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NOTES AND COMMENTS

Federal Income Taxation—The Ups and Downs of the Education Expense Deduction

Introduction

Each year an increasing number of men and women in the United States are returning to college or business school in order to improve themselves in their chosen field of endeavor or to fulfill a requirement of their employer. Under the present Treasury regulations[1] some are allowed to deduct the costs of this additional education as an "ordinary and necessary" expense incurred in the carrying on of their trade or business, while others are not. Because of the close line which has been drawn, it is often difficult for a taxpayer to decide if his educational expenses fall into the deductible or non-deductible category.[2]

The objective of this discussion is to trace the development of the education expense deduction and to look at the present day application of the so-called "liberalized" regulations[3] by the Internal Revenue Service and our courts.

The Hill Case

Prior to 1950 there was virtually no deduction for education expenses except in fringe areas.[4] These deductions were disallowed by the courts on the ground of being either personal expenses[5] or

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[1] Treas. Reg. § 1.162-5 (1958).

[2] Generally the costs incurred for undergraduate college education and basic professional training have never been deductible, and this comment is not a discussion of this point. See Louis Aronin, 30 P-H Tax Ct. Mem. 993 (1961); Knut F. Larson, 15 T.C. 956 (1950); Lewis v. Commissioner, 8 T.C. 770, *aff'd*, 164 F.2d 885 (2d Cir. 1947); T. F. Driscoll, 4 B.T.A. 1008 (1926); J. D. Bowles, 1 B.T.A. 584 (1925). *But cf.* Michaelson v. United States, 203 F. Supp. 830 (D. Wash. 1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963).

[3] *Supra* note 1.

[4] Alexander Silverman, 6 B.T.A. 1328 (1927) (college chemistry department head allowed deduction for attending scientific convention); Marion D. Shutter, 2 B.T.A. 23 (1925). Physicians were allowed to deduct expenses incurred while attending meetings and conventions of medical societies, but there is no definite indication that they were of an educational nature. See Robert C. Coffey, 21 B.T.A. 1242 (1931); Cecil M. Jack, 13 B.T.A. 726 (1928).

[5] James M. Osborn, 3 T.C. 603 (1944) (no deduction allowed professor for doing scholarly research); T. F. Driscoll, 4 B.T.A. 1008 (1926) (no

non-depreciable assets.[6]

The first significant break-through in this area came in the case of *Nora Payne Hill.*[7] The taxpayer was a school teacher who was required by state law to renew her teaching certificate every ten years. In order to meet this requirement she had to pass an examination on five books *or* complete three hours of college credit in courses which were acceptable to the school board. She chose the latter. This choice did not increase her salary since she was already receiving the maximum allowed. The taxpayer claimed a deduction for the expenses which she incurred on account of attending college.[8] She argued that the expenses were ordinary and necessary expenses incurred in conducting her trade or business as a teacher in the public schools. She contended that the additional education made it possible for her to meet the requirements of the state law regarding renewal of her teaching certificate and helped her to sharpen the tools of her trade, *i.e.,* to maintain, not to better, the status which she had already achieved.

The Commissioner contended that the costs incurred by the taxpayer were personal in nature and not "ordinary and necessary"[9] business expenses. He relied on a 1921 Office Decision,[10] stating that costs incurred by teachers attending summer school were personal and non-deductible, and on the Treasury regulations then in force.[11]

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deduction for voice lessons anticipating professional engagements); Jay N. Darling, 4 B.T.A. 499 (1926) (no deduction allowed cartoonist for incidental expenses while studying sculpturing).

The Commissioner acquiesced in this position at all times. O.D. 984, 5 CUM. BULL. 171 (1921) (expenses incurred by doctors in taking post-graduate courses are personal); O.D. 892, 4 CUM. BULL. 209 (1921) (expenses of teachers attending summer school are personal). See also Treas. Reg. 111, § 29.23(a)-15(b) (1943); Treas. Reg. 103, § 19.23(a)-15(b) (1940).

[6] This idea came about by way of dictum in Welch v. Helvering, 290 U.S. 111 (1933), where Justice Cardozo said: "Reputation and learning are akin to capital assets, ... For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business." *Id.* at 115-16.

[7] 13 T.C. 291 (1949).

[8] The deduction claimed was for room rent, traveling expense, tuition, and the estimated difference between cost of living at school and at home.

[9] For good discussions of the legal definition of an "ordinary" expense see Deputy v. DuPont, 308 U.S. 488, 495-96 (1940); Welch v. Helvering, 290 U.S. 111, 114 (1933).

[10] O.D. 892, 4 CUM. BULL. 209 (1921).

[11] Treas. Reg. 111, § 29.23(a)-15(b) (1943).

The Tax Court held for the Commissioner. The court stated that the taxpayer had not overcome the presumptively correct determination by the Commissioner that the expense was a personal one. The inference was made that since the taxpayer's certificate had expired she might not have been "employed" at the time she took the summer school courses, but rather incurred the expense to qualify for re-employment. The court also stated that for an expense to be "ordinary" it must be one of common or frequent occurrence in the particular occupation. In this instance it could not be assumed that teachers ordinarily attend summer school to obtain a renewal of their certificates when another method was available, *i.e.,* passing an examination on five books.

The Fourth Circuit Court of Appeals reversed.[12] The court said that "clearly, the very logic of the situation here shows that she went to Columbia *to maintain her present position, not to attain a new position; to preserve, not to expand or increase; to carry on, not to commence.* Any other view seems to us unreal and hypercritical."[13]

Thus, as a result of *Hill,* deductions for educational expenses were allowed if the education was undertaken to enable the taxpayer to meet a requirement necessary for the maintenance of his *present* position. However, once it appeared that the taxpayer was seeking to attain a *new* position, the deduction was to be disallowed.

THE TREND FOLLOWING HILL

After *Hill* the Commissioner promulgated I.T. 4044[14] which modified the old 1921 Office Decision and allowed *Hill* to be followed where the facts were similar. This ruling stated that where a teacher incurred expenses in order to maintain her position, they would be deductible as ordinary and necessary business expenses. However, where the expenses were "incurred for the purpose of obtaining a teaching position, or qualifying for permanent status, a higher position, an advance in the salary schedule, or to fulfill the general cultural aspirations of the teacher,"[15] they will be deemed personal expenses and not deductible.

In *Manoel Cardozo*[16] the Tax Court was called on to apply the guidelines set out in *Hill* and in I.T. 4044. Here, the taxpayer, a

[12] Hill v. Commissioner, 181 F.2d 906 (4th Cir. 1950).
[13] *Id.* at 909. (Emphasis added.)
[14] 1951-1 CUM. BULL. 16.
[15] *Id.* at 17.
[16] 17 T.C. 3 (1951).

university professor, took a trip to Europe for the purpose of study and research. It was not necessary for him to take this trip in order to retain his position at the university. Indeed, the petitioner himself contended that the trip was undertaken to better equip himself to perform the duties of his present employment, to increase his prestige, and to attract opportunities in the fields of scholarship and education by improving his reputation for scholarship and learning. The court stated that neither *Hill* nor I.T. 4044 would allow the deduction asked for by the taxpayer.[17] The fact was stressed that *Hill* required the taxpayer to incur the expenses either to maintain, preserve, or carry on his present position. Since the taxpayer in this instance was not *required* to make the trip for any of these purposes, the deduction was not allowed.[18]

In *George G. Coughlin*[19] the petitioner was an attorney who handled tax matters in the course of his general practice. He claimed a business expense deduction for expenses incurred while attending the New York University Institute on Federal Taxation. The Tax Court denied the deduction because the taxpayer's objective was of a personal nature. The Second Circuit Court of Appeals in reversing[20] indicated that the situation presented was analogous to *Hill.*

[17] Neither is a deduction allowed in connection with travel and study expenses incurred by a teacher on sabbatical leave unless the undertaking is required by the school for the maintenance of the teacher's position. Rev. Rul. 55-412, 1955 CUM. BULL. 318.

[18] In Knut F. Larson, 15 T.C. 956, 958 (1950), the taxpayer agreed that the studies for which the deduction was claimed increased his earning capacity, and this, said the court, was enough to distinguish the case from *Hill.* The court said: "Thus, whether the expenses were undertaken as purely personal matters to improve petitioner's education and cultural attainments or in order to achieve improvement in his professional status . . . the result would be identical."

See Samuel W. Marshall, Jr., 24 P-H Tax Ct. Mem. 797 (1955), where the deduction was disallowed for music lessons to qualify the taxpayer for a position as a music teacher. This question was not raised on appeal. 240 F.2d 185 (5th Cir. 1957). In Rhonda Fennell, 22 P-H Tax Ct. Mem. 460 (1953), a deduction was allowed for expenses incurred by a librarian who, because of a ruling made by the Tennessee State Board of Education, had to have additional credits in library science courses to retain her position when the school in which she was employed exceeded a certain average daily attendance. See also Richard Henry Lampkin, 21 P-H Tax Ct. Mem. 507 (1952) (no deduction allowed for expenses incurred in connection with a doctor's dissertation); Fred A. DeCain, 20 P-H Tax Ct. Mem. 535 (1951) (no deduction for trips of an educational nature).

[19] 18 T.C. 528 (1952). Four judges dissented without opinion.

[20] Coughlin v. Commissioner, 203 F.2d 307 (2d Cir. 1953). Also see Anthony E. Spitaleri, 32 T.C. 988 (1959) (no deduction for expenses incurred by a practicing accountant to take a law school correspondence

The court felt that the only difference between the two cases was in the degree of necessity which prompted the incurrence of the expenditures. The court stated:

> It was a way well adapted to fulfill his professional duty to keep sharp the tools he actually used in his going trade or business. It may be that the knowledge he thus gained incidentally increased his fund of learning in general and, in that sense, the cost of acquiring it may have been a personal expense; but . . . the immediate, over-all professional need to incur the expenses in order to perform his work with due regard to the current status of the law so overshadows the personal aspect that it is the decisive feature.[21]

In *Robert M. Kamins*[22] the taxpayer, who had been hired as an instructor by a university on a year to year basis, attempted to deduct a portion of the cost of getting a doctorate degree. The understanding between the taxpayer and his employer was that he would substantially complete his qualifications for a doctorate degree before a permanent contract of employment would be offered. Nevertheless, the taxpayer was appointed to a permanent position before completing the necessary prerequisite. In arguing for the allowance of the deduction, the taxpayer contended that he was in fact "maintaining" his position as set forth in *Hill* and I.T. 4044, and that the requirement of completing his doctorate was a condition subsequent to the attaining of the teaching position. The Tax Court disallowed the deduction. In its opinion it referred to a letter from a university official which stated that the degree was essential to the retention of the position. The court stated that even though the taxpayer was hired on a permanent basis before completion of his work, still, he was not fully and completely established in his chosen profession until he attained the doctorate degree. On this latter ground the case was distinguished from *Hill*.[23]

course); Musser v. United States, 1957-1 U.S. Tax Cas. ¶9603 (N.D. Cal.) (deduction allowed for expenses incurred in attending a professional seminar).

[21] Coughlin v. Commissioner, 203 F.2d 307, 309 (2d Cir. 1953).

[22] 25 T.C. 1238 (1956).

[23] In Richard Seibold, 31 T.C. 1017 (1959), both husband and wife were school teachers. The husband held a permanent certificate permitting him to teach music, and his wife held a temporary certificate to teach the same subject. Both taxpayers took a European trip which included a two week course at the University of Geneva. The husband did not attend the course but was given two hours of credit toward his inservice requirement upon the

In *Clark S. Marlor*[24] the petitioner was hired as a tutor by the Board of Education of New York City. The board had a rule which provided that a tutor who did not meet the requirements for the position of instructor within five years from the date of his appointment would neither be eligible for promotion to the rank of instructor nor eligible for reappointment as a tutor. To meet this requirement a tutor had to demonstrate substantial progress toward a Ph.D. degree. In 1952 the petitioner claimed a deduction for expenses incurred in progressing towards his Ph.D. and contended that he incurred the expenses to retain his position as a tutor. The Tax Court, with three judges dissenting, upheld the Commissioner's contention that he expended the money in order to qualify himself for a higher rank. The dissent expressed the position that the expenditures were made for a *dual* purpose, *i.e.,* to qualify for a permanent position and to retain his temporary appointment, with the latter of the objectives being the more immediate. Thus, the petitioner's position is supported by *Hill.* In a per curiam reversal, the Second Circuit Court of Appeals said it agreed in all respects with the dissenting opinion of the Tax Court.[25]

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submission by him of a detailed report indicating the places he visited on the trip and his ideas of the benefits he attained from the trip. The Tax Court in rejecting the deduction of the husband's expenses said that this was merely a sightseeing trip and was not an "ordinary" way for a teacher to earn credit hours towards a requirement even though it was a permissible way. The court also pointed out that he did not take the trip essentially to secure the credits since he could have gotten three times the number of credit hours allowed him for no additional cost simply by attending the course at Geneva University. The wife attained six hours of credit by attending the course at Geneva, and she later went on to attain additional credits which together with the credits received at Geneva allowed her to obtain a permanent teaching certificate. In denying the deduction both for the trip to Geneva and the additional costs incurred in attaining the certificate, the court said she made the expenditures in order to acquire a position which she had never held before, *i.e.,* a permanent one. For this reason the court indicated that her situation was analogous to that of the taxpayer in *Kamins* and not *Hill* as was contended.

[24] 27 T.C. 624 (1956).

[25] Marlor v. Commissioner, 251 F.2d 615 (2d Cir. 1958). In Robert S. Green, 28 T.C. 1154 (1957), a deduction was allowed where the taxpayer was required by the local board of education to take additional college courses to maintain her advanced standing. The court was unconcerned with the fact that the taxpayer combined these courses with others in later obtaining a masters degree which led to a pay raise.

In Bistline v. United States, 145 F. Supp. 802 (D. Idaho 1956), the taxpayer was allowed a $435.20 deduction on his 1948 return for unreimbursed travel expenses, hotel costs, and costs for tuition and books to attend a two week course in federal taxation in New York City. The issue of this deduction was not raised on appeal. 260 F.2d 80 (9th Cir. 1958).

THE NEW REGULATIONS UNDER THE 1954 CODE

The discussion up to this point has involved only cases which arose under the 1939 Code. With the enactment of the 1954 Code, a change took place in the education expense deduction area.

To understand the reason for the change which occurred, we must look to the Commissioner's new regulations.[26] This set of regulations was promulgated in 1958 and made to apply retroactively to all 1954 Code years.[27] They came about mainly as a result of pressure being put on Congress for legislative action in this area.[28] At the time of their promulgation, a bill, extremely liberal in nature (although affecting only teachers), was pending before Congress.[29] When the Treasury Department announced the new regulations, the sponsor of the pending legislation stated that they obviated the necessity of enacting his bill.[30] These regulations were hailed as a "liberalization" of the policy governing education expenses, and it was estimated by the National Education Association that they would save teachers alone $20 million annually.[31]

These regulations provide in part as follows:

> (a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:
>
> (1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or
>
> (2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.[32]

As we shall see, the genuine "liberalization" which the taxpayers expected from these regulations was not to be forthcoming. Instead,

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[26] Treas. Reg. § 1.162-5 (1959).

[27] Technical Amendments Act of 1958, § 96, 72 Stat. 1606, 1672.

[28] NEA News Bulletin, May 1958, p. 13, col. 2.

[29] H.R. 4662, 85th Cong., 1st Sess. (1957). This proposed legislation would have allowed a teacher to deduct expenses paid during the taxable year for the furtherance of his education. This deduction would have been limited to $600 per annum and would have been a deduction *from* adjusted gross income. Such a deduction was not to be allowed under this section if it was allowable as a trade or business expense deduction under Section 162 of the 1954 Code.

[30] NEA News Bulletin, *supra* note 28.

