra*. Some authority for flexible due process is found under the doctrine of *parens patriae*, in that the legislature, as *parens patriae* may, to some extent, make provisions for the care of those who are unable to care for themselves, as in cases of insane persons and neglected children. *E.g.*, Hammon v. Hill, 228 Fed. 999 (W.D. Pa. 1915). For a criticism of this doctrine see Whitmore, *supra* note 4, at 522 n.18.

[34] Brock v. North Carolina, 344 U.S. 427-28 (1953). See also Moyer v. Peabody, 212 U.S. 78, 84 (1909).

[35] Hager v. Reclamation District, 111 U.S. 701, 708 (1884).

[36] Thus the direction is towards liberalized commitment procedures. See generally GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT, COMMITMENT PROCEDURES (No. 4, 1948); Kadish, *A Case Study in the Significance of Procedural Due Process—Institutionalizing the Mentally Ill*, 9 WESTERN POLITICAL Q. 93 (1956); Slovenko & Super, *The Mentally Disabled, the Law, and the Report to the American Bar Foundation*, 47 VA. L. REV. 1366 (1961); Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS

constantly improving mental health facilities[37] and to couple this with the realistic appeal procedure provided for by an enlarged writ, the court completely ignored the patient's medical rights. The fact that notice and a hearing may evolve into a painful traumatic experience for a mentally ill individual is now fully appreciated.[38] Notice to a paranoid may cause him to flee, while notice to a depressive may cause suicide.[39] North Carolina, as a result of *Wilson* now requires notice to be given not once, but twice. No other state so holds.

Has the court, by requiring application of strict due process, really given a person more protection from being "railroaded"?[40] Many states employ the same procedure for indeterminate commitment that North Carolina utilizes for observational purposes.[41] In this state the observation period is utilized to further insure that a sane person is not being deprived of his liberty. Only after the hospital authorities have had a chance to observe the individual's behavior and have certified to the clerk that he is mentally ill is a patient indeterminately committed. It is questionable that a second notice and hearing at the end of the observation period would serve any useful purpose. The only new evidence likely to be introduced is the psychiatrists' testimony concerning the patient's behavior while in the institution.[42] This testimony will be exactly the same as is

L. REV. 307 (1946); Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178 (1947).

[37] North Carolina is ranked twenty-fourth as to adequacy of physicians in public mental hospitals. 1961 *Hearings* 283. The state also has one of the highest percentages of first patient releases. Over eighty per cent of first admission patients are released within ninety days. *Id.* at 176. For a complete survey of the present status of North Carolina mental hospitals see STATISTICAL AND RESEARCH DIVISIONS OF N. C. HOSPITALS BOARDS OF CONTROL, TRENDS IN HOSPITALIZATION FOR MENTAL ILLNESS (1961).

[38] See, *e.g.*, GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 295 (1952); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT, COMMITMENT PROCEDURES, *op. cit. supra* note 36; Ross, *supra* note 2, at 966.

[39] 1961 *Hearings* 81.

[40] See generally Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 293-97 (1953). Although the popular fears of "star chambers" and "lettres de cachet" are still prevalent, "railroading" as such, is almost nonexistent. Dr. Eugene Hargrove, Commissioner of Mental Health, has stated that in the seventeen years he has been associated with mental institutions he has not known of *one single case.* 1961 *Hearings* 176. This is also true in other jurisdictions. See, *e.g.*, Slovenko & Super, *supra* note 36, at 1368. For a good example of a "railroading" case see Shields v. Shields, 26 F. Supp. 211 (W.D. Mo. 1939).

[41] See LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 44-106; Ross, *supra* note 2, at 1008-16. Other states have provisions for observational commitment before indeterminate commitment, but the observation period is initiated without notice and hearing.

[42] For the proponents of a second hearing it should be noted that the

now forwarded to the clerk requesting indeterminate commitment. If a sane person is by some chance being "railroaded" there is little doubt that he would be released by the hospital or would have applied for a writ under the doctrine of *In re Harris*[43] by or before the time that the observation period is terminated.

The effect of this decision is twofold: (1) A more expensive court procedure is now required to commit, and (2) a definite hindrance has been introduced to the effective care and treatment of patients through the adverse effect of a second notice and possible second hearing.