[31] *Ibid.*

[32] Treas. Reg. § 1.162-5(a) (1959).

due to the Commissioner's strict and narrow construction of these innovations, the question of educational expenses has become one of the more litigated in the federal income tax field.

THE INITIAL INTERPRETATION OF THE NEW REGULATIONS

John S. Watson[33] was the first case to arise under these new regulations. The taxpayer, a physician who specialized in internal medicine, used "psychosomatic medicine" in his practice. After practicing for a few years, he decided to obtain further training in psychiatry. The training was undertaken on a completely voluntary basis and did not lead to any additional degree or certificate. The taxpayer contended that it would enable him to do a better job of practicing internal medicine. The Commissioner in contesting the deduction allowance argued that the taxpayer had not proven it to be *customary*[34] for a specialist of internal medicine to undertake a course of this type.

The Tax Court in allowing the deduction[35] stated that it was not absolutely necessary for the taxpayer to show that such training was customary. Instead, the court felt that the emphasis should be placed on the *primary purpose* of the additional education. The court stated:

> Though the course was specialized, petitioner was not pursuing it for the purpose of fitting himself to engage in the specialty. He continued to practice as an internist but with skills presumably sharpened by his additional training in analysis and psychiatric techniques.[36]

Less than a year later *Arnold Namrow*,[37] one of the leading cases in this area, came before the Tax Court. The two petitioners were engaged in the practice of psychiatry. They enrolled in a psychoanalytic institute for training in the practice and theory of psychoanalysis. In addition to tuition and fees, they incurred expenditures for a personal analysis and for the services of a supervising analyst. The petitioners contended that this additional training was primarily undertaken to improve their skills as psychiatrists and should be deductible as a business expense. The Commissioner argued that

[33] 31 T.C. 1014 (1959).
[34] This is the guideline set forth in Treas. Reg. § 1.162-5(a) (1958).
[35] Four judges dissented without opinion.
[36] 31 T.C. 1014, 1016 (1959). The court says the taxpayer comes under example (2) of Treas. Reg. § 1.162-5(e) (1959).
[37] 33 T.C. 419 (1959).

psychoanalysis is a medical specialty and not merely a technique of psychiatric therapy and, therefore, the taxpayers were obtaining a new specialty. A majority of the court disallowed the deduction and stated that "the purpose of their attendance . . . was to obtain a new or substantial advancement in position and the training they were undertaking . . . was to satisfy the minimum requirements for each petitioner to establish himself as a practitioner in the special technique of psychoanalysis."[38] The court pointed out that each student at the institute promised not to hold himself out as a psychoanalyst until so authorized by the institute and that most of the patients which the taxpayers would treat by use of psychoanalysis would be referrals from colleagues at the institute. Thus, it would be unlikely for a psychiatrist to establish a psychoanalytic practice unless he attended the institute.

Five judges dissented on the ground that the facts showed psychoanalysis to be merely an intensive form of psychotherapy, the most common form of treatment used by psychiatrists. The dissenting judges felt that the expenses were incurred by the taxpayers to maintain or improve their skills required in the practice of psychiatry rather than to obtain a new specialty.[39]

The disallowance of the deduction was affirmed by the Fourth Circuit Court of Appeals[40] on the ground that the findings of the Tax Court were not so clearly erroneous as to compel a reversal.[41] The court rationalized that the true purpose and effect of an expense governs its deductibility,[42] and the court felt that the taxpayers expended money and time in order to secure recognition in the eyes of their professional brethren as competent psychoanalysts. However,

[38] *Id.* at 434. The majority rejected the argument that the payments made for services of supervising analysts were in effect consultation fees. They held that these fees were incurred as a part of the required supervised clinical work of the institute and any benefit which the patient received from them was incidental.

[39] The dissenters would allow the deduction of the fees paid for supervising analysts as ordinary and necessary business expenses regardless of whether or not all the expenses are deductible education costs.

[40] Namrow v. Commissioner, 288 F.2d 648 (4th Cir.), *cert. denied,* 368 U.S. 914 (1961). For a more recent case in accord where the taxpayer was both a practicing psychiatrist and part-time teacher of psychiatry, see Grant R. Gilmore, 38 T.C. No. 76 (1962).

[41] Where there is sufficient evidence to support the lower court's position, it will not be reversed unless the findings of fact are clearly untenable and erroneous. See Commissioner v. Duberstein, 363 U.S. 278, 290-91 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[42] Weiss v. Stearn, 265 U.S. 242 (1924).

while of no monetary benefit to the taxpayers, the court did conclude that "the basic question of fact, whether psychoanalysis requires the acquisition of a new skill or the improvement of one already possessed, still remains to be answered . . . ."[43] Thus, the result seems to rest upon the fact that psychoanalysis is in effect regarded as a specialty "by a large body of medical opinion without whose approval it cannot be successfully practiced."[44]

Upon an examination of *Watson* and *Namrow,* a distinction, though narrow in scope, can be seen. If the taxpayer is felt by the court to be "running in place," *i.e.,* maintaining his present position, the deduction will be allowed. On the other hand, if the court feels he has "taken a step upwards," *i.e.,* obtained a new and superior position, the deduction will be disallowed.

This distinction, although in line with the rule of *Hill,* appears unharmonious with the supposed liberalization of the education expense deduction. When the new regulations were promulgated, the Treasury Department reportedly stated that the new ruling would cover the "cost of courses taken to keep one's skills on a par with those of colleagues and competitors . . . ."[45] This seems to recognize the fact that in our modern day society a person cannot remain static upon attaining the minimum requirements in his chosen occupation. He must be constantly improving his knowledge, understanding, and ability in his field of endeavor in order to keep up with changing conditions. It appears that neither the Commissioner nor the courts are adequately recognizing this factor in their application of the regulations.

Also, when appraising this area of the tax law, it must be kept in mind that most of the claims for deduction will be for relatively small amounts, and the taxpayers will, in most instances, contest the non-allowance of the deduction, if at all, without legal counsel.[46] Thus, the Commissioner's harsh application of his regulations and

[43] 288 F.2d 648, 652 (4th Cir. 1961).

[44] *Id.* at 653. The contention that the expenses were deductible as medical expenses was rejected unanimously by both the Tax Court and the appellate tribunal.

[45] New York Times, April 4, 1958, p. 23, col. 8.

[46] The deduction is further minimized if the taxpayer is an employee as distinguished from a self-employed individual. In the case of an employee, the education expense deduction will be a deduction from adjusted gross income and can be claimed only if the taxpayer does not elect the standard deduction. See Hartrick v. United States, 205 F. Supp. 111 (N.D. Ohio 1962); William E. Thompson, 26 P-H Tax Ct. Mem. 229 (1957).

the strict view of the courts as exemplified by *Namrow* are making it extremely difficult for the deduction to receive widespread use.

RECENT DEVELOPMENTS

From 1960 to the present, cases in this area have been coming before the courts in rapid succession. In some cases it has been clear that the taxpayer had incurred a non-deductible expense.[47] In other instances the courts have adhered to the so-called "liberal spirit" of the regulations and have allowed the deduction.[48] How-

[47] In Bernd W. Sandt, 30 P-H Tax Ct. Mem. 997 (1961), *aff'd,* 303 F.2d 111 (3d Cir. 1962) and Roger A. Hines, 30 P-H Tax Ct. Mem. 1123 (1961), *aff'd,* 303 F.2d 111 (3d Cir. 1962) the petitioners were research chemists. They were promised jobs as patent chemists if they obtained a legal education. The court reasoned that the primary purpose of the additional education was to obtain a new position, and on this ground the deduction was denied.

It has been held that where government employees hold jobs which do not require legal training, expenses incurred in obtaining a law degree will not be allowed as a deduction. See James J. Engel, 31 P-H Tax Ct. Mem. 1441 (1962); Louis Aronin, 30 P-H Tax Ct. Mem. 993 (1961).

See also Soloman Diamond, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63, 037; Ansis Mitrevics, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) § 63, 067; Frederick T. Simon, 31 P-H Tax Ct. Mem. 1072 (1962); Maude A. Schinnagel, 31 P-H Tax Ct. Mem. 638 (1962); James J. Condit, 31 P-H Tax Ct. Mem. 1446 (1962); Daniel Kates, 31 P-H Tax Ct. Mem. 1545 (1962); Morris S. Schwartz, 30 P-H Tax Ct. Mem. 795 (1961).

[48] In Woodward W. Hartrick, 1963 P-H CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,036, the taxpayer held a provisional teaching certificate and took courses to get the certificate renewed as required by the school board. These courses also led towards a degree in elementary education, but the court refuted the contention of the Commissioner that the taxpayer was meeting the minimum requirements of her trade or business. The court held that the taxpayer was already employed in her trade or business and was undertaking the additional education to maintain her employment, not to obtain it.

In James E. Lane, 31 P-H Tax Ct. Mem. 1089 (1962), the taxpayer took courses related to those which he taught even though they also led to a master's degree. The court concluded that the primary purpose of the expenditure was to improve the quality of the taxpayer's teaching with all other motives being secondary and immaterial.

In Ruth Domigan Truxall, 31 P-H Tax Ct. Mem. 795 (1962), the taxpayer, a teacher holding a permanent certificate, took a trip to Mexico. She received semester hours credit for the trip, which additional credit was needed in order that she could meet the schedule for annual advancements that the school board had set up (*i.e.,* she would have lost salary rights had she not fulfilled this obligation although her certificate and job were not in jeopardy).

In Peggy A. King, 31 P-H Tax Ct. Mem. 551 (1962), the taxpayer incurred expenses in quest of a Ph.D. degree. The taxpayer was a trained social worker and was employed by the public school system in the field of behavioral sciences. She obtained a leave of absence to pursue the Ph.D. degree in education, and even though the taxpayer later abandoned the

ever, inconsistency on the part of the courts in applying the regulations has been significant.

In 1960 the Commissioner attempted to alleviate the problems in this area by issuing Revenue Ruling 60-97.[49] This ruling was an effort to establish additional guidelines for the treatment of expenses incurred for education. In regard to the allowance of the deduction

effort, the court felt that this work was undertaken primarily to maintain and improve her skills in this field. The court also found from the evidence that it was common and usual for people to obtain additional education in this field.

In Elmer R. Johnson, 30 P-H Tax Ct. Mem. 641 (1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963), the taxpayer had to take additional courses in order to obtain a new emergency teaching certificate. The fact that these courses helped her to later get a permanent certificate was held to be incidental by the court.

In Smith v. United States, 7 Am. Fed. Tax R.2d 1238 (N.D. Fla. 1961), the taxpayer took a trip to Europe and claimed 90% of her total costs as a business expense. The taxpayer was a college teacher, and the jury found that the trip was taken primarily to maintain and improve the skill required by the taxpayer in her job.

In Michaelson v. United States, 203 F. Supp. 830 (E.D. Wash. 1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963), the taxpayer incurred expenses in taking courses which allowed him to renew a provisional teaching certificate although these courses also led to a permanent teaching certificate and a Bachelor of Law degree.

In Laurie S. Robertson, 37 T.C. 1153 (1962), *acq.*, 1963 INT. REV. BULL. No. 8, at 7, the taxpayer incurred expenses in an effort to obtain a Ph.D. degree although this goal was never achieved. The taxpayer was hired as a college instructor and was reappointed annually for five years at which time he was given a leave of absence to complete his Ph.D. The current policy of the college was that tenure could not be granted until he attained a Ph.D. degree. The court found as a fact that this policy was enacted subsequent to the hiring of the petitioner and for this reason rejected the Commissioner's contention that the job was originally taken on a conditional basis. The court concluded that this educational requirement was imposed by the university as a condition upon the taxpayer for the retention of his salary, status, and employment.

In Reuben B. Hoover, 35 T.C. 566 (1961), *acq.*, 1961-2 CUM. BULL. 4, a partial deduction was allowed for costs incurred by the petitioner in going on a "medical seminar cruise" although the trip was taken primarily for pleasure. The court felt that the taxpayer did receive some professional benefit from part of the trip which included medical lectures and discussions.

In Evelyn L. Sanders, 29 P-H Tax Ct. Mem. 364 (1960), a deduction was allowed for expenses incurred by a teacher of art and geography in taking a trip abroad. Approved traveling was one means of meeting a school board requirement, and the board approved this trip. The court reasoned that the petitioner's travel activities bore a logical relationship to the courses which she taught and constituted a normal and natural response in light of the school board's requirement.

See also Donald C. Hester, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,107; Lonnie R. Lenderman, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,110.

[49] 1960-1 CUM. BULL. 69.

under the theory that the expense was incurred for the maintaining and improving of skills, the ruling stated:

> [I]t is necessary that the taxpayer show his purpose through specific facts. In this connection it will be necessary for him to establish that the education does maintain or improve skills required in his employment or other business. *The skills "required" by the taxpayer in his employment or other trade or business are those which are appropriate, helpful, or needed.*[50]

The most significant fault in this area today lies in the fact that the courts are reluctant to place a proper interpretation on the last preceding quoted sentence of the revenue ruling. This fault appears to be the main reason for the inconsistency in the following illustrations.

In *Evelyn Devereaux*[51] the taxpayer was a university instructor under a contract of permanent tenure. There was no requirement that he undertake any additional studies leading to a Ph.D. degree in his field. The facts, however, indicate that studies leading to a Ph.D. degree were undertaken before the taxpayer was given a contract of permanent tenure in an effort to induce the university to renew his contract and secure his position. Since the Commissioner could not argue that these expenses were incurred to meet the minimum requirements of the taxpayer's chosen profession, he contended that they were incurred primarily for the purpose of attaining substantial advancement in position and an increase in salary. The Tax Court agreed with the Commissioner's contention and disallowed the deduction.[52]

The petitioner in *Devereaux* acting as his own counsel on this claim which totaled less than 2000 dollars, appealed the result of the Tax Court and emerged with a victory.[53] The Third Circuit recognized the fact that the regulations in this area are intended to be liberally enforced. The court, however, based its reason for the reversal on less than satisfactory grounds. The court indicated that the taxpayer owed the university a "moral" obligation to continue

[50] *Id.* at 70. (Emphasis added.)
[51] 29 P-H Tax Ct. Mem. 509 (1960).
[52] *Quaere* what the petitioner could have undertaken which would have been any more appropriate and helpful in the teaching field.
[53] Devereaux v. Commissioner, 292 F.2d 637 (3d Cir. 1961).

his studies leading to a Ph.D. degree in light of the fact that he used this additional education as an inducement for renewal of his contract. Therefore, the court concluded that the taxpayer was maintaining his position by undertaking the studies, and that any promotion or salary increase as a result of attaining the Ph.D. degree would be incidental.[54] While the result seems correct, the court, nevertheless, failed to recognize that a taxpayer may incur educational expenses in an attempt to "run-in-place" although such education leads to a doctorate degree and an advancement in salary.

In *Joseph T. Booth, III*[55] the petitioner, after attaining a law degree and practicing for a short time, worked as an assistant legal advisor to the Governor of Alabama. Later he and two other attorneys decided to open a practice together. He was designated to attend New York University for the purpose of taking some tax courses since it was agreed that none of the three partners-to-be had enough knowledge in this field. The facts revealed that the taxpayer had not taken any tax courses in law school; that he had handled no tax cases during the brief period in which he had practiced; and that he had not handled any tax matters while working as advisor to the Governor of Alabama. The taxpayer contended that the courses were taken primarily to improve skills which he required in practicing his profession. On the other hand, the Commissioner argued that the expenses were incurred in order that the taxpayer could acquire a new skill or specialty and obtain a new position. In disallowing the expenditures, the Tax Court concluded that the primary purpose of the education was to enable the taxpayer to become a partner in the newly formed law firm.