The possibilities of what course of action the next General Assembly will take in light of this decision are innumerable. One possibility already under consideration is to do away altogether with the observation period and have one hearing to decide indeterminate commitment.[44] Thus the final result of a decision meant to protect the constitutional rights of the mentally ill may well cause them to lose one safeguard not afforded in any other state—an observation period after hearing before final commitment.

GEORGE C. COCHRAN

Real Property—Restrictive Covenants—Effect of Change of Conditions on Enforcement.

It is well established that under appropriate circumstances equity will invalidate privately imposed restrictive covenants limiting the use of land in unified subdivisions.[1] In general this is deemed appro-

second hearing will be conducted by the same clerk that made the original commitment. N.C. GEN. STAT. § 122-46.1 (Supp. 1961). The idea of a "last ditch stand" with a battery of lawyers cross-examining the hospital psychiatrists in order to secure the patient's release is inconceivable. If the clerk had enough evidence to commit for the observation period it is extremely doubtful that his decision will change, for the psychiatric testimony is in addition to the other positive evidence previously received and will serve to bear out what the clerk had already decided—that the person is mentally ill.

[43] 241 N.C. 179, 84 S.E.2d 808 (1954). It should be noted that there is dictum in the principle case indicating that the court did not fully consider the enlarged writ and its implications. 257 N.C. at 597, 126 S.E.2d at 492.

[44] Durham Morning Herald, Sept. 8, 1962. p. 1B, col. 6.

[1] This can result from two types of actions: affirmative relief granted to parties seeking to have the restrictions lifted, or refusal of the court to issue an injunction preventing violation of the restrictions. Either method being equitable relief, may or may not also preclude a remedy at law. Some courts hold the decree in equity extinguishes the covenant entirely, while others maintain that mere unenforceability in equity does not preclude an action at law for damages for breach of covenant. 2 AMERICAN LAW OF PROPERTY § 9.39, at 444-45 (Casner ed. 1952); 13 N.C.L. REV. 518 (1935).

priate where the factors justifying the original imposition of the restrictions have so changed that it is unconscionable to give further effect to them.[2]

Application of this general principle involves resolution of two subsidiary problems. First, where must the change of conditions, making enforcement of the restrictions inequitable, occur? A basic divergence of opinion has arisen as to whether a sufficient change must have occurred within the restricted tract itself, whether changes in the neighborhood surrounding the covenanted tract, considered alone, justify nonenforcement, or whether the two may be considered together to require non-enforcement. Second, and independent of the first problem, is it appropriate to invalidate the restrictions piece-meal when only some of the lots of a subdivision are directly affected by the change? Here too, conflicting answers are found.

The North Carolina Supreme Court, in *Tull v. Doctors Building, Inc.*,[3] recently held that no change of conditions occurring outside the covenanted area is to be considered in deciding whether restrictions are to be lifted.[4] In the same decision it upheld the lower court's expressed opinion that in any event release from restrictions cannot be made piece-meal.[5] These two holdings when applied in combination represent the most conservative approach to the matter possible, short of flat refusal to deny enforcement for any reason except initial invalidity. Since few if any other courts appear to follow this extreme approach,[6] an examination of its evolution in North Carolina decisions and an evaluation of its practical operation is in order.

Because change of conditions within the area necessarily involves factors making available the equitable defenses of acquiescence, estoppel, or laches against the party opposing invalidation, such change furnishes the strongest possible case for lifting the restric-

[2] See generally Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927); 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952); 5 POWELL, REAL PROPERTY § 683-84 (1962); 3 TIFFANY, REAL PROPERTY § 871-75 (3d ed. 1939); Annot., 4 A.L.R.2d 1111 (1949).

[3] 255 N.C. 23, 120 S.E.2d 817 (1961).

[4] *Id.* at 38, 120 S.E.2d at 827 (conclusion of law 2).

[5] *Id.* at 41, 120 S.E.2d at 829-30 (discussion of law 5).

[6] While there is authority for either one holding or the other in a large number of cases, the combination of the two is rarely announced. Rather, as is suggested in 2 AMERICAN LAW OF PROPERTY § 9.39, at 447 (Casner ed. 1952) courts denying piece-meal destruction commonly permit the entire subdivision to be released by a surrounding change. See Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944); Talles v. Rifman, 189 Md. 10, 53 A.2d 396 (1947); Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892).

tions.[7] It is quite clear then why the courts, including North Carolina, see change of conditions within as furnishing the strongest single ground for relief.[8] Still, many courts allow a change of conditions outside the restricted tract, considered alone, to be sufficient cause for the invalidation,[9] and most will take such change into consideration when it is coupled with some change within the restricted subdivision.[10]

North Carolina seems unequivocally committed to the rule that even a substantial change in the surrounding neighborhood will not warrant release from the restrictions when there is not also evidence of inside change.[11] However, where there has been evidence of some change within the tract, other North Carolina cases have held that this, considered in conjunction with evidence of substantial change outside the area, justifies lifting the restrictions.[12] In these latter

[7] There is a much more equitable basis for denying injunctive relief to a complaining party himself at fault in respect to the changed condition within, whether that fault be characterized as acquiescence, laches, estoppel or unclean hands, than for denying it to one who has had no means of control over the development of a situation which he now seeks to halt.

Change of conditions *within* the area is probably more aptly characterized generically by the term "abandonment," rather than "change of conditions." The latter term should be reserved to define occurrences outside the area. 2 AMERICAN LAW OF PROPERTY § 9.39, at 445-46 (Casner ed. 1952).

[8] 32 C.J. *Injunctions* § 328 & n.40 (1923); 43 C.J.S. *Injunctions* § 87b(4)(f) (1945).

[9] See, *e.g.*, Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Daniels v. Notor, 389 Pa. 510, 133 A.2d 520 (1957); Johnson v. Poteet, 279 S.W. 902 (Tex. Civ. App. 1925) where injunctions seeking to prevent violations of covenants were denied, and Wolff v. Fallon, 269 P.2d 630 (Cal. Dist. Ct. App. 1954), *aff'd*, 44 Cal. 2d 695, 284 P.2d 802 (1955); Norris v. Williams, 189 Md. 73, 54 A.2d 331 (1947); and Welitoff v. Kohl, 105 N.J. Eq. 181, 147 Atl. 390 (Ct. Err. & App. 1929) where affirmative relief was granted.

[10] For cases wherein injunction against violation of residential restrictive covenants was denied because changes had occurred both inside and outside the restricted tract see Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933); Harrigan v. Mulcare, 313 Mich. 594, 22 N.W.2d 103 (1946); Mathews Real Estate Co. v. National Printing and Engraving Co., 330 Mo. 190, 48 S.W.2d 911 (1932); Wood v. Knox, 277 P.2d 982 (Okla. 1954). For decisions granting affirmative relief see Alexander v. Title Ins. and Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (Dist. Ct. App. 1941); Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938); Nashua Hospital Ass'n v. Gage, 85 N.H. 335, 159 Atl. 137 (1932); Overton v. Ragland, 54 S.W.2d 240 (Tex. Civ. App. 1932).

[11] See Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Brenizer v. Stephens, 220 N.C. 395, 17 S.E.2d 471 (1941).

[12] Shuford v. Asheville Oil Co., 243 N.C. 636, 91 S.E.2d 903 (1956); Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932); Higgins v. Hough, 195 N.C. 652, 143 S.E. 212 (1928); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927).

cases, although both were considered, there was no indication of which factor was decisive, nor that either standing alone could have been. There was then, until *Tull,* at least a possibility under this line of cases that a substantial change outside could have tipped the balance in favor of invalidation when coupled with change within which, standing alone, would not have sufficed. The significance of *Tull* in this regard is that it may indicate the end of this possibility,[13] for there the court flatly refused to consider evidence of outside change although there was also evidence of some change within.[14]

When faced with the problem of piece-meal destruction of the restrictions, some jurisdictions allow them to be lifted on a few lots at a time as they are affected.[15] On the other hand, a majority of courts require the covenants to be invalidated *in toto* or not at all.[16] Unlike North Carolina, however, many jurisdictions which reject such step-by-step lifting of restrictions do hold that an outside change will warrant release from the restrictions even though there is no change of circumstances within the restricted tract.[17]

[13] Advocates seeking to have an outside alteration considered in conjunction with some changes within in spite of Tull v. Doctors Building, Inc., may be aided by the fact that all of the North Carolina authority relied upon in that case consisted of cases showing absolutely no change within the covenanted area. Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942); Brenizer v. Stephens, 220 N.C. 395, 17 S.E.2d 471 (1941). In addition to pointing out that Tull based its decision upon these cases which are distinguishable on the facts, one could also show that there was no mention whatever of the more liberal line of cases in North Carolina whose decisions *were* based on change *both* within *and* in the surrounding area. See cases cited note 12 *supra.* Failure to expressly overrule these decisions should be significant.