Perhaps on the facts presented in *Booth,* the petitioner did fail the "primary purpose" test. For this reason the result appears satisfactory. However, a more difficult question would have been presented if the obtaining of a new position had not been a pertinent factor. The Commissioner, assumedly, still would have attacked the allowance of the deduction on the ground that the taxpayer was acquiring a new skill or specialty. In light of *Namrow* the court might agree with this position. But it is questionable whether this attack would be a valid one in light of the regulations and Revenue Ruling 60-97. Admittedly, the taxpayer had attained the minimum

[54] The court rejected the Commissioner's contended applicability of example (9) of Rev. Rul. 60-97, 1960-1 CUM. BULL. 69, 77-78.

[55] 35 T.C. 1144 (1961).

requirements necessary for the practice of his profession. But it is believed that the taking of tax law courses by an attorney is *appropriate, helpful, and needed to improve and maintain his skills in the legal field.* It is suggested that the court should allow the deduction in such a case if the regulations and Revenue Ruling 60-97 are interpreted in the proper light.

A case coming close to *Booth* on its facts and reaching a contrary result is *Cosimo A. Carlucci.*[56] The taxpayer was employed as an assistant research analyst in the field of industrial psychology by an insurance company. He had attained several credit hours leading to a Ph.D. degree in industrial psychology, and in 1958 he took nine additional credit hours towards this degree. It was not necessary for the retention of his job that he obtain this degree, nor was it a prerequisite leading to a promotion, although over the long run his chances of a promotion or a salary increase would obviously be enhanced. The petitioner contended that it was necessary for him "to keep abreast of current knowledge, literature, and thinking in the field, and that his purpose in taking such courses was to accomplish that result and to maintain and improve his standing, in terms of knowledge, as an industrial psychologist . . . ."[57] The Tax Court looked to the fact that he had already met the minimum requirements of qualification in his chosen field, and to the fact that many other persons employed in psychological research by the taxpayer's employer, either had Ph.D. degrees or were doing work towards a graduate degree. This latter fact indicated to the court that such additional education was customary in this field. Thus, the Tax Court in *Carlucci* appeared to make an effort to carry out the intended spirit of the regulations.

It was soon to be apparent that the thinking of the court in *Carlucci* was predicated largely on the "custom" of the additional education in the psychology field rather than on the more important consideration that the education was *appropriate, helpful, and needed.* This conclusion is substantiated by the result of the Tax Court in *Harold H. Davis.*[58] In this case the taxpayer was a college professor on permanent tenure and was not required to undertake any additional scholarly duties in his field. However, the college did

[56] 37 T.C. 695 (1962).
[57] *Id.* at 700-01.
[58] 38 T.C. 175 (1962), *appeal docketed,* No. 18188, 9th Cir., July 23, 1962.

encourage its professors to engage in research and writing activities. Accordingly, the petitioner took a trip to Europe for the purpose of studying source material, unavailable in the United States, for a book in his field which he desired to write. The majority held that the expenses were voluntary and were undertaken so that the taxpayer could increase his prestige as a scholar. It was concluded that the expenses were incurred to acquire additional reputation and learning, and thus cannot be classified as ordinary and necessary business deductions.

Six judges dissented from the result of *Davis*. They felt that the expenses could be classified as ordinary and necessary so long as they were *appropriate* to the profession of the taxpayer. Clearly the thinking of the dissent is correct if the regulations and Revenue Ruling 60-97 are to be given meaningful interpretation.[59] If the view of the dissent is not adopted by the Ninth Circuit Court of Appeals in its review of this case,[60] it will amount to a significant step in the wrong direction. Certainly the facts of *Davis* fall within the guidelines which have been issued to help the taxpayers and the courts in this area, *i.e.*, the expenses were appropriate and helpful for the maintenance of the taxpayer's skills.

Conclusion

Much progress has been made in this area since the *Hill* case in 1950. To a large extent this has been made possible by the willingness of the courts, except in *Namrow* and *Davis*, to apply the regulations in a liberal manner. The Commissioner, however, still seems unwilling to "fall in step" with the intended spirit of the regulations. As a result of this, many taxpayers probably lose what should be valid deductions due to the expense which would be involved in attempting to litigate a small claim. The Commissioner's attitude and attacks impair success of any attempt to forward education as the

[59] Dennehy v. Commissioner, 309 F.2d 149 (6th Cir. 1962), *affirming* 30 P-H Tax Ct. Mem. 821 (1961), involved facts very similar to those in *Davis*. The taxpayer, a full time college math instructor, took a trip to Europe during his sabbatical summer. The facts revealed that his activities on this trip were no different from those of most tourists taking a European trip. Both the Sixth Circuit Court of Appeals and the Tax Court denied him a deduction for these expenses. It appears that there is a definite factual distinction between *Dennehy* and *Davis*, and it is suggested that this distinction is such that it was proper to deny *Dennehy* the deduction while it was improper to treat *Davis* in the same manner.

[60] *Appeal docketed*, No. 18188, 9th Cir., July 23, 1962.

means of professional improvement. Perhaps legislation in this area will eventually be necessary if we are to attain such a goal. In conclusion, the following statement of the district court judge in *Michaelson v. United States* concerning the importance of this deduction to the "little" taxpayer seems appropriate:

> The importance of encouragement of individuals interested in self-improvement should not be minimized. Certainly rapid write-offs of investments in buildings, deductions for advertising and deductions for expenses in those higher brackets, are no more important to them than a smaller deduction is to one who has limited funds, as the taxpayer here.[61]

H. ARTHUR SANDMAN

Conflict of Laws—Capacity to Sue—Which Law Should Govern?

It is generally accepted that the law of the place of wrong determines whether a person has sustained a legal injury.[1] In *Shaw v. Lee*[2] this rule was applied to determine the capacity of one spouse to sue the other. Plaintiff brought suit against her deceased husband's estate alleging that while riding through Virginia in an automobile owned and operated by her husband, she was injured in a collision between the automobile and a truck, and that the collision was caused by the joint and concurrent negligence of her husband and the truck driver. At the time of the injury plaintiff and her husband were domiciled in North Carolina. The lower court sustained defendant's demurrer to the complaint and on appeal the supreme court affirmed. The court recognized that Virginia, unlike North Carolina,[3] does not permit a married woman to sue her husband for injuries negligently inflicted.

Shaw v. Lee was not a case of first impression. It reaffirmed North Carolina's previous position[4] and is in accord with the ma-

[61] 203 F. Supp. 830, 832-33 (E.D. Wash. 1961).

[1] Doss v. Sewell, 257 N.C. 404, 125 S.E.2d 899 (1962); Morse v. Walker, 229 N.C. 778, 51 S.E.2d 496 (1949); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933); 2 BEALE, CONFLICT OF LAWS § 378.2 (1935); RESTATEMENT, CONFLICT OF LAWS §§ 377-79 (1934); STUMBERG, CONFLICT OF LAWS 182 (2d ed. 1951).

[2] 258 N.C. 609, 129 S.E.2d 288 (1963).

[3] "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." N.C. GEN. STAT. § 52-10.1 (Supp. 1961).

[4] Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931), is practically

jority rule in this country[5]—a rule which is a product of Beach's vested rights theory.[6] More recently, however, several cases have established a trend—applauded by many writers in the field[7]—away from this mechanical application of a technical conflict of laws rule. Instead they favor a conflicts rule which is shaped with regard to the nature of the case at hand and gives more consideration to social, economic, and domestic factors. This appears to be done best, in order to stay within the existing framework for determining conflict rules, by a policy oriented method of characterization.[8] In

identical to the principal case, but there plaintiff sued her husband and not his estate. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), involved the reverse situation. There the husband and wife were domiciled in Ohio, where the common-law rule of family immunity was in force, and the accident occurred in North Carolina. The court refused to apply the law of the family domicile and held the wife was entitled to maintain her action.

[5] See Annot., 22 A.L.R.2d 1248 (1952).

[6] Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L. J. 656 (1918). See 2 BEALE, CONFLICT OF LAWS §§ 377.2-78.2 (1935).

The theoretic premise of vested rights is that when a case is decided with multi-state contacts, a right is enforced which vested under the law of the appropriate state. In the case of torts this is the place of the injury. The purpose is to promote uniformity, and in turn discourage forum shopping. "Its greatest virtue is its simplicity, the facility of its application. It reduces the legal mental process to a minimum because, once having determined that the matter is one of the substance, all that is left to do is to look to the place where the harmful force first took injurious effect and then to apply without distinction the substantive law there. Its universal adoption, besides bringing about uniformity, would enable the lawyer in advising his client to predict with facility and accuracy the judicial results in any situation, regardless of where suit might be brought." STUMBERG, CONFLICT OF LAWS 201 (2d ed. 1951).

[7] Bingham, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L. J. 297 (1958); Packel, *Backward and Forward in Conflicts*, 31 TEMP. L. Q. 117 (1958). See also STUMBERG, CONFLICT OF LAWS 201-12 (2d ed. 1951), for a criticism of the place of the tort rule.

[8] Some cases also refuse to follow the place of the tort rule because the foreign law, if applied, would be contrary to the public policy of the forum. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898). See generally RESTATEMENT, CONFLICT OF LAWS § 5, comment *b* (1934).

In several cases the state of the forum and domicile has upheld the family immunity rule when the accident occurred in a state where the immunity had been abolished, on the ground that public policy of the forum forbade one spouse from suing the other. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935). These decisions may be responsible for some obvious forum shopping by spouses who in similar situations bring

most instances the characterization determines the choice of law rule which applies, so where the court characterizes an issue in a tort action as "procedural" rather than "substantive" the law of the forum applies and not the law of the place of wrong.[9] If an issue is characterized as "contract" the law of the place of contracting may determine questions concerning the formation of the contract, while the law of the place of performance may determine questions relating to its performance;[10] and if characterized as "family law" the law of the domicile may be said to be the proper law to govern.[11]

Such a policy oriented method of characterization has been applied by a few courts to problems involving family immunity, capacity to sue, and other related issues.[12] The leading case among

their actions in the state where the accident occurred. To apply the place of the tort rule under these circumstances, as North Carolina did in Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), does not promote uniformity, but rather encourages forum shopping.

[9] RESTATEMENT, CONFLICT OF LAWS § 585 (1934).

In Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943), plaintiff sued *A* for injuries arising out of an accident in Tennessee. *A* then sought to join *B* for contribution as a joint tortfeasor under what is now N.C. GEN. STAT. § 1-240 (1953). The common law was still in force in Tennessee where there was no right of action by one joint tortfeasor to enforce contribution from another. The court characterized the right to join for contribution as substantive, and dismissed the action against *B* under Tennessee law.

[10] RESTATEMENT, CONFLICT OF LAWS §§ 311, 358 (1934). *But see* RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960), which now says the validity of a contract is determined by the law of the state with which the contract has its most *significant relationship*—which might be the state chosen by the parties, the state of the contracting, or the state where performance is to take place.

In Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928), a Connecticut statute provided that anyone renting a motor vehicle to another should be liable for any damage caused to any person by the operation of such vehicle while rented. The defendant rented *A* an automobile, and plaintiff was injured by *A*'s negligent operation of the automobile in Massachusetts. The court characterized this as a contract action rather than tort and applied the law of Connecticut, which was the place of contracting.

[11] See 1 BEALE, CONFLICT OF LAWS § 110.1 (1935); RESTATEMENT, CONFLICT OF LAWS § 54 (1934).

[12] Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), applied the law of the family domicile and not the place of the tort. The court characterized the issue as one of capacity to sue and permitted the wife and her two unemancipated daughters to sue the husband and father for personal injuries sustained in an automobile accident. Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956), refused to apply California law and impute the husband's negligence to the wife. The wife sued defendant for injuries she sustained in an automobile collision between defendant and her husband in California. The court applied the law of plaintiff's domicile, where the husband's negligence would not bar her recovery. Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958), decided a wife could not sue her hus-

these is *Haumschild v. Continental Cas. Co.*,[13] involving facts substantially similar to the principal case except that the issue of capacity to sue was characterized as "family law." The plaintiff sued her husband in Wisconsin, where they were domiciled, for personal injuries sustained as a result of an automobile accident in California, but unlike the principal case the Wisconsin Supreme Court overruled its previous position[14] saying:

> We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict-of-laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.[15]

The social function of both the law of torts and domestic relations would be best served if the court in the principal case, like *Haumschild,* had characterized the issue as an incident of "family law" to be governed by the law of the domicile.[16] Why indeed are problems of the law of torts ordinarily decided in accordance with the law of the place of the wrong? If it is to carry out the social purpose of the law, then what is the social purpose and function of the law of torts?

The law of torts is the body of rules which indicates under what circumstances one person who has suffered a loss can shift such loss to another member of society.[17] While ordinarily a loss lies where it falls, under special circumstances one can shift his loss to another, as in the case where the other person "caused" the loss through conduct falling short of the standard *set by the community.* The com-

band in New Jersey where they were domiciled, even though the accident occurred in New York where such suits are permitted.

See also Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), where the issue was the survival of a cause of action for personal injury after defendant's death. In Arizona, where the injury occurred, it did not survive, but in California, the defendant's domicile, it did. The court characterized this as a problem of administration of estates and applied the survival law of the forum.

[13] 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

[14] Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), was a leading authority for the rule as applied by the principal case.

[15] 7 Wis. 2d at 137, 95 N.W.2d at 818 (1959).

[16] Ford, *supra* note 7, at 417, points out that in the civil law countries interspousal actions sounding in tort are treated primarily as incidents of the family law and governed by the law of the family domicile.

[17] Rheinstein, *Michigan Legal Studies: A Review,* 41 MICH. L. REV. 83 (1942).

munity which sets the standard should be the community where the harm will be manifested. Such considerations are the foundation of the rule that problems of tort law should be governed by the law of the place of the wrong. These same considerations should also determine the scope of the rule's application.

Therefore, in determining whether the rule should apply to such a problem as that of allowing a law suit between members of a family, it should be asked whether this is primarily a problem of shifting loss or one of regulating the relations between the members of a family. Since the two reasons most often advanced for the common law rule of family immunity are the ancient concept the husband and wife constitute in law but one person, and that to permit such suits will create family discord and disrupt family harmony,[18] it would appear that for problems of this kind the most appropriate law is that of the family domicile.[19]

In light of these considerations this writer suggests that North Carolina amend G.S. § 52-10.1 to provide that a husband and wife domiciled in North Carolina have a cause of action against each other to recover for injuries, wherever sustained, as if they were unmarried.

SAMUEL S. WOODLEY, JR.

Constitutional Law—Case or Controversy—Dismissal for Mootness

Where a decision in a case at bar will have no effect because of some intervening fact which has rendered the case moot, the United

[18] Ford, *supra* note 7, at 398, sets out the historical background and reasons for disallowing suits between spouses.

Johnson v. People's First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958), held that the doctrine of intrafamily immunity from suit by a member of the family expires upon the death of the person protected and does not extend to a decedent's estate for the reason that death terminates the family relationship and there is no longer a relationship in which the state or public policy has an interest.

[19] The court in the principal case also dismissed plaintiff's plea for recovery under North Carolina's Motor Vehicle Financial Responsibility Act of 1957 by pointing out that liability insurance protects against claims legally asserted, but does not itself produce liability. Plaintiff, however, did not contend that the presence of liability insurance should create liability, but rather contended with some merit that by allowing defendant immunity, the public policy of the state, as expressed by the vehicle responsibility act, for protecting its citizens who are injured in automobile accidents would be contravened. In North Carolina a wife who is injured by her husband's negligent operation of an automobile will have the protection of the insurance required under this act, but by denying plaintiff the same protection, because she happened to incur her injury across the state line, the insurance company is given a fortuitous windfall.