[14] The existence of change both inside and outside of the tract is indicated in the findings of fact 20-34. Tull v. Doctors Building, Inc., 255 N.C. at 31-32, 120 S.E.2d at 822-23. At 255 N.C. 39-40, 120 S.E.2d 828-29, the court adjudges the change within to be insufficient to warrant removal of the restrictive covenants. At 255 N.C. 38, 120 S.E.2d 827, in denying consideration of the outside changes the court quotes from the Brenizer case: "It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place within the covenanted area." Brenizer v. Stephens, 220 N.C. 395, 399, 17 S.E.2d 471, 473 (1941).

[15] Wolff v. Fallon, 269 P.2d 630 (Cal. Dist. Ct. App. 1954), *aff'd,* 44 Cal. 2d 695, 284 P.2d 802 (1955); Downs v. Kroger, 200 Cal. 743, 254 Pac. 1101 (1927); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930); Cushing v. Lilly, 315 Mich. 307, 24 N.W.2d 94 (1946).

[16] Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931); Boston-Edison Protective Ass'n v. Goodlove, 248 Mich. 625, 227 N.W. 772 (1929); Rombauer v. Compton Heights Christian Church 328 Mo. 1, 40 S.W.2d 545 (1931); Martin v. Cantrell, 225 S.C. 140, 81 S.E.2d 37 (1954).

[17] See, *e.g.,* Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944);

The flat pronouncement against piece-meal lifting in the principal case seems to be North Carolina's first definitive holding on the point. Although a prior case possibly furnishes some basis for piece-meal lifting,[18] the decision on this point in *Tull* is unequivocal.[19] Application of this holding in conjunction with the holding against any consideration of outside changes combine to form a doctrine which invites analysis in terms of its commercial and social utility.

If these two rules are uniformly and inflexibly applied they presumably will equally affect small restricted tracts of two or more lots and large tracts with hundreds of lots. It is obvious that a wholesale change from residential to commercial use of property surrounding a two or three lot subdivision should much more readily warrant releasing all the lots from the restrictions than should a similar

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Esso Standard Oil Co. v. Mullen, 200 Md. 487, 90 A.2d 192 (1952); Page v. Murray, 46 N.J. Eq. 325, 19 Atl. 11 (Ch. 1890).

[18] The opinions of supreme court cases prior to Tull contains no discussion of this point as far as this writer has been able to ascertain. However, Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932), consists of a short opinion affirming the lower court's ruling which released from the restrictions only the two lots affected. The court did not discuss this particular result of their affirmation. However, the superior court judge did dwell on the subject at length.

"It has been seriously suggested that any deviation from the original scheme must of necessity destroy the whole scheme in the whole development. This Court can not arrive at such a conclusion. To do so would be to hold that equity is without power or authority to do exact justice with a nicety. This Court conceives it has been of the very essence of equity in all of its past history to venture into new paths if necessary to discover a way to do exact justice in such fashion that it will work no undue hardship to the other interested parties related to the situation. It is in an effort to reach such an end that this Court holds upon the evidence and the findings of fact that a radical change has been wrought in the area affected by the conditions existing at and near the intersection of McDowell and Morehead Streets, but that this change in this particular area does not change the remainder of the development and does not release the remainder of the development from the original restrictions in reference to residential purposes." Record, p. 46, Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932), *as quoted in* Brief for Plaintiff, p. 14, Tull v. Doctors Building, Inc., 255 N.C. 23, 120 S.E.2d 817 (1961).

[19] "It is not necessary for us to approve or disapprove of the judge's opinion that all of the lots in Block G and Lots 15, 16, and 17 in Block P should be released from the restrictions requiring residential use, but we do concur in his opinion as to the law set forth in conclusion of law 5." Tull v. Doctors Building, Inc., 255 N.C. 23, 41, 120 S.E.2d 817, 829-30. Conclusion of law 5 reads: "The court is of the opinion that Lots 4, 5, 6, 7, 8 in Block G and Lots 15, 16, and 17 in Block P, as shown on plaintiffs' Exhibit 1, should be released from the restrictions requiring residential use; that the court would adjudge that these lots are so released, except for the court's further opinion that the law requires either a complete abrogation of the restrictive covenants on all of the lots in the subdivision, or a complete enforcement of the restrictive covenants as to all of the lots in the subdivision." *Id.* at 34-35, 120 S.E.2d at 825.

change around a much larger residential area. Furthermore, piecemeal lifting has not at all the same practical significance in a small subdivision that it has in a large one, whatever the basis for invalidation.