States Supreme Court will order the case dismissed.[1] That the Court will summarily dismiss a mooted case has long been one of the basic principles in its disposition of cases. But the question of whether or not a case is moot is not so easily disposed of. Where a decision by the Court would affect the parties, the Court will decide the case on its merits.[2] Even where one issue of the case has become moot, the Court will decide the case if there are other issues involved which remain alive.[3]

The events which can occur to render a case moot are legion. A case will be dismissed as moot if the relief sought has already been granted,[4] as where the parties have settled pending appeal,[5] or defendant has paid plaintiff the amount contested;[6] if a statute has been passed which renders the action unnecessary;[7] if one seeking admission to a school has passed school age;[8] if, in an election dispute, those elected have already been seated by Congress;[9] or if the act sought to be enjoined has already been completed by the time the Court hears the case.[10] The latter result is unaffected by the

[1] Brownlow v. Schwartz, 261 U.S. 216 (1923); Security Mut. Life Ins. Co. v. Prewitt, 200 U.S. 446 (1906); Mills v. Green, 159 U.S. 651 (1895); United States v. Phillips, 31 U.S. (6 Pet.) 776 (1832).

[2] In Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946), petitioner had contested being drafted. The circuit court ordered him released from service. On appeal to the Supreme Court he contended the case was moot. The Court held that it was not moot because a reversal would necessitate his re-induction into the Army.

[3] In Wilson v. United States, 232 U.S. 563 (1914), petitioner reached the Supreme Court only by asserting that the White Slave Act was unconstitutional. By the time the Court heard this case, the constitutional issue had been settled by another case. Held, that having taken jurisdiction on the constitutional point, the Court would retain jurisdiction to decide the rest of the case, though the constitutional question was moot. *Accord,* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913).

[4] Taylor v. McElroy, 360 U.S. 709 (1959) (petitioner had been re-instated in his job); Gray v. Board of Trustees, 342 U.S. 517 (1952) (Negro petitioners had been admitted to previously segregated school).

[5] Buck's Stove & Range Co. v. AFL, 219 U.S. 581 (1911); Gardner v. Goodyear Dental Vulcanite Co., 131 U.S. ciii App. (1873).

[6] California v. San Pablo & T.R.R., 149 U.S. 308 (1893); Singer Mfg. Co. v. Wright, 141 U.S. 696 (1891); San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885).

[7] United States v. Alaska S.S. Co., 253 U.S. 113 (1920).

[8] Doremus v. Board of Educ., 342 U.S. 429 (1952); Atherton Mills v. Johnston, 259 U.S. 13 (1922).

[9] Richardson v. McChesney, 218 U.S. 487 (1910); Jones v. Montague, 194 U.S. 147 (1904).

[10] Gray v. Board of Trustees, 342 U.S. 517 (1952); Security Mut. Life Ins. Co. v. Prewitt, 200 U.S. 446 (1906) (disputed permit to do business had expired); Mills v. Green, 159 U.S. 651 (1895) (disputed delegates to constitutional convention had been seated).

fact that a damage remedy is still available.[11] The Court twice dismissed cases where alleged anti-trust violations had been halted because of World War I.[12]

In an unusual context, the Supreme Court has substantially changed the law on mootness. In *Robinson v. California*[13] the Court reversed defendant's conviction and held that a California statute making the status of dope addiction a crime was unconstitutional. Afterward, the state of California filed an alternate petition for rehearing and for an abatement of the judgment on the ground that defendant had died before the Court decided the case. In a memorandum decision the Court denied the petition for rehearing.[14] Justice Clark, with whom Justices Harlan and Stewart joined, wrote a dissenting opinion. Justice Clark called the decision of the Court a "meaningless gesture utterly useless in the disposition of the case—the appellant being dead—and, as I read our cases, is contrary to the general policy this Court has always followed . . . ."[15]

For over a century, the Court has consistently held that the death of an appealing defendant renders the case moot. In fact, the usual statement has been that upon the happening of defendant's death, the case is treated as having abated altogether.[16] Every circuit court ruling on the matter has held that the action is void ab initio, and that a fine levied on the defendant in the trial court cannot now be recovered from his personal representative.[17] From this

[11] Local 8-6, AFL-CIO v. Missouri, 361 U.S. 363 (1960).

[12] United States v. American-Asiatic S.S. Co., 242 U.S. 537 (1917); United States v. Hamburg-Amerikanische Packetfahrtactien Gesellschaft, 239 U.S. 466 (1916). These cases involved alleged anti-trust violations between American, British, and German steamship companies. The companies had of necessity ceased doing business together because of World War I, and the Court held that this rendered the case moot. United States v. W.T. Grant Co., 345 U.S. 629 (1953) is distinguishable. There the Court held that the case was not moot simply because defendant had filed an affidavit stating that he would resign his positions which had brought about Clayton Act interlocking directorate prosecution. The Court stated that defendant would still be free to resume his former practices if a decision were not reached.

[13] 370 U.S. 660 (1962). See Note, 41 N.C.L. REV. 244 (1963).

[14] Robinson v. California, 371 U.S. 905 (1962).

[15] *Id.* at 905.

[16] Singer v. United States, 323 U.S. 338 (1945); Menken v. Atlanta, 131 U.S. 405 (1889); United States v. Daniel, 47 U.S. (6 How.) 11 (1848).

[17] Daniel v. United States, 268 F.2d 849 (5th Cir. 1959); Howard v. Wilbur, 166 F.2d 884 (6th Cir. 1948); United States v. Mook, 125 F.2d 706 (2d Cir. 1942); Baldwin v. United States, 72 F.2d 810 (9th Cir. 1934); Rossi v. United States, 21 F.2d 747 (8th Cir. 1927); Pino v. United States, 278 Fed. 479 (7th Cir. 1921); United States v. Theurer, 213 Fed. 964 (5th Cir. 1914); Dyar v. United States, 186 Fed. 614 (5th Cir. 1911); United States v. Dunne, 173 Fed. 254 (9th Cir. 1909).

it necessarily appears that *Robinson* must stand for a drastic change in the Court's policy on mootness cases, despite the relatively narrow context of the denial of a petition for rehearing.

The dissenters in *Robinson,* in citing *Stewart v. Southern Ry.,*[18] outlined the procedure usually followed by the Court in such cases. There, the Court had already decided the case on appeal, not knowing that the parties had previously settled. On petition for rehearing this fact was pointed out to the Court, and as a result the Court granted the petition, vacated the former judgment and remanded to the district court with directions to dismiss the suit as moot.[19]

A line of decisions separate from the *Robinson* case may indicate a trend toward finding cases not moot. In these cases the defendant had been released from prison pending the appeal; hence, they are distinguishable from the principal case in which defendant had died pending the appeal. In the first two cases in this series the Court merely dismissed the appeal as moot.[20] Then, in *Lewis v. United States,*[21] there was a suggestion that if the defendant could have been tried again for the offense (it was nol prossed below), the case might not have been moot. Next came the landmark case of *St. Pierre v. United States.*[22] This case differed little from the earlier cases in its actual holding—a dismissal of the case as moot—but was important for the incidental hint it contained which was adopted by the Court in later decisions. The Court stated: "Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."[23] Finally, in *Fiswick v. United States,*[24] the budding theory blossomed as the Court unanimously held the case not moot although the defendant had already been released from prison. The Court pointed out that the defendant was an alien and was liable to be deported for conviction of this crime, that a conviction might harm any naturalization plans the defendant had, and that he might also suffer the loss of certain civil rights. On

[18] 315 U.S. 784 (1942).

[19] See Little v. Bowers, 134 U.S. 547 (1890). In Cahill v. New York, N.H. & H.R.R., 351 U.S. 183 (1956), the Court had already decided the case and had denied a petition for rehearing, but on defendant's motion to recall, the case was re-opened in the interest of fairness.

[20] *Ex parte* Baez, 177 U.S. 378 (1900); United States v. Phillips, 31 U.S. (6 Pet.) 776 (1832).

[21] 216 U.S. 611 (1910).

[22] 319 U.S. 41 (1943).

[23] *Id.* at 43.

[24] 329 U.S. 211 (1946).

these grounds the case was distinguished from *St. Pierre.* Thus the doctrine of "collateral consequences," first mentioned in *St. Pierre,* was actually applied in *Fiswick.*

In *United States v. Morgan*[25] the doctrine's growth continued, the Court holding in a five to four decision that the case was not moot although defendant had been released from prison, since he had already been convicted of another crime in a state court and was subject to a longer sentence as a second offender. In *Pollard v. United States*[26] the doctrine reached its fullest development. The Court, although divided five to four on the merits, was unanimous in holding that the case was not moot. The Court said: "We think that petitioner's reference to the above cases (*Morgan* and *Fiswick*) sufficiently satisfies the requirement that review in this Court will be allowed only when its judgment will have some material effect. The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."[27] It is significant to note that there were no unusual consequences in this case, such as possible deportation or second offender conviction, as were present in prior cases. Here the Court was talking only about the normal consequences of conviction of a felony—moral stigma, loss of certain civil rights, etc.

The onrush of the doctrine of collateral consequences came to an abrupt halt in *Parker v. Ellis.*[28] The majority in a per curiam decision held that since the petitioner had been released pending a hearing in the Court on his habeas corpus writ, and since the writ could not issue if there were no detention, the case was moot. The majority said that *Pollard* was poorly considered and probably overruled by *Heflin v. United States.*[29] The Chief Justice, joined by Justices Douglas, Black and Brennan, dissented. The dissenters argued that *Pollard* should control this case and that the Court had never overruled *Pollard* either directly or by implication. Both the Chief Justice and Justice Douglas, in a separate dissenting opinion, pointed out the collateral consequences involved and said that the harm done defendant below should be undone.[30]

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[25] 346 U.S. 502 (1954).
[26] 352 U.S. 354 (1957).
[27] *Id.* at 358.
[28] 362 U.S. 574 (1960).
[29] 358 U.S. 415 (1959). The Court did not cite *Pollard.*
[30] Chief Justice Warren stated: "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his

Just how much effect the *Parker* case will have on the collateral consequences doctrine is highly debatable, for it is at least inferable that *Robinson* represents a swing back in the other direction. Whether *Robinson* represents such a swing or not, there can be little doubt that the companion case of *Wetzel v. Ohio*[31] does so indicate. In that case the defendant died pending the appeal and his wife as administratrix filed a motion to be substituted as a party. The state filed a motion to dismiss the appeal. In a per curiam decision, the Court granted the wife's motion. It also granted the state's motion to dismiss the appeal for want of a substantial federal question. The case is significant in that the Court, by allowing the wife's motion, necessarily decided that the case was not moot, and reached a determination on the merits.

Justice Douglas' concurring opinion in *Wetzel,* which sheds the only light upon the reasoning of the majority, was based mainly upon the collateral consequences involved in the case. In Ohio the costs in a criminal case are charged personally to the defendant and his property may be sold in enforcement of this.[32] The Ohio Court of Appeals has held that the death of a defendant did not abate the cause, but merely left the judgment as it stood before the appeal.[33] However, in the same case that court said that it did not decide the question of whether defendant's estate was liable for the payment of costs. But Justice Douglas said that Ohio law is apparently to the effect that costs can be collected from a deceased's estate. Justice Douglas cited and relied on *Pollard,* the key case in the "collateral consequences" line of decisions. He specifically refused to pass upon whether decedent's family's interest in his good name satisfied the case or controversy requirement, but his mentioning it at all may indicate a possible future trend.[34]

Justice Clark, joined by Justices Harlan and Stewart, dissented on the ground that the Court had on numerous times held that the existence of a judgment taxing costs in such cases cannot alone

reputation and economic opportunities . . . . [T]here is an important public interest involved in declaring the invalidity of a conviction obtained in violation of the Constitution . . . ." Parker v. Ellis, 362 U.S. 574, 593-4 (1960).

[31] 371 U.S. 62 (1962).

[32] OHIO REV. CODE §§ 2949.14, .15 (1954).

[33] State v. Sholiton, 128 N.E.2d 666 (Ct. App. Ohio 1954).

[34] In United States v. Mook, 125 F.2d 706 (2d Cir. 1942), the court stated in a per curiam decision: "Nevertheless, we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law."

prevent dismissal. There is indeed a long line of cases supporting the proposition that no appeal lies from a mere decree respecting costs.[35]

It seems clear that the *Robinson* and *Wetzel* cases establish some new rules in the field of mootness. Whether or not they will be followed is of course not known. But it appears that the Court has applied the collateral consequences line of cases, previously limited to situations where the defendant had been released from prison, to cases where the defendant has died. It also appears that the doctrine, which was under attack in *Parker,* has been revived, and that *Pollard* still stands. It is not here intended to argue whether the Court is right or wrong in these decisions, but it is hoped that the Court in future cases will make clear to the public and to the bar what its position is on this matter, preferably with a full decision squarely discussing the problem.

LAWRENCE T. HAMMOND, JR.

Constitutional Law—Financial Responsibility Act—Liability of Insurer Without Notice

In *Lane v. Iowa Mut. Ins. Co.*[1] the North Carolina Supreme Court recently affirmed a trial court decision imposing liability on a defendant who had absolutely no notice or opportunity to be heard before his liability became irrevocably fixed.

The plaintiff was injured in an automobile accident as a result of the negligence of an "assigned risk" whom the defendant insured.[2] The insured did not stop at the scene of the accident and did not file an accident report.[3] Consequently, neither the plaintiff nor the

[35] Heitmuller v. Stokes, 256 U.S. 359 (1921); Wingert v. First Nat'l Bank, 223 U.S. 670 (1912); Paper-Bag Cases, 105 U.S. 766 (1882); Elastic Fabrics Co. v. Smith, 100 U.S. 110 (1879); Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307 (1830). But where the authority of the court below to assess the costs which it levied is challenged, the case is not moot even though the costs are all that remain to be settled. Newton v. Consolidated Gas Co., 265 U.S. 78 (1924); Citizens' Bank v. Cannon, 164 U.S. 319 (1896).

[1] 258 N.C. 318, 128 S.E.2d 398 (1962).

[2] N.C. GEN. STAT. § 20-279.34 (Supp. 1961), provides that the Commissioner of Insurance shall equitably apportion among insurance carriers "those applicants for motor vehicle policies who are required to file proof of financial responsibility . . . but who are unable to secure such insurance through ordinary methods."

[3] N.C. GEN. STAT. §§ 20-166, to -182 (Supp. 1961) provide that a wilful failure to stop is punishable by imprisonment for up to five years and/or a fine of $500. Failure to file an accident report as required by N.C. GEN. STAT. § 20-166.1 (Supp. 1961) is a misdemeanor.

investigating officer included the insured's name on the accident reports they were required to file.[4] Such inclusion would have given the defendant notice of the accident.[5] When the plaintiff subsequently discovered the identity of the insured, service of process was obtained, and judgment by default and inquiry followed against the insured. The insured failed to inform the defendant of the accident or the suit, thereby breaching his insurance contract.[6] When the plaintiff sued to collect as judgment creditor,[7] the trial court found that the defendant was liable, despite the complete lack of notice. On appeal, the defendant claimed that the statute, as applied, was unconstitutional as violating the due process requirements of notice and opportunity to be heard. The court held that the constitutional question could not be entertained because it had not been raised at the trial.[8] The defendant's liability became absolute on the happening of the accident, and subsequent policy violations by the insured could not operate to defeat the plaintiff's right to recover.[9]

Where the contract of insurance was voluntarily made by the parties in the normal course of business, the court, in a situation similar to the principal case, had the constitutional issue squarely before it and decided against the insurer.[10] The court reasoned that

[4] N.C. GEN. STAT. § 20-166.1 (Supp. 1961), states that where property damage is $100 or more, the persons involved in the accident and the investigating officer must file a report to the Department of Motor Vehicles within twenty-four hours.

[5] When the accident reports are received by the Department of Motor Vehicles, a matching process takes place. If one driver fails to file a report, the department obtains his name from the other driver's report and immediately requests the filing of the report. When the report is finally filed, a portion of it is detached and sent to the insurance carrier involved, as notice to the insurance company that its insured has been involved in an accident.

Since the identity of the insured was not discovered within the twenty-four hour limit, the name of the insured was not available for the filing of the reports. This meant the department had no way of making the insured file the report so that the insurer would get notice of the accident. See Brief for Defendent, p. 6.

[6] The insurance contract provided that the insured was to give notice to the insurer as soon as practicable; the insured was to forward all notices and legal papers sent to him; and the insurer was to be allowed to investigate all or any claims deemed expedient by it. See Brief for Defendant, p. 4.

[7] N.C. GEN. STAT. § 20-279.21(f)(1), (2) (Supp. 1961), provides that the liability of the insurance company becomes absolute on the occurrence of the accident. No policy violations by the insured can relieve the insurer of its liability. The injured party has the right to recover from the insurer without first satisfying the judgment against the insured.

[8] 258 N.C. 318, 322, 128 S.E.2d 398, 400 (1962).

[9] N.C. GEN. STAT. § 20-279.21(f)(1) (Supp. 1961).

[10] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

the insurer assumed the risk of liability without notice from the insured when it voluntarily entered into the agreement. Therefore, the insurer was deemed to have waived his constitutional right to notice. This holding is in accord with cases in other jurisdictions which operate under similar financial responsibility statutes.[11] However, the theory of these cases is inapposite where the contract is not entirely voluntary, as with an "assigned risk." Moreover, in each of these cases the insurer had at least some knowledge that its insured had been involved in an accident.[12]

In the principal case, although refusing to consider the constitutional issue, the court referred to the middle district's decision in *Sanders v. Travelers Indem. Co.*[13] on this point. However, the only reference in that case to constitutionality is that "assigned risk" legislation has been upheld.[14] Adequate notice and hearing from a constitutional standpoint were not discussed. No direct holding on the constitutionality of the statute as applied to the facts in the principal case has been found.

To fully appreciate the nature of the problem raised, but not decided, in the principal case, some basic factors must first be considered. In the absence of the type of financial responsibility statute which North Carolina now has, the injured party derives his right to collect from the insurer through the insured.[15] The injured party's rights against the insurer are founded on the insurance contract. Therefore if the insured breaches his contract by failing to abide by the notice requirement, the injured party's rights against the insurer are defeated. Under the financial responsibility act, the injured party no longer has merely a derivative right. His rights are now based on the statute, rather than the insurance contract.[16] Therefore, any violations of the contract, such as failure to give notice, do not

[11] *E.g.*, Royal Indem. Co. v. Olmstead, 193 F.2d 451 (9th Cir. 1951); Wilkinson v. Maryland Cas. Co., 119 F. Supp. 383 (E.D. Va. 1953); Kruger v. California Highway Indem. Exch., 201 Cal. 672, 258 Pac. 602 (1927); National Indem. Co. v. Simmons, 230 Md. 234, 186 A.2d 595 (1962).

[12] There appears to be no definite rule as to what can serve as constructive notice. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Even if constructive notice could be founded on the insurer's knowledge of the accident, there would be no constructive notice in the principal case because the insurer had no knowledge whatever of the accident.

[13] 144 F. Supp. 742 (M.D.N.C. 1956).

[14] *Id.* at 744.

[15] See, *e.g.*, Baldwin v. Fidelity Phenix Fire Ins. Co., 260 F.2d 951 (6th Cir. 1958); Sheldon v. Bennett, 282 Mass. 240, 184 N.E. 722 (1933); Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 482 (1960).

[16] See note 11 *supra;* 48 COLUM. L. REV. 799, 800 (1948).

defeat the statutory right. Public policy demands that an injured party's right to recover should not be defeated by an irresponsible motorist's failure to give notice to his insurer.[17] This line of reasoning, while sound, does not encompass a basic tenet of our legal system that:

> An elementary and fundamental requirement of due process in any proceeding, which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.[18]

The conclusion follows that notice must be viewed in two aspects: (1) as a requirement of the contract between the insurer and the insured (which does not affect the insurer's liability), and (2) as a requirement of due process (which does affect the insurer's liability).

It is apparent that when a situation comparable to the principal case reappears with a constitutional objection at the trial level, the statute may be declared unconstitutional. Although the statutory requirement that the insurer's liability will not be defeated by the insured's failure to give notice appears to be unobjectionable, the requirement of some sort of notice persists. The notice requirement of due process is so embedded in our system of jurisprudence that a statute imposing liability with absolutely no notice must necessarily be invalid.[19]

The court might, however, uphold the statute by applying the "assumption of risk" theory. The insurer voluntarily chose to do

[17] For a discussion of the deprivation of certain defenses of insurers, including the insured's failure to give notice, see 40 ORE. L. REV. 351 (1961).

[18] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In this case the Court held that notice by publication of settlements of a trustee's account was insufficient to meet the requirements of due process where the trustee knew of the beneficiaries' whereabouts. The principle of *Mullane* has been repeatedly reaffirmed. Schroeder v. City of New York, 371 U.S. 208 (1962) (notice of condemnation proceedings published in county newspapers); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (notice by publication of proceeding to fix compensation under eminent domain); Covey v. Town of Somers, 351 U.S. 141 (1956) (notice of foreclosure of tax lien by mail where person was known incompetent without guardian).

[19] See note 18 *supra* and accompanying text.

business in the state, knowing that he would have to deal with "assigned risks" and that he would be subject to liability without notice. Therefore the insurer waived his constitutional right to notice. No cases have been found upholding any such condition precedent to doing business in a state. Moreover, such a requirement would probably be "arbitrary and capricious" and hence unconstitutional, since a reasonable alternative exists whereby notice could be afforded the insurer.[20]

It is clear that curative legislation is needed in order to afford the insurer notice and thereby prevent the statute from being invalidated. Several devices could be used to effect this purpose: (1) make the insurer a necessary party to the suit, (2) require the injured party to give notice to the insurer, or[21] (3) require that notice be given to the insurer before damages are assessed on a default judgment.[22] None of these would impose a great burden on the injured party, because once the insured is found, it is a simple matter to locate the insurer.[23]

By affording the insurer notice, the following results might be obtained: (1) the opportunity for settlement out of court, and (2) a reduction of the possibility of collusion between an unscrupulous insured and a third party. Such curative legislation would not only afford the insurer the requisite due process, but would also benefit both the public and the courts.

JOHN SIKES JOHNSTON

[20] There have been no cases decided on whether deprivation of notice could be imposed on corporations by the state as a condition precedent to doing business in the state. However, there have been numerous cases invalidating regulations on businesses where the desired result could have been accomplished by alternative means which entailed a much lesser deprivation. See, *e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[21] The insurer argued that either it should have been made a party to the suit, or the plaintiff should have been required to notify it of the suit. Brief for Defendant, p. 13. The plaintiff answered that this was a problem for the legislature. Brief for Plaintiff, p. 7.

[22] ME. REV. STAT. ch. 22, § 80(II)(E) (Supp. 1961) contains this provision.

[23] This seems apparent because of the ease with which the injured party discovered the insurance company for the purpose of satisfying the default judgment in the principal case.

Criminal Law—Evidence—Admissibility of Post Arraignment Confessions

In *Killough v. United States*[1] the defendant was arrested for the murder of his wife and held for thirty-four hours before arraignment, during which time he signed a written confession. He was then taken before a magistrate and advised of his right to have counsel and to remain silent.[2] The preliminary hearing was then adjourned for twenty days to allow him to obtain counsel and to enable counsel time to prepare a defense. He was then committed to jail. Twenty hours after arraignment, and before he had obtained counsel, defendant voluntarily agreed to a visit by one of the police officers to whom he had confessed the previous day. The purpose of the officer's visit was not to obtain an affirmation of the previous confession, but to return articles of clothing and to secure a burial release of the wife's body. During the conversation defendant orally confessed to the crime. The trial court excluded the written confession under the *McNabb*[3]-*Upshaw*[4]-*Mallory*[5] line of cases. However, the court found the oral confession made after arraignment to have been voluntary and properly admissible. Defendant was found guilty of manslaughter and appealed. The court of appeals reversed, holding the second confession inadmissible as a "fruit of the first."[6]

Rule 5(a) of the Federal Rules of Criminal Procedure[7] provides

[1] No. 16398, D.C. Cir., Oct. 4, 1962.

[2] "(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith. (b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." FED. R. CRIM. P. 5.

[3] McNabb v. United States, 318 U.S. 332 (1943).

[4] Upshaw v. United States, 335 U.S. 410 (1948).

[5] Mallory v. United States, 354 U.S. 449 (1957).

[6] Compare Nardone v. United States, 308 U.S. 338 (1939), and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), where the "fruit of the poisonous tree" idea is introduced with respect to wiretap evidence and search and seizure.

[7] See note 2 *supra*.

that an arrested person must be taken *without unnecessary delay* before a commissioner or other officer for arraignment. The *McNabb-Mallory* doctrine renders invalid in federal court[8] any confession obtained during an unnecessary delay before arraignment.[9] The principal case makes a significant extension of the scope and spirit of this exclusionary rule by holding that a confession taken *after* proper arraignment can also be inadmissible if it is not independent of invalid pre-arraignment admission.

Neither the *McNabb-Mallory* line of decisions nor the principal case rests on constitutional grounds.[10] This exclusionary rule is a product of the Supreme Court's supervisory power over the lower federal courts.[11] The purpose of the rule is to enforce the congressional requirement of prompt arraignment by excluding evidence gained by its violation, and to prevent police from using unwarranted detention to extract confessions by methods "easily gliding into the evils of 'the third degree.' "[12]

Under both the *McNabb-Mallory* doctrine and its extension in *Killough* the confession may be completely voluntary and yet inadmissible.[13] Thus, in *pre-arraignment* confessions the key factor in determining admissibility is whether or not the confession came during a period of unnecessary delay. When, as in *Killough,* a *post-arraignment* confession follows an invalid pre-arraignment confes-

[8] This rule does not apply to state criminal prosecutions. Brown v. Allen, 344 U.S. 443, 476 (1953); Gallegos v. Nebraska, 342 U.S. 55, 64 (1951).

[9] Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 322 (1943). See generally Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1 (1958). The *McNabb-Mallory* rule has met with much criticism. *E.g.,* Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442 (1948); Comment, 42 MICH. L. REV. 679 (1944). Such criticism would also apply to an extension of the rule.

[10] "No one even suggests that any right under the constitution is involved." Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962, at 25 (dissent). Compare Mapp v. Ohio, 367 U.S. 643 (1961), where evidence obtained by illegal search and seizure was held inadmissible in state courts on constitutional grounds.

[11] McNabb v. United States, 318 U.S. 332 (1943).

[12] Mallory v. United States, 354 U.S. 449, 453 (1957); See 47 VA. L. REV. 884 (1961).

[13] Upshaw v. United States, 335 U.S. 410 (1948); Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962. An involuntary confession is inadmissible in federal courts under the fifth amendment. Bram v. United States, 168 U.S. 532 (1897). The fourteenth amendment renders invalid an involuntary confession in state criminal prosecutions. Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

sion the criteria of admissibility is whether or not the second is independent of the first.[14]

The principal case attempts to prevent police from obtaining a confession by violating *McNabb-Mallory,* yet reaping all the benefits by a reaffirmation following arraignment.[15] Too often the reaffirmation will be a mere mechanical act[16] by a prisoner who, having confessed, can see no harm in repeating what he has already said. The Court recognized this problem in *United States v. Bayer*[17] when it stated:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first.

Thus in order to preserve the *McNabb-Mallory* rule it is necessary to curb in some degree the use of post-arraignment confessions.

As a possible solution it has been suggested that the defendant's second confession should not be allowed unless it clearly appears that he knew that his first confession was not admissible against him.[18] This test would do much to prevent police circumvention of *McNabb-Mallory.* But this solution is inadequate since the arraigning magistrate cannot conclusively determine the admissibility of the first confession and is, therefore, not in a position to give the prisoner a positive warning,[19] nor can the police be expected to so warn him. When faced with this problem the court cannot lay down an inflexible rule but must look at the totality of the circumstances in each case.[20] The court must weigh certain factors and determine whether the

[14] Killough v. United States, *supra* note 13 (concurring opinion).

[15] In *Killough* the majority quotes a portion of the record from Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962), in which police admitted that a post-arraignment reaffirmation was obtained for fear that the first confession would be excluded under *McNabb-Mallory.* The case was reversed on other grounds.

[16] In Jackson v. United States, 273 F.2d 521 (D.C. Cir. 1959), the defendant merely signed a typewritten copy of an invalid oral confession.

[17] 331 U.S. 532, 540 (1947).

[18] McCORMICK, EVIDENCE § 114, at 237 (1954); Note, 26 TEXAS L. REV. 536 (1948).

[19] Note, 70 YALE L.J. 298, 304 n.30 (1960).

[20] This is the court's procedure in determining whether a confession is involuntary and thus a violation of due process. Payne v. Arkansas, 356 U.S. 560 (1958); Chambers v. Florida, 309 U.S. 227 (1940).

second confession can be considered separate from and independent of the first.

One of the factors to be considered is the time between arraignment and the second confession. *Jackson v. United States*[21] held a post-arraignment confession invalid because it was not independent of the pre-arraignment confession. Here the defendant made an oral confession which was invalid under *McNabb-Mallory*. He was then arraigned and immediately returned to police headquarters where within one hour he signed a typewritten copy of his prior confession. Defendant had no chance to consult counsel. The typewritten confession was held inadmissible because it could not be considered an independent act based upon proper counsel or occurring after time for deliberate reflection. On the other hand, *United States v. Bayer*[22] holds that a confession invalid under *McNabb* does not perpetually bar the defendant from making an admissible subsequent confession. Here the confession came six months after the first and was admitted.

It would seem that no minimum time can be set. More time may be necessary where defendant was actually a victim of physical or mental coercion before arraignment.[23] Thus the court should determine from all the circumstances whether there was sufficient time for defendant to grasp the significance of the magistrate's warning.

A second factor to be considered is whether or not the defendant had the advice of counsel before making his second confession. Lack of counsel should not of itself destroy the second confession, since the prisoner has had judicial instruction as to his rights.[24] However, advice by counsel in addition to a magistrate's warning should make a defendant well aware of his rights and tend to show an independent confession. In both *Goldsmith v. United States*[25] and *Jackson v. United States*[26] the holding that a second confession was independent, and therefore admissible, turned largely on the presence and advice of counsel. In *Goldsmith* defendant's invalid pre-arraign-

[21] 273 F.2d 521 (D.C. Cir. 1959).

[22] 331 U.S. 532 (1947).

[23] Under *McNabb-Mallory* the pre-arraignment confession need not actually be involuntary so there may be no coercive influence to carry over to the second confession. Note, 70 YALE L.J. 298 (1960). Compare Thomas v. Arizona, 356 U.S. 390 (1958); Lyons v. Oklahoma, 322 U.S. 596 (1944).

[24] FED. R. CRIM. P. 5(b).

[25] 277 F.2d 335 (D.C. Cir. 1960), 74 HARV. L. REV. 1222 (1961).

[26] 285 F.2d 675 (D.C. Cir. 1960). This is the second appeal of Jackson v. United States, 273 F.2d 521 (1959), 47 VA. L. REV. 884 (1961).

ment confessions were reaffirmed only one hour after proper arraignment. However during this hour defendant had a fifteen minute consultation with an attorney. In *Jackson* the defendant was arraigned on Sunday and the admissible affirmation of his confession occurred on Tuesday. Defendant had benefit of consultation with his attorney and consented in writing to the Tuesday interview with the police.[27]

A spontaneous or unsolicited confession or affirmation should also weigh heavily in determining if the second confession is independent of the first.[28] While it is true that the defendant may be facing police who know his secret, it would seem that an unsolicited, spontaneous admission would likely be independent of the first confession.