Another factor which militates against an inflexible application of these two rules arises out of the common practice of developing large subdivisions in successively platted portions of the whole tract under identical restrictions. As a practical matter the residents of one of these subdivisions are apt to consider it a single unit in the sense of its geography and of their social and economic identity of interest as residents.[20] But the North Carolina court considers that for related legal purposes each of the successively platted tracts is a *separate* unit.[21] The question then arises as to whether in application of the *Tull* rule against consideration of changes occurring outside a restricted subdivision, the court will focus on the unified whole or the separate units as the critical area to determine what is "outside." If the separate unit concept is applied, an anomalous situation could result. Abandonment of restrictions in several of these legal units, actually portions of a unified subdivision, could result in a radical change in the very heart of the overall residential district similarly restricted. Yet, the holding in *Tull* inflexibly applied could deny relief to a lot immediately adjacent to the completely changed tract because there had been no change "within the subdivision."

Equity might better be served[22] if some flexibility of doctrine in both regards were maintained to take into account the widely varying

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[20] See generally 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952); 5 POWELL, REAL PROPERTY § 683-84 (1962); 3 TIFFANY, REAL PROPERTY § 871-75 (3d ed. 1939).

[21] In Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949), the court seemingly disposed of this problem with finality in discussing a contention of the defendant. "They assert initially that the Stephens Company had developed Myers Park as a unit composed of its different subdivisions . . . which are merely parts of Myers Park as a whole . . . . The defendants overlook the fact that this identical contention has been expressly rejected by this Court on at least four occasions. McCleskey v. Heinlein, 200 N.C. 290, 156 S.E. 489; Johnson v. Garrett, 190 N.C. 835, 130 S.E. 835; Homes Co. v. Falls, *supra* [184 N.C. 426, 115 S.E. 184 (1922)]; Stephens Co. v. Homes Co., 181 N.C. 335, 107 S.E. 233. The land shown on the map of Blocks 11-C and 11-D of Myers Park 'is in fact, and was designed to be, a separate, distinct and integral subdivision,' bearing no relationship whatever in the present field of law to any other subdivision of Myers Park. Stephens Co. v. Homes Co., *supra*."

[22] See note 18, *supra*.

circumstances under which restricted subdivisions are created, and the widely varying sizes of subdivisions however created.

JAMES M. KIMZEY

Torts—Libel and Slander—Defenses of Qualtified Privilege and Fair Comment

The law early recognized the desirability of encouraging free public discussion and criticism of the official conduct of persons in public life in order to combat corruption. This was severely hampered, however, by the strictures of the common-law actions of libel and slander.[1] In time, the courts devised a defense to these actions sometimes labelled qualified or conditional privilege and sometimes fair comment. Whether these labels carry with them any substantive distinction has been a matter of considerable controversy.

Fair comment embraces within its protection the right to criticize the public conduct of government officers and employees[2] at every level.[3] No comment or criticism, however, is fair if it is made through actual malice.[4] Neither is it fair comment if it is unreasonable or made without an honest purpose.[5] Furthermore, the doc-

[1] See PROSSER, TORTS 572 (2d ed. 1955). Libel and slander generally are actions which have not been blessed by agreement or uniformity of opinion among those learned in the law. Mr. Justice Black has said: "I have no doubt myself that the provision, [U.S. CONST. amend. I] as written and adopted, intended that there should be no libel or defamation law in the United States . . . just absolutely none so far as I am concerned." *Justice Black & First Amendment Absolutes: A Public Interview,* 37 N.Y.U.L. REV. 549, 557 (1962). Compare the advocacy of absolute liability for defamation even, in certain situations, where the statements are in fact true in Riesman, *Democracy and Defamation: Fair Game and Fair Comment II,* 42 COLUM. L. REV. 1282 (1942).

[2] This comment is limited in scope to a discussion of the doctrine of fair comment as it relates to public officers and candidates. Other areas in which it has been applied are: works of art and literature, Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); RESTATEMENT, TORTS § 609 (1938); the commodities, wares and merchandise of those who appeal to the public to buy, Schwarz Bros. Co. v. Evening News Publishing Co., 84 N.J.L. 486, 87 Atl. 148 (Sup. Ct. 1913); RESTATEMENT, TORTS § 610 (1938); and those in charge of educational, religious and charitable institutions and other organizations in which the public has a substantial interest, Klos v. Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901); RESTATEMENT, TORTS § 610 (1938). See generally 1 HARPER & JAMES, THE LAW OF TORTS 420 (1956).

[3] RESTATEMENT, TORTS § 607 (1938).

[4] Brinsfield v. Howeth, 107 Md. 278, 68 Atl. 566 (1908).

[5] Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); England v. Daily Gazette Co., 143 W.Va. 700, 104 S.E.2d 306 (1958).

trine of fair comment affords no protection for attacks on one's private life or character.[6] Underlying the doctrine is the policy of encouraging government to be more responsive to the electorate by permitting individuals to expose its abuses.[7]

A defamatory statement is qualifiedly or conditionally privileged when made on a privileged occasion,[8] or pursuant to a political, judicial, social, or personal duty.[9] The communication must be made in good faith[10] and with reasonable grounds to believe in its truth.[11] The privilege is destroyed on a showing of either malice[12] or excessive publication.[13]

The authorities are in conflict as to whether fair comment is simply an application of the doctrine of qualified privilege or a separate and distinct defense. A minority of courts make the distinction that qualified privilege is a defense which excuses or justifies defa-

[6] Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957).

[7] Carr v. Hood, 1 Camp N.P. 355 (K.P. 1808); See generally Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949). The doctrine has also been held to be based on the constitutional guarantee of freedom of speech, Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).

[8] The occasion is privileged when the publisher of the defamation and the person receiving it have correlative interests or duties. In Hartsfield v. Harvey C. Hines Co., 200 N.C. 356, 361, 157 S.E. 16, 19 (1931) it was said, "Qualified privilege rests upon the fact of interest or duty. That is to say, if the speaker of the alleged slanderous words has an interest or duty in the subject matter of the conversation, and the hearer has an interest or duty with respect to the subject matter of the conversation, then the doctrine of qualified privilege applies." In the recent case of Ponder v. Cobb, 257 N.C. 281, 295, 126 S.E.2d 67, 78 (1962), the court adopted the definition that a privileged occasion is one "when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter; one on which a privileged person is entitled to do something which no one not within the privilege is entitled to do on that occasion; and it has been said that it is not the publication itself, but the occasion of its publication, that is privileged." 53 C.J.S., *Libel and Slander* § 87 (1948).

[9] Alexander v. Vann, 180 N.C. 187, 104 S.E. 360 (1920).

[10] Alexander v. Vann, *supra* note 9; Gattis v. Kilgo, 128 N.C. 402, 38 S.E. 931 (1901). See generally 53 C.J.S., *Libel and Slander* § 87 (1948).

[11] Alexander v. Vann, 180 N.C. 187, 104 S.E. 360 (1920).

[12] The term malice, as it relates to defamation, has been defined as "not necessarily . . . personal ill will or malevolence; it may be said to exist when it is shown that the publication is made from some ulterior motive and it may be inferred where a defamatory statement is knowingly false or made without any fair or reasonable grounds to believe in its truth, or, at times, from the character and circumstances of the publication itself, but with the exception, probably, that a man's general moral character is presumed to be good until the contrary is shown." State v. Greenville Publishing Co., 179 N.C. 720, 723, 102 S.E. 318, 319 (1920).

[13] Fields v. Bynum, 156 N.C. 413, 72 S.E. 449 (1911).

mation, while fair comment is simply not defamation because only the plaintiff's work, and not the plaintiff himself, has been assailed.[14] But because a showing of malice defeats either defense,[15] the weight of authority views fair comment only as a special application of the general doctrine of qualified privilege.[16]

In jurisdictions which view fair comment and qualified privilege as separate defenses, a distinction can be drawn as to their scope. In these jurisdictions fair comment is available to all members of the public.[17] Qualified privilege, on the other hand, is confined to situations in which the parties share an interest or duty with respect to the subject matter of the alleged defamation.[18] A hypothetical case may clarify the distinction. A shopkeeper (or anyone else) could, with impunity, make derogatory statements concerning the mayor's handling of municipal affairs, protected by his right of fair comment. However, liability would attach where the criticism was directed to the mayor's private life, if it had no bearing on his ability or competence as the city's chief executive. Similarly, the shopkeeper could tell his partner that a certain employee was stealing from them, and the communication would be qualifiedly privileged due to the existence of a common interest in protecting their business. But the result would be otherwise if the same statement were made at a social gathering either to, or by, persons having no legitimate interest or duty in the matter.