The person to whom the second confession is made should also be considered.[29] If the reaffirmation is made to officers who heard the invalid first confession the problem of the prisoner's psychological disadvantage is clearly present.[30] Conversely, if the second confession is to one whom the prisoner knows or believes is not aware of the first confession, this should raise an inference of independence. Additional factors to be considered include the age, background and mental capacity of the defendant,[31] and whether he gave the officer hearing the second confession permission to visit his jail cell.[32]

Absence of counsel and brevity of time seem to be the main elements relied on by the majority of the court in *Killough.* Indeed, if the spirit of the majority is followed advice of counsel seems to be almost a prerequisite of independence. On the other hand, it seems clear that the majority does not accord much weight to the judicial warning given to the prisoner. Considering all of the circumstances in the principal case the court made a very liberal determination of the lack of independence of the confession in question. In fact, aside

[27] The court in *Killough* distinguishes the present case mainly on the fact that the defendant had no advice of counsel. However, four judges intimate they would overrule *Goldsmith* and the second *Jackson* case if necessary. A fifth urges that they be overruled.

[28] Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960). *Cf.* Stroble v. California, 343 U.S. 181, 191 (1952).

[29] In *Killough* the second confession was made to an officer who had heard the first. *Cf.* Jackson v. State, 209 Md. 390, 121 A.2d 242 (1956).

[30] See note 17 *supra* and accompanying text.

[31] *Cf.* Chambers v. Florida, 309 U.S. 227 (1940).

[32] Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962, at 31 (dissent).

from lack of counsel, most of the circumstances would seem to indicate an independent confession.

In confession cases the court is faced with the problem of the balancing of civil liberties with the need for effective police protection.[33] The idea of a coerced confession is abhorrent. On the other hand, the guilty should not escape punishment because of a mere technicality. In the principal case individual rights are weighed heavily at the expense of police effectiveness. If the spirit of this decision is followed the *McNabb-Mallory* rule is clearly in no danger of being circumvented by post-arraignment police activities.

CHARLES M. WHEDBEE

Criminal Procedure—Continuance

It is the policy of the law that controversies should be settled as speedily as possible.[1] In criminal cases this right is guaranteed to the accused by the constitution.[2] However, undue speed may often work as much or more injustice as unnecessary delay.[3] To insure a prisoner adequate time to prepare his defense a continuance may often be necessary. In a criminal trial in North Carolina the granting or denial of a motion for a continuance of a case to another term or until later in the same term is a decision which rests within the sound discretion of the trial judge.[4] Normally continuance of a criminal case is not favored.[5]

The statutory pattern for continuance of any cause is extremely broad.[6] Generally, continuances may be granted if the judge is satisfied that though the applicant has diligently prepared his case, it would be impossible for the moving party to have a fair trial at the present term for reasons beyond his control. No universal enumeration of the grounds for a continuance is possible, since the sufficiency of the cause is dependent upon and interwoven with the

[33] See Mallory v. United States, 354 U.S. 449, 453 (1957).

[1] Piedmont Wagon Co. v. Bostic, 118 N.C. 758, 24 S.E. 525 (1896).

[2] U.S. CONST. amend. VI.

[3] State v. Creech, 229 N.C. 662, 677, 51 S.E.2d 348, 359 (1949) (dissent).

[4] State v. Flowers, 244 N.C. 77, 92 S.E.2d 447 (1956); State v. Ipock, 242 N.C. 119, 86 S.E.2d 798 (1955); State v. Hackney, 240 N.C. 230, 81 S.E.2d 778 (1954).

[5] State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

[6] N.C. GEN. STAT. §§ 1-175 to -176 (1950), as amended, N.C. GEN. STAT. § 1-175 (Supp. 1961).

facts of the case.[7] No appeal will lie from continuing a cause, and in the case of an order refusing continuance, the court will not reverse unless the judge has plainly abused his discretion.[8]

An exception to this general rule applies when the motion for continuance is based upon the constitutional rights of the accused to confront his accuser and to have representation of counsel.[9] When based upon a constitutional right, the motion ceases to be a matter of discretion and becomes a question of law, and appeal will lie from a refusal to grant the motion.[10] In the recent case of *State v. Lane*[11] the defendant was indicted for a crime against nature. The judge on his own motion appointed counsel for the indigent accused at 10:30 A.M. The case was tried at 2:30 P.M. on the same day. Counsel moved for a continuance contending that he had not had adequate time to prepare the defense. The motion was denied and the defendant was convicted.[12] On appeal the court, in reversing, found that the defendant was entitled to a reasonable time in which to prepare the case, and on the record it could not be said that this opportunity had been afforded.

[7] Common grounds for the request for a continuance are: (1) absence of counsel for good cause, State v. Lea, 203 N.C. 13, 164 S.E. 737, *cert. denied sub nom.*, Davis v. North Carolina, 287 U.S. 649 (1932); (2) physical or mental incapacity of the accused, State v. Ipock, 242 N.C. 119, 86 S.E.2d 798 (1955); (3) absence of a witness or evidence, State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951), *cert. denied*, 344 U.S. 825 (1952); (4) want of preparation on the part of counsel, State v. Parker, *supra*. The cases set forth are hardly exclusive. See generally 22A C.J.S. *Criminal Law* §§ 480-529 (1961); Annot., 84 A.L.R. 544 (1933).

[8] State v. Lindsey, 78 N.C. 499 (1878).

[9] N.C. CONST. art. I, § 11; U.S. CONST. amend. XIV. The right to counsel and the right of confrontation are closely interrelated. North v. People, 139 Ill. 81, 28 N.E. 996 (1891). The right to confrontation carries with it the right to face the accuser and the opportunity to prepare a defense. State v. Garner, 203 N.C. 361, 166 S.E. 180 (1932); State v. Ross, 193 N.C. 25, 136 S.E. 193 (1927). The right to counsel includes the right of that counsel to confer with witnesses and to prepare a defense. Powell v. Alabama, 287 U.S. 45 (1932). A defendant may not be brought to trial until the right of confrontation has been met, and the duty to appoint counsel is not discharged by the assignment of counsel at such time as to preclude the giving of effective aid. Commonwealth v. O'Keefe, 298 Pa. 169, 148 Atl. 73 (1929).

[10] State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943).

[11] 258 N.C. 349, 128 S.E.2d 389 (1962).

[12] In fairness to the trial judge, it should be borne in mind that at the time of the trial the defendant, under Betts v. Brady, 316 U.S. 455 (1942), had no right to court appointed counsel. The judge may have felt that having done the defendant the favor of appointing counsel in the first place, he was not obligated to go further and also allow a continuance. Betts v. Brady was overruled in March, 1963, by Gideon v. Wainwright, 372 U.S. 335 (1963). The trial here was held in March 1962.

Prior to *State v. Lane* the exception to the continuance rule had never been applied to a non-capital felony, the facts sufficient to raise the exception having been found only in capital cases where, because of special circumstances, it was found that counsel did not have time in which to prepare the case. Thus in North Carolina the accused may now appeal the denial of a continuance of any felony case when the motion is properly based upon the right to adequate preparation of his defense. The case is also significant because it illustrates the increasing willingness of the court to look at the entire circumstances of a case with a view toward determining whether on the whole record the defendant has had a fair opportunity to prepare his defense.

The case which first articulated the exception to the continuance rule in North Carolina was *State v. Farrell*.[13] In *Farrell* the defendant was charged with rape. Counsel was appointed on Saturday. The following Monday counsel asked for time to have a psychiatrist examine the defendant. When the case was called on Thursday the defendant moved for a continuance, contending that a complete psychiatric examination could not be obtained, and that family and friends were far away and could not be reached. Supporting letters to this effect were produced. The motion for continuance was denied and the defendant was found guilty. On appeal the court said that if the issue had been guilt or innocence, ample time had been allowed. But since the defense was insanity, three days for preparation and investigation was insufficient, thereby violating the right of the defendant to confrontation and effectively denying the right to counsel. The question was whether the defendant had a fair opportunity to prepare his defense, not the merits of the particular defense.

Following *Farrell* the court was called upon to decide the same issue in *State v. Gibson*.[14] In *Gibson* the defendant was indicted for rape. Counsel was appointed at the arraignment and the trial was scheduled for the next day. Counsel immediately moved for a continuance stating that he did not have ample time to prepare the case, and that the defendant should be given a complete mental examination. Counsel could neither state the names of witnesses he wished to call nor any special defense which he intended to use. The motion was denied and the defendant was convicted and sen-

[13] 223 N.C. 321, 26 S.E.2d 322 (1943).
[14] 229 N.C. 497, 50 S.E.2d 520 (1948).

tenced to death. On appeal the court stated that every man was entitled to counsel and that this would amount to nothing if sufficient time were not allowed for preparation of the defense. However, in this case the defendant did not support his motion by affidavit or other proof. The court found that the suggestions of counsel did not indicate the existence of any substantial reason for the requested postponement, and that while counsel hinted at insanity, he did not advise the trial court that such a defense was contemplated. A mere intangible hope that something helpful might turn up was found to be no basis for delaying the trial since the record failed to show that the continuance would enable counsel to obtain additional evidence or otherwise present a stronger defense.[15]

The court in *Gibson* completely ignored the statement in *Farrell* that the merits of the defense were not in question and that the only inquiry was whether the defendant had a fair opportunity to prepare a defense. The court seemingly required that counsel have the defense prepared immediately upon his appointment, ignoring the fact that counsel had been appointed for that very purpose. The court in *Gibson* obviously begs the question of the fair opportunity to prepare the case which was the basis of the *Farrell* decision.[16]

Despite the limited interpretation placed by the *Gibson* decision on the manner and circumstances in which the exception to the continuance rule may be raised, there has been a trend toward the rationale of *Farrell* in subsequent cases.[17] The court recently stated that while there is no rule that a case may not be tried in the same term as the indictment is rendered, except under certain circumstances in capital cases "the more speedily a case is brought to trial, after the offense has been committed or arrest made, the greater the

[15] *Id.* at 502, 50 S.E.2d at 524.

[16] In 1949 following *Gibson* the Legislature enacted N.C. GEN. STAT. § 15-4.1 (1950), which was designed to implement the right of confrontation, N.C. CONST. art. I, § 11. State v. Simpson, 243 N.C. 436, 90 S.E.2d 708 (1956). The statute provides that in any capital case where the appointment of counsel is delayed until the term of court at which the accused is arraigned, on motion of counsel for the accused, the case shall be continued until the next ensuing term of criminal court.

[17] See, *e.g.*, State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949), where the court reversed the denial of a motion for a continuance when a special venire drawn from outside the county was impaneled without prior notice to either side. In a dissenting opinion in State v. Creech, 229 N.C. 662, 677, 51 S.E.2d 348, 359 (1949), Justice Barnhill stated that while the motion for continuance was not technically within the rule of *Farrell*, undue haste (one day in a murder trial), particularly in this type of case, would pervert justice as surely as unnecessary delay would defeat it.

duty of the courts to determine whether or not the accused has had a fair opportunity for trial."[18]

In the principal case the court followed *Farrell* in a per curiam opinion. The court not only extended the doctrine to include non-capital felonies but also allowed the exception to be taken upon an oral motion for continuance. The case represents a significant break from the technical distinctions laid down in *Gibson* with respect to the sufficiency of the allegations necessary to come within the doctrine of *State v. Farrell*.[19]

While the principal case provides a more liberal approach to the request for a continuance of a criminal action on constitutional grounds, it should be remembered that in order to take advantage of this doctrine counsel must prepare an adequate basis for the appeal.[20] It is always necessary to allege that constitutional rights were violated in order to preserve the appeal and come within the exception;[21] otherwise, the court will treat the motion as one within the discretion of the trial judge and will not normally reverse.[22] Preferably the record must be made to show that the continuance would enable counsel to obtain additional evidence or otherwise present a stronger defense.[23] The statutory scheme of continuance must be followed as nearly as possible, particularly in having written statements and evidence, names and addresses of witnesses, and all other possible defenses which might be urged.[24]

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[18] State v. Graves, 251 N.C. 550, 559, 112 S.E.2d 85, 92 (1960).

[19] Counsel for the accused in *Lane* made an oral motion for a continuance as did counsel for the accused in *Gibson*. The defense offered was much less compelling than that offered by counsel in *Gibson*. The defense propounded in *Lane* was that defendant could not have been guilty of a crime against nature *per anum* as alleged in the indictment because the defendant had been rendered impotent as a result of the use of a "whammey," the filler contained in a nasal inhaler.

[20] State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943).

[21] The speed of the trial does not necessarily constitute a denial of due process. State v. Hedgebeth, 228 N.C. 259, 45 S.E.2d 563 (1947). No standard length of time must elapse before a defendant should go on trial. Each case and its surrounding circumstances provides its own yardstick. United States v. Nierstheimer, 166 F.2d 87 (7th Cir. 1948).

[22] State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949).

[23] State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

[24] Note the similarity of the requirement for the motion as stated in *Gibson* to the requirements of the ordinary continuance as set out in G.S. §§ 1-175 to -176.

It has been held that there was no denial of due process in refusing a continuance where a fingerprint expert could not be present at the trial, State v. Rising, 223 N.C. 747, 28 S.E.2d 221 (1943), or where witnesses sought to be subpoenaed could not be named by the prisoner, State v. Hackney, 240 N.C. 230, 81 S.E.2d 788 (1954), or where the defendant was merely without

Additional significance is added to the principal case by the decision of the United States Supreme Court in *Gideon v. Wainwright*[25] where the Court decreed that counsel must be provided in criminal cases.[26] Since all accused now have the right to counsel, the corollary right to adequate opportunity to prepare the defense is also extended.[27] While *State v. Lane* and *Gideon v. Wainwright* are large steps forward in the protection of the rights of those accused of non-capital crimes, there are many problems which remain unanswered. The courts have the duty both to provide the defendant a speedy trial and to clear overcrowded trial dockets. A continuance in every case could frustrate the speed of justice and cause administrative turmoil and unnecessary delay. On the other hand, appointment of counsel to represent indigent defendants will involve all members of the bar, including those who do not deal primarily with criminal cases. As a result continuance to allow proper preparation by attorneys will be essential in carrying out the purposes of such an appointment.

As the principal case held, the immediate solution to the problem has been to make the denial of continuance appealable. The most obvious alternative solution to the problem would be a statute similar to G.S. § 15-4.1 which would provide for an automatic continuance, in proper circumstances, upon motion of counsel. However, statutory procedures alone can never fully satisfy due process in every case. Ultimately the solution must lie in an increased awareness of this problem and a sympathetic treatment of the indigent by the trial judiciary. It is believed that the trial judges, having been apprised of the problem as presented in the principal case, are equal to the task.

TOM D. EFIRD

Damages—Collateral Source Rule—Pensions as Reducing Factor on Personal Injury

In *Browning v. The War Office*[1] the English Court of Appeal considered the question of reducing an award for damages by the

friends or relatives nearby to be at the trial to testify in his behalf, State v. Hedgebeth, 228 N.C. 259, 45 S.E.2d 563 (1947).

[25] 372 U.S. 335 (1963).

[26] In *Gideon v. Wainwright* the Court did not expressly extend the decision to cover all criminal prosecutions, but certainly all felonies are included within the rule.

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

[1] [1963] 2 Weekly L. R. 52 (C.A.).

amount of a disability pension which the plaintiff was receiving. Plaintiff, a sergeant in the United States Air Force, lost his arm in an automobile collision while stationed in England. The injury resulted in his discharge and an award of a disability pension amounting to nearly one-half of the salary he had been receiving. Plaintiff's claim for recovery was predicated on his loss of earnings, and the trial court awarded damages without considering the pension. Heretofore, the leading English case on the subject had held that pensions were in that class of collateral sources along with plaintiff's insurance and gifts which do not go to mitigate loss of earnings.[2] But on appeal, in *Browning,* the court held that this precedent had been overruled[3] and that pensions were the equivalent of earnings and were allowed to mitigate damages.

With this decision England has adopted a purely compensatory theory of damages whereby the aim is to compensate the injured party for the loss of earnings sustained, and nothing more. This theory is based on the logic that no matter how serious the actual injury is to the plaintiff in terms of lost income, the defendant should not be required to compensate plaintiff for more than the difference in income prior to the injury and income from both earnings and collateral sources after the injury. For example, in the present case plaintiff was receiving 450 dollars a month in earnings prior to the injury. After the injury, and the termination of his regular salary, plaintiff began to receive 217 dollars a month as a disability benefit from the United States government. Some courts might say that the plaintiff was injured in the amount of 450 dollars a month by

[2] In Payne v. Railway Executive, [1952] 1 K.B. 26, the English court had held that pension payments to which a serviceman was entitled could not be considered when figuring pecuniary loss, especially since the pension could be reduced after the judgment at the discretion of the authorities.

[3] The court held that Payne v. Railway Executive had been overruled by British Transp. Comm'n v. Gourley [1956] 2 Weekly L.R. 41. *Gourley* dealt exclusively with the question of taxes being considered in figuring damages. The court held taxes a valid consideration in the computation of pecuniary loss for personal injury, stating that damages should compensate and not punish. Now, by analogy, the court decides that to award plaintiff damages for losses which are covered by disability pensions would be to punish the defendant.

The *Gourley* case itself is contrary to the predominant American view regarding taxes. *E.g.,* Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Atlantic Coast Line Ry. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874 (1956); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). These cases generally hold that the income tax savings should not be considered when fixing damages for loss of earnings because of personal injuries. *Contra,* Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957).

losing his status in the Air Force. But by applying the compensatory theory and taking into consideration the income from the collateral source the court in *Browning* concluded that the plaintiff's injury was 233 dollars per month and not 450 dollars.

Not all income from collateral sources will reduce defendants' liability. Such items as gratuitous payments from third parties, insurance for which the plaintiff has paid, and those payments to plaintiff which he must repay will not reduce the liability of the defendant.[4] It should be noted that these items are excluded because of the particular circumstances of payment in each case, and for this reason they are not recognized as mitigating in any jurisdictions.[5] This is the class of payments in which England previously held disability benefits to exist until the principal case. *Browning* removed disability payments from this list of exceptions in computing loss of earnings.

The opinion of the court advances two reasons for this result. First, most recoveries of this kind are paid by defendant's insurance companies who in turn increase their premium charges to the general public. These increased insurance rates cause the amount of such recoveries to be borne by the general public, and this is against public policy.[6] Second, actual damages are not awarded to punish the wrongdoer; liability only accrues when the wrongdoer causes damage and this damage is all that should be recompensed.[7]

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[4] *E.g.*, Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 338 P.2d 702 (1959) (insurance payments); Drinkwater v. Dinsmore, 80 N.Y. 390, 36 Am. Rep. 624 (1880) (gratuity); Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 Pac. 325 (1909) (gratuitous medical services).

[5] England still recognizes this class of exceptions. *E.g.*, Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874) (insurance benefits which plaintiff has bought with his own money); Redpath v. Belfast & County Down Ry., [1947] No. Ire. L.R. 167 (charitable gifts); Dennis v. London Passenger Transp. Bd., 64 T.L.R. 269 (1948); Schneider v. Eisovitch, [1960] 2 Q.B. 430 (payments by third persons which plaintiff has undertaken to repay).

[6] Browning v. The War Office, [1963] 2 Weekly L.R. at 60-61.

[7] In a very learned discussion Diplock, L.J. says: "A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff. A defendant in an action for negligence is not a wrongdoer at large; he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff. Thus in relation to damages for negligence, to speak of the wrongdoer appropriating to himself the benefit of some fortuitous circumstance which has in fact reduced the loss which the plaintiff might otherwise have sustained as a result of the defendant's negligence involves what I respectfully think is an erroneous approach to the problem. Implicit in such a statement is the tacit assumption that there is some norm of damages which a defendant who has acted without reasonable care ought to pay for his careless act, even though owing to some circumstances for which the

In spite of the force of this reasoning, the majority of the American courts hold that pensions, whether being paid at present or anticipated in the future, should not be considered in assessing damages.[8] Such holdings are based on the theory that the defendant should not benefit from a collateral income which the plaintiff receives, even if the total income after the injury exceeds income prior to the injury. The rule supported by this reasoning is called the "collateral source rule" and is stated as follows: "total or partial compensation for an injury received from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the responsible party."[9] The "collateral source rule" grows directly from the punitive theory of damages which stresses the punishment of the defendant.[10] Consequently there is a qualification of the rule that only those payments made *wholly independent of the wrongdoer* shall not mitigate. If the wrongdoer has contributed to the collateral funds then the amount of his liability will be reduced by the amount of his contribution. This reduction in liability is readily illustrated by the calculation of damages in suits against the United States government brought by its employees. Disability pensions paid by the government to servicemen are a mitigating factor since the government, as wrongdoer, has made the payments.[11] The disability

defendant is not directly responsible the plaintiff has not in fact suffered a loss corresponding to the norm." [1963] 2 Weekly L.R. at 62.

[8] *E.g.*, Price v. United States, 179 F. Supp. 309 (E.D. Va. 1959); Hume v. Lacey, 112 Cal. App. 2d 147, 245 P.2d 672 (1952); Mullins v. Bolinger, 115 Ind. App. 167, 55 N.E.2d 381 (1944); Rusk v. Jefferies, 110 N.J.L. 307, 164 Atl. 313 (1933); Heath v. Seattle Taxicab Co., 73 Wash. 177, 131 Pac. 843 (1913). *But see* Brooks v. United States, 337 U.S. 49 (1949) where the Court concluded that payments through servicemen's disability pensions should be considered when the government is the defendant and will pay its liability under the Federal Tort Claims Act.

[9] See 15 Am. Jur. *Damages* § 198 (1938).

[10] "There is, in addition to the compensatory aspect, a punitive one, a notion that the defendant's moral fault subjects him to liability. The theory of compensation stresses that the plaintiff must be paid; the punitive theory, that the defendant must pay. Such a view of civil damages gives them the function of criminal sanctions: to enforce adherence to set standards of conduct. But this function, although desirable, is not generally accepted as the primary purpose of the civil action. A consequence of the punitive aspect of damages is the 'collateral source rule.' Since liability for damages is often considered *inherent in the wrong,* any mitigation of those damages, it is said, would be a benefit to the defendant—a windfall. Therefore, courts generally refuse to reduce damages where the plaintiff's loss has been (or will be) compensated from some source collateral to the defendant's wrong." 63 HARV. L. REV. 330, 331 (1949).

[11] See Tessier v. United States, 164 F. Supp. 779 (D.C. Mass.), *aff'd,* 269 F.2d 305 (1st Cir. 1959); Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958). This mitigation has been granted where the pensions are merely

benefits are not received from a source wholly independent of the wrongdoer and the collateral source doctrine does not apply. On the other hand, civil service benefits are not a mitigating factor between the employees and the government since the employees contribute to the funds from which benefits are paid.[12] The benefits from these funds are wholly independent of the wrongdoer and therefore the "collateral source rule" applies.

It is obvious that the normal application of the collateral source doctrine results in a windfall to the plaintiff. And, if the reasoning of the English court is correct, how do the majority of American courts justify the rule that disability pensions will not go to mitigate a defendant's liability?[13] The dissent in *Browning* expresses the predominant American conclusion that pensions, such as the one in the present case, are earned by the injured party's past services and therefore are analogous to insurance payments.[14] These insurance payments (or pensions) having come from a collateral source wholly independent of the wrongdoer should be excluded from the computation of defendant's liability. It is also pointed out in *Browning* that disability pensions would be payable whether there was a tort or not.[15] The single precedent to their payment is merely the occurrence of a disabling injury. Logic is conspicuous by its absence when such payments are considered as compensation for the loss of earnings inflicted by a tort.

In addition to the above reasoning there would seem to be another strong argument for refusing reduction of loss by disability pensions. In cases where these payments are being made, someone, either plaintiff or defendant, is going to profit from these collateral payments whether they be considered as gratuities, insurance, or earnings. Provided that the defendant is not in a position to pass the loss to other parties,[16] it would seem to be the better reasoned

a likelihood or have actually been received. Snyder v. United States, 118 F. Supp. 585 (D.C. Md. 1953).

[12] See Price v. United States, 179 F. Supp. 309 (E.D. Va. 1959).

[13] Hume v. Lacey, 112 Cal. App. 2d 147, 245 P.2d 672 (1952); Ring v. Minneapolis St. Ry., 176 Minn. 377, 223 N.W. 619 (1929); Texas Cities Gas Co. v. Dickens, 156 S.W.2d 1010 (Tex. Civ. App. 1941); Cunnien v. Superior Iron Works Co., 175 Wis. 172, 184 N.W. 767 (1921).

[14] [1963] 2 Weekly L.R. at 61.

[15] *Ibid.*

[16] It would seem that many potential defendants are in such a position. Most private persons are covered by insurance of some type, while large corporate defendants can pass on large payments to the public in the form of raised consumer prices.

judgment to allow the plaintiff and not the defendant to profit. The culpability of the defendant should bar his receiving a windfall which on the other hand would go to an innocent party.

North Carolina, like England, feels that compensation from collateral sources should go to the mitigation of damages where it would be unjust or inequitable to hold otherwise.[17] However, we have not reached the point of allowing receipt of pensions by the injured party to reduce the award of damages where the defendant was not paying that pension.[18] In *Bryant v. Woodlief*[19] the court, although dealing with the problem of damages for wrongful death and not personal injury, held that railroad retirement benefits which deceased was receiving at time of death should be considered in computing the damages for the wrongful death. In *Bryant* the court made statements to the effect that retirement pay and other income for life would be considered in an action for wrongful death.[20] However, the court in wrongful death actions bases the damages upon the pecuniary loss to the estate of the decedent. This represents that amount which would have accrued to the estate of the deceased through his own efforts had he lived his normal life span. In personal injury actions the liability for lost earnings is based on compensating the plaintiff. These funds also should represent amounts which the plaintiff would have earned through his own efforts had he not been disabled. Perhaps, therefore, the analogy would be drawn to the effect that compensation for disability includes loss of future earnings which would have accrued to the estate of the de-

[17] North Carolina is a compensation state as is seen from the language in Broadway v. Cope, 208 N.C. 85, 179 S.E. 452 (1935): "[A]ward no damages based upon speculation, or no damages based upon imagination; but you would be confined to the rule of law which the court gave you; that is, compensatory damages that actually flow, that proximately flow and are necessary for the results . . . of the wrong done the plaintiff by the defendant . . . ." *Id.* at 89, 179 S.E. at 455.

[18] In Lane v. Southern Ry., 192 N.C. 287, 134 S.E. 855 (1926) a nineteen year old soldier sued for injuries resulting in amputation of part of his hand. He was allowed damages of $15,000 which the court held were not excessive. The question of reduction of liability for loss of earning capacity due to government pension was not raised since disability provisions were not enacted until four years after the action by the amending act of July 3, 1930 (ch. 849, 46 Stat. 995). This act was a departure from the theory upon which past legislation was based in that it granted monetary benefits to veterans whose disabilities were not the result of service in actual combat.

[19] 252 N.C. 488, 114 S.E.2d 241 (1960), 39 N.C.L. REV. 107 (1961).

[20] "We do not understand that the general rule in this respect would exclude the inclusion of income from an annuity, life estate, retirement pay or other income for life only, in arriving at the pecuniary loss sustained by reason of wrongful death." 252 N.C. at 494, 114 S.E.2d at 246.

ceased in a wrongful death action, adopting in effect the English view of allowing mitigation of lost earnings by disability pensions. However, the question of how far the court will extend the holding in *Bryant* is still unanswered since this particular aspect of the decision has not been relied upon in any decision since *Bryant* was decided.[21]

As stated earlier, the American courts allow pensions paid by the government to a serviceman to mitigate any recovery by the serviceman against the United States. One of these federal court decisions applied North Carolina law.[22] In support of such a result, the Fourth Circuit Court of Appeals cited *Holland v. Southern Public Util. Co.*,[23] apparently relying on the following language of that decision: "we think the weight of both authority and reason is to the effect that any amount paid by anybody . . . . for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage."[24] This language may indicate that our court will accept disability benefits as an amount paid for and on account of an injury even though coming from a third party. Undoubtedly, the acceptance of disability pensions in reduction of damages in personal injury actions will find strong support in the North Carolina cases when the question in its purest form arises in this state.

It would seem highly inequitable to allow a tortfeasor to have a reduction in liability because of mere chance or plaintiff's foresight. But, it would appear that the plaintiff does not really "lose" those earnings which are, in effect, guaranteed by third parties. North Carolina has built a strong foundation for adopting the minority view in regards to the compensation theory of damages. Moreover, the court has indicated that it is not afraid to side with the minority to expand our compensation theory where good judgment demands it.[25] Regardless of which turn we take, when the question arises,

[21] See 39 N.C.L. REV. 107 (1961).

[22] United States v. Brooks, 176 F.2d 482 (4th Cir. 1949). It must be remembered that this action involves one of those cases where the plaintiff has been compensated in part by the defendant and is an exception to the general rule followed in the United States.

[23] 208 N.C. 289, 180 S.E. 592 (1935).

[24] This same reasoning has recently been followed in Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961), which also involved the issue of reduction of damages by consideration given for a covenant not to sue by a third party.

[25] See Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962). Here the question was presented of recovery by the plaintiff for hospital and doctor's

we may have to discard all analogies and decide the issue by looking to the equities of the case.[26]

ARNOLD T. WOOD

Dedication—Acceptance of Streets in Subdivision—Public User

X, owner of a subdivision, sold lots therein by reference to a recorded map which showed the location of the lots and streets. *Y* owned a lot outside the subdivision upon which he built a home. He then opened his driveway onto a street in the subdivision. Although this subdivision street, which connected two public highways, had been regularly used by *Y* and other members of the general public for at least two years, it had never been accepted or maintained by public authority. When *X* barricaded the street, cutting off access to *Y*'s driveway, *Y* obtained a mandatory injunction for reopening the street. The North Carolina Supreme Court, in *Owens v. Elliot*,[1] reversed. The court held that an effective dedication to the property owners within the subdivision had been made, but as to the general public there was only an *offer* of dedication, requiring formal acceptance by the proper public authorities before *Y*, as a member of the general public, acquired a right to use the street.

When streets are shown on a recorded plat or map of a subdivision two types of interests are created.[2] First, purchasers of

bills which had been paid by the defendant under automobile medical payments insurance. The defendant's comprehensive insurance policy also contained a liability clause for payment on behalf of defendant of any tort liability within policy limits. The medical payments clause called for payments directly to injured persons regardless of the insured's negligence. The court, after stating the majority view that recovery could be had under both clauses, refused to allow a double recovery on the theory that there should be but one recovery for one injury regardless of what the source of the compensation.

[26] As stated by Lord Denning, M.R., in the principal case: "I prefer . . . to discard . . . analogies and ask myself the simple question: is it fair and just that, in assessing compensation, regard should be had to the fact that Sergeant Browning is already, as of right, in receipt of nearly half his pay? And my answer is, 'Yes.' He ought not receive compensation twice over. If he had remained in the Air Force, he would not have received both his pay and his pension. Nor should he do so now." [1963] 2 Weekly L.R. at 58.

[1] 258 N.C. 314, 128 S.E.2d 583 (1962). This case was before the court on appeal in 257 N.C. 250, 125 S.E.2d 589 (1962), where a judgment for damages was reversed. It was remanded to determine the injunction issue in light of pertinent evidence.