More importantly, there may be a procedural difference in the two defenses. As a general rule, where the defendant contends that his statements were protected by a qualified privilege, the plaintiff has the burden of proving *both* express malice *and* falsity in order to defeat the privilege,[19] and some courts apply the same rule where

[14] Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 61 So. 345 (1913); Ott v. Murphy, 160 Iowa 730, 141 N.W. 463 (1913); Bearce v. Bass, 88 Me. 521, 34 Atl. 411 (1896); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Van Lonkhuyzen v. Daily News Co., 203 Mich. 570, 170 N.W. 93 (1918); Cook v. Pulitzer Publishing Co., 241 Mo. 326, 145 S.W. 480 (1912); Merrey v. Guardian Publishing Co., 79 N.J.L. 632, 80 Atl. 331 (Sup. Ct. 1909); Bingham v. Gaynor, 203 N.Y. 27, 96 N.E. 84 (1911); Williams Printing Co. v. Saunders, 113 Va. 156, 73 S.E. 472 (1912).

[15] Tawney v. Simonson, 109 Minn. 341, 124 N.W. 229 (1909); 1 HARPER & JAMES, THE LAW OF TORTS 420 (1956).

[16] RESTATEMENT, TORTS § 606 (1938); Noel, *supra* note 7; Note, 45 VA. L. REV. 772 (1959).

[17] Madison v. Bolton, 234 La. 997, 1026, 102 So. 2d 433, 443 (1958); Kinsley v. Herald & Globe Ass'n, 113 Vt. 272, 277, 34 A.2d 99, 102 (1943).

[18] See note 8, *supra*.

[19] Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919).

the defense of fair comment is interposed.[20] But it has been held that the right of fair comment can be defeated on a showing of *either* express malice *or* falsity.[21]

To complete the picture one writer has taken the position that it is of no consequence which view is accepted, since "there is immunity on either basis."[22]

North Carolina is in accord with the majority view that fair comment is simply one application of the doctrine of qualified privilege and not a distinct defense.[23] In the recent case of *Ponder v. Cobb*[24] the court held that there is a qualified privilege to write defamatory[25] letters to the Governor and the State Board of Elections concerning the conduct of local election officials in a state-wide bond referendum. The trial court charged the jury that while the defendant did have a qualified privilege to lodge his complaint with the Governor and the State Board of Elections, there was no privilege to make the defamatory statements to persons having no authority to afford redress. Therefore, release of these letters to the press was not privileged. On appeal, the supreme court granted a new trial for error in this instruction, holding that the privilege was not destroyed by releasing the letters to newspapers of both general and local circulation. Manifestly, these facts present a case which would, in the minority view, give rise to the defense of fair comment. But our court, following a long line of past decisions,[26] phrased the decision in terms of qualified privilege.

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[20] Pfeiffer v. Haines, 320 Mich. 263, 30 N.W.2d 862 (1948); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264 (1938).

[21] Warren v. Pulitzer Publishing Co., 336 Mo. 184, 78 S.W.2d 404 (1934). In the English practice, the plaintiff may successfully attack qualified privilege by showing express malice, but where the defense of fair comment is raised, the defendant must give negative malice by proving that the comment was fair. Turner v. Metro-Goldwyn-Mayer Pictures, Ltd., [1950] 1 All E. R. 449, 461 (H.L.); Adams v. Sunday Pictorial Newspapers, Ltd., [1920] 1 K.B. 354, 359; See generally 24 HALSBURY'S LAWS OF ENGLAND, *Libel & Slander* § 131 (3d ed. 1958).

[22] PROSSER, TORTS 619 (2d ed. 1955).

[23] While no case has been discovered expressly repudiating the latter view, in Yancey v. Gillespie, 242 N.C. 227, 229, 87 S.E.2d 210, 212 (1955), the court set out the classic definition, couched in terms of qualified privilege: "Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written maliciously."

[24] 257 N.C. 281, 126 S.E.2d 67 (1962).

[25] Qualified privilege is a defense by which defamation is excused or justified, and not an assertion that the publication was non-defamatory. Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955).

[26] In North Carolina, qualified privilege has been found in these situations:

There is a further divergence of judicial opinion on whether qualified privilege is available where the defamation of a public official involves a misstatement of fact. According to the majority the privilege is limited to comment, criticism, and opinion, and does not protect a false assertion of fact.[27] There is a growing minority view, however, that a misstatement of fact may nonetheless be privileged where the defendant, on reasonable grounds, and after diligent inquiry to determine the truth, makes the statement in good faith.[28] North Carolina followed the minority position in *Lewis v. Carr*,[29]

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a newspaper article accusing the chairman of the county board of elections of using county funds to pay his expenses to the State Teacher's Assembly, based on false affidavits of two bank employees stating that they had drawn the vouchers for the plaintiff, Lewis v. Carr, 178 N.C. 413, 72 S.E. 449 (1911); an editorial accusing the plaintiff of being unfaithful and criminally negligent in the execution of his duties as sheriff, State v. Greenville Publishing Co., 179 N.C. 720, 102 S.E. 318 (1920); a newspaper report that a mayor had wasted municipal funds in purchasing a tract of land, Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955); a letter to the Superintendent of the Census alleging that the plaintiff, one of the appointed enumerators, had murdered two soldiers, and had defrauded the defendant out of his election to state office, Ramsey v. Cheek, 109 N.C. 270, 13 S.E. 775 (1891). For application of the doctrine of qualified privilege generally, see Gattis v. Kilgo, 128 N.C. 402, 38 S.E. 931 (1901); Hartsfield v. Harvey C. Hines Co., 200 N.C. 356, 157 S.E. 16 (1931); and Riley v. Stone, 174 N.C. 588, 94 S.E. 434 (1917).

On the other hand, the court has held the following not to be privileged: a letter written to the Sheriff of Pitt County concerning the conduct of the plaintiff, a Deputy Sheriff of Hertford County, Alexander v. Vann, 180 N.C. 187, 104 S.E. 360 (1920); a post card sent by the superintendent of public instruction of Yadkin County to the corresponding official in Davie County accusing the Treasurer of Davie County of embezzlement, Logan v. Hodges, 146 N.C. 38, 59 S.E. 349 (1907); and a postmaster's defense of his administration, where malice was shown, Newberry v. Willis, 195 N.C. 302, 142 S.E. 10 (1928). For other cases holding that there was no qualified privilege see Elmore v. Atlantic C.R.R., 189 N.C. 658, 127 S.E. 710 (1925); and Scott v. Harrison, 215 N.C. 427, 2 S.E.2d 1 (1939).

[27] The jurisdictions which take this view are Alabama, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. Annot., 150 A.L.R. 358 (1944).

[28] Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281 (1908) is the leading case. There, Justice Burch, in a rhetorical moment, set out the rationale for the minority view when he said, "The people have good authority for believing that grapes do not grow on thorns nor figs on thistles." *Id.* at 739, 98 Pac. at 291. *Accord,* Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1923); Cline v. Wallace, 144 Kan. 730, 62 P.2d 907 (1936); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264 (1938); Lafferty v. Houlihan, 81 N.H. 67, 121 Atl. 92 (1923); Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943). See generally PROSSER, TORTS 622 (2d ed. 1955); Note, 23 GA. B.J. 421 (1960).

[29] 178 N.C. 578, 101 S.E. 97 (1919).

holding that "In cases of qualified privilege . . . proof of falsity does not *per se* raise a presumption of malice . . ." and thereby defeat the privilege.[30]

In rejecting any distinction between the defenses of qualified privilege and fair comment the North Carolina Supreme Court has adopted a rule of law which, at very least, has the virtue of simplicity, facilitating understanding and application by the bar and the courts. By extending the defense of qualified privilege to protect misstatements of fact, under certain circumstances, the forthright citizen is encouraged, and the litigious plaintiff is hopefully dissuaded. When reviewed in light of the current trend "not to give the language of privileged communications too strict a scrutiny,"[31] this area of the law would seem to be in a state which should be applauded.

ROBERT G. BAYNES

[30] In the most recent case, Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962), both Lewis v. Carr, *supra* note 29, and Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281 (1908), are cited and approved. See note 28, *supra*.

[31] Gattis v. Kilgo, 128 N.C. 402, 412, 38 S.E. 931, 935 (1901).