[2] See, *e.g.*, Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950), where the court stated, in effect, that when an owner subdivides and sells in reference to a plat or map, he dedicates the streets to the public in general and the purchasers in particular. See generally 11 MCQUILLAN, MUNICIPAL COR-

lots within the subdivision acquire a fixed right of ingress and egress immediately upon conveyance, and the grantor is estopped to deny them the use of the streets already laid out.[3] Secondly, the general public acquires an interest through dedication.[4]

In many states dedication of subdivision streets is usually accomplished by the recording of a plat or map of the subdivision in accordance with an express statutory scheme.[5] North Carolina has no such statute.[6] Consequently, dedication is accomplished here in accordance with long-established common-law principles. By analogy to the law of contracts a completed common-law dedication requires

PORATIONS § 33.24 (3d ed. 1949); 4 TIFFANY, REAL PROPERTY § 1103 (3d ed. 1939).

[3] See 11 McQUILLAN, *op. cit. supra* note 2, § 33.24; 4 TIFFANY, *op. cit. supra* note 2, § 1103; 31 N.C.L. REV. 202 (1953). It is generally agreed by the courts and treatise writers that the purchasers' rights to the unimpeded use of subdivision streets is not obtained by dedication, since technically there can be no dedication except to the public. However, more often than not this distinction is not made, and the purchasers' rights are loosely included in the term dedication. There need not be acceptance in any manner by the public or public authorities for the purchaser to enforce his rights. Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943).

[4] An Oregon case illustrates one court's distaste with this distinction. "Many of the courts, in discussing this subject, have made too great an effort to discriminate between such purchasers and the general public. The former are not a distinct class from the latter; they belong to it; are as much a part of the public as those who use the streets for the purposes of travel . . . . [T]hey would, so far as I can see, represent the public in the affair as much as a like number of wayfarers who travel upon such streets, and have equal authority to accept a dedication of them for the public." Meier v. Portland Cable Ry., 16 Ore. 500, 509, 19 Pac. 610, 615 (1888).

Dedication is generally defined as devotion of land to a public use by an unequivocal act of the owner of the fee, manifesting an intention that it shall be accepted and used presently or in the future. See, *e.g.*, Manning v. House, 211 Ala. 570, 100 So. 772 (1924); Whippoorwill Crest Co. v. Town of Stratford, 145 Conn. 268, 141 A.2d 241 (1958); City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943); City of Kingman v. Wagner, 168 Kan. 558, 213 P.2d 979 (1950). See generally 11 McQUILLAN, *op. cit. supra* note 2, § 33.02.

[5] *E.g.*, MINN. STAT. ANN. § 505.01 (1947). Even in those states with statutory dedication there may still be common-law dedication. *E.g.*, Louisville & N.R.R. v. City of Owensboro, 238 S.W.2d 148 (Ky. 1951); City of Hardin v. Ferguson, 271 Mo. 410, 196 S.W. 746 (1917).

The term dedication, of course, includes both the statutory and common-law types. Where necessary to distinguish between the two it is generally surmised that a statutory dedication operates in the nature of a grant of an easement, while a common-law dedication operates by way of estoppel in pais. See generally 1 ELLIOT, ROADS AND STREETS § 125 (4th ed. 1925); 11 McQUILLAN, *op. cit. supra* note 2, § 33.03.

[6] The only statute in North Carolina expressly dealing with the subject merely provides a method of withdrawal of a street after it has been effectively dedicated but not used within fifteen years of the dedication date. N.C. GEN. STAT. § 136-96 (1958).

an offer of dedication and an acceptance by the public.[7] The offer, based on the dedicator's objective intent, may be indicated in a number of ways.[8] One of the most widely acknowledged methods, with which North Carolina is in full accord,[9] is by subdividing land and making sales with reference to a recorded map or plat.[10] The majority view is that a sale of lots in a subdivision settles the rights between the seller and buyer, but, as to the general public, the offer to dedicate remains revocable at will until there has been some act of acceptance on the part of the public.[11] In discussing the public acceptance sufficient to complete dedication of subdivision streets, the North Carolina court has stated the rule in various ways. Typically it is said that the public acceptance must be in some "recognized legal manner."[12] This rule is deceptively simple due to the evasive mean-

[7] Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Irwin v. City of Charlotte, 193 N.C. 109, 136 S.E. 368 (1927); Wittson v. Dowling, 179 N.C. 542, 103 S.E. 18 (1920); Elizabeth City v. Commander, 176 N.C. 26, 96 S.E. 736 (1918); Green v. Miller, 161 N.C. 25, 76 S.E. 505 (1912). See generally 11 McQUILLAN, *op. cit. supra* note 2, § 33.43.

[8] *E.g.*, by written instrument expressly for that reason, Gallagher v. City of Detroit, 262 Mich. 298, 247 N.W. 188 (1933); by recitals in a deed in which the rights of the public are recognized, Neill v. Hake, 254 Minn. 110, 93 N.W.2d 821 (1958); by oral declarations, Seaboard Air Line Ry. v. Dorsey, 111 Fla. 22, 149 So. 759 (1932); by affirmative acts of the owner in connection with his property, Atlantic Coast Line R.R. v. Donalsonville Grain & Elevator Co., 184 Ga. 291, 191 S.E. 87 (1937); by acquiescence of the owner in the public use of his property for a public purpose, City of Spokane v. Catholic Bishop of Spokane, 33 Wash. 2d 496, 206 P.2d 277 (1949).

[9] Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956); Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 266 (1954); Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); Foster v. Atwater, 226 N.C. 472, 38 S.E.2d 316 (1946); Evans v. Horne, 226 N.C. 581, 39 S.E.2d 612 (1946); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Somersette v. Stanaland, 202 N.C. 685, 163 S.E. 803 (1932). The rule announced in this line of cases is, in effect, that the process of subdividing, platting, and selling lots in a subdivision amounts to a dedication of the streets therein to the use of the purchasers of such lots and the general public.

[10] There is virtually no conflict among the jurisdictions on this point. McQuillan calls it "one of the clearest ways of declaring an intention to dedicate." 11 McQUILLAN, *op. cit. supra* note 2, § 33.30. *But see* 4 TIFFANY, *op. cit. supra* note 2, § 1003, for a mild criticism.

[11] McQUILLAN, *op. cit. supra* note 2, § 33.45. Tiffany disagrees with McQuillan and makes the statement that the weight of authority is that once sales are made in reference to a plat, a dedication effected thereby cannot be revoked even though there has been no indication of an acceptance by the public. He criticizes this rule because it eliminates the necessity of acceptance by the public. 4 TIFFANY, *op. cit. supra* note 2, § 1106. To be sure, there is at least agreement that there is disagreement.

[12] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 583 (1962); Gault v. Town

ing of the words "acceptance" and "recognized legal manner." This evasiveness has led to a state of confusion in North Carolina concerning public user[13]—one of the universally recognized modes of acceptance, and the one relied on by the plaintiff in the *Owens* case.[14]

The usual modes of acceptance of an offer of dedication are (1) by formal or express acts of public authorities; (2) by implication from acts of public authorities; (3) by implication from user by the public for the purpose for which the property was dedicated.[15] North Carolina has recognized these three methods,[16] but often the third has been disregarded.[17] Where there has been an attempt to impose liability on a public authority for repairs and maintenance of streets, no doubt the omission has been deliberate.[18] In this context public user is properly not a "recognized legal manner" of acceptance. Much of the confusion has been caused by the indiscriminate application of this principle of non-recognition of public user to cases in which imposition of liability on a public authority is not involved.[19] The principal case is a prime example.

It is generally held in North Carolina that a public highway, in the sense that the public is responsible for its maintenance, may be established only by (1) regularly instituted proceedings by public authorities; (2) user by the public and control by public authorities

of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Wright v. Town of Lake Waccamaw, 200 N.C. 616, 158 S.E. 99 (1931).

[13] Although unable to find "public user" anywhere precisely defined, a reading of numerous cases indicates that it can range from mere use of dedicated land by members of the public, to public use with the additional element of maintenance and repair by a public authority. Maintenance in this context is carried on without any formal authorization and, therefore, is also considered to be an ingredient of "public user."

[14] Brief for Plaintiff, pp. 2, 3.

[15] Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956), cited in 11 McQUILLAN, *op. cit. supra* note 2, § 33.47.

[16] Town of Blowing Rock v. Gregorie, *supra* note 15, at 367, 90 S.E.2d at 901; Wittson v. Dowling, 179 N.C. 542, 545, 103 S.E. 18, 19 (1920).

[17] Owens v. Elliot, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962); Scott v. Schackelford, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955); Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944); Stewart v. Frink, 94 N.C. 487, 488 (1886); Kennedy v. Williams, 87 N.C. 6, 8 (1882).

[18] There is a split of authority as to whether mere public user is sufficient to impose liability on a public authority for repairs and maintenance. 11 McQUILLAN, *op. cit. supra* note 2, § 33.50; 4 TIFFANY, *op. cit. supra* note 2, § 1107. McQuillan takes the stand that user should be sufficient, basing this on the ground that the public is in reality the municipality, while the principal officers are merely agents of the public. North Carolina has never decided this point.

[19] See note 18 *supra*.

for twenty years; or (3) dedication by the owner with the sanction of public authorities which have accepted it.[20] When this rule is coupled with the doctrine of acceptance of dedication by public user[21] in a context other than an attempt to impose liability on the public for maintenance, formal recognition of the latter rule is practically vitiated.[22] Upon analysis it becomes clear that the two rules are directed at different ends and should not be invariably construed together. The rule of public user is directed toward the dedicator and makes his offer of dedication irrevocable. The rule concerning establishment of public highways is directed toward state agencies and defines the manner in which a duty of public maintenance is created. This duty carries with it tort liability for negligent failure to properly maintain the street.[23] But the creation of a right in the public to use a dedicated street does not necessarily impose a concomitant duty on the public to maintain it.[24] In such a case the public is free to use the dedicated street as a public highway but at

[20] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 583 (1962); Scott v. Shackelford, 241 N.C. 738, 86 S.E.2d 453 (1955); Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944); Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937); Stewart v. Frink, 94 N.C. 487 (1886); Kennedy v. Williams, 87 N.C. 6 (1882).

[21] In cases not involving streets in a subdivision North Carolina has recognized user as a proper device for accepting a dedication. Draper v. Conner & Walters Co., 187 N.C. 18, 121 S.E. 29 (1924); Penland v. Barnard, 146 N.C. 378, 59 S.E. 1109 (1907); Crump v. Mims, 64 N.C. 767 (1870).

[22] That the doctrine of user and this rule can exist together is not questioned. However, this is true only in contexts in which it was originally employed, that is, where the intent of the owner to dedicate is in issue. Intent, either express or implied through conduct, is the fundamental prerequisite of an offer to dedicate. Draper v. Conner & Walters Co., *supra* note 21.

[23] Savannah Beach, Tybee Island v. Drane, 205 Ga. 14, 52 S.E.2d 439 (1949); Richmond v. City of Marseilles, 154 Ill. App. 345 (1910); State v. Wilson, 42 Me. 9 (1856); Kennedy v. City of Cumberland, 65 Md. 514, 9 Atl. 234 (1886); Chapman v. City of Sault Ste. Marie, 146 Mich. 23, 109 N.W. 53 (1906); Cincinnati & M.V.R.R. v. Village of Rosevill, 76 Ohio St. 108, 81 N.E. 178 (1907); City of Winchester v. Carroll, 99 Va. 727, 40 S.E. 37 (1901); Pence v. Bryant, 54 W. Va. 263, 46 S.E. 275 (1903). *Contra,* Makepeace v. City of Waterbury, 74 Conn. 360, 50 Atl. 876 (1902); City of Hammond v. Maher, 30 Ind. App. 286, 65 N.E. 1055 (1903); Dunn v. City of Oelwien, 140 Iowa 423, 118 N.W. 764 (1908); Phelps v. City of Mankato, 23 Minn. 276 (1877); Benton v. City of St. Louis, 217 Mo. 687, 118 S.W. 418 (1909); Sweeney v. Village of Newport, 65 N.H. 86, 18 Atl. 86 (1889); Ackerman v. City of Williamsport, 227 Pa. 591, 76 Atl. 421 (1910); City of Austin v. Ritz, 72 Tex. 291, 9 S.W. 884 (1888); Cady v. City of Seattle, 42 Wash. 402, 85 Pac. 19 (1906).

[24] Gilbreath v. City of Greensboro, 153 N.C. 396, 69 S.E. 268 (1910); Jones v. Town of Henderson, 147 N.C. 120, 60 S.E. 894 (1908); State v. Fisher, 117 N.C. 733, 23 S.E. 158 (1895).

their own risk.[25] Tort liability may be voluntarily assumed by the municipality or public authority but it cannot be forced upon them.

Another oft-used doctrine is that a person who purchases a lot on the outside boundaries of a subdivision has no rights in respect to the dedicated streets of that subdivision other than those enjoyed by the general public.[26] One can hardly take issue with the rule standing alone. However, when used in the context of the principal case it begs the question. The landowner in the principal case became a "user" of the street as a member of the general public and, therefore, played his part in aiding consummation of the dedication.

Confusing the issue still further is the subtle intrusion of the law of prescriptive easements into the domain of dedication. This handy tool was employed in the principal case by simply stating that the mere permissive use of a way over land does not imply a dedicatory right in the public to unimpeded use.[27] Doubtless the rule is validly applied to create an easement of passage over land where there is adverse user. However, user in prescription is not at all analogous to user in dedication.[28] Prescriptive user must contain an element of hostility and an absence of acquiescence by the owner, at least for twenty years.[29] The easement is created by use which has the same

[25] See, *e.g.*, Palmer v. East River Gas Co., 115 App. Div. 677, 101 N.Y. Supp. 347 (1906), where this point was made with unusual clarity by a concurring judge who said, "Though a street used by the public generally be not an official one, so that the city is under duty to keep it in repair, and liable for damages for dangerous defects in it, it may nevertheless be a public street in the sense that the public have and exercise the right of travel over it, such right being conferred by the owner of the land in the street by dedication, such as granting the land abutting on it by conveyances bounding on the street as shown by a map."

[26] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 538 (1962); Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961); Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937).

[27] The case cited to support this proposition, Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944), concerned an easement and not dedication.

[28] A most succinct discussion of the dissimilar elements of user in prescription and user in dedication is found in Drimmell v. Kansas City, 180 Mo. App. 339, 168 S.W. 280 (1914). On this point the court said, *inter alia*, "The throwing open of land to public use as a street without other formality is sufficient to establish the fact of dedication to the public and if individuals become interested to have it continue so, the owner cannot resume it. To establish dedication by prescription in this state, user for ten years must be shown; but a valid common-law dedication may be shown by an act of dedication and of the animus dedicandi without reference to the period of use." *Id.* at 344, 168 S.W. at 281.

[29] Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958); Henry v. Farlow, 238 N.C. 542, 78 S.E.2d 244 (1953); Whitacre v. City of Charlotte, 216 N.C. 687, 6 S.E.2d 558 (1940); Darr v. Carolina Aluminum Co., 215 N.C. 768, 3 S.E.2d 434 (1939); Hemphill v.

characteristics as adverse possession. A dedicator affirmatively manifests an intent for the public to use his property. Adverse user is simply not in play.[30] The language in the principal case further illustrates a commingling and confusion of the two doctrines by adding the requirement of use for twenty years in a context involving acceptance of an offer of dedication of subdivision streets.[31] This is wholly incorrect. It is generally accepted that, in a situation where the owner has made an express offer of dedication, length of time of use is not controlling and has nothing to do with the period of adverse use necessary for a perfected prescriptive easement.[32] It is merely evidence of the intent of the public to accept the dedication.[33] More important evidence of acceptance is the sufficiency of the character of the use, such as whether the land has been used for the purpose for which it is dedicated, and whether the quantum of use is

Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937); City of Durham v. Wright, 190 N.C. 568, 130 S.E. 161 (1925); Draper v. Conners & Walters Co., 187 N.C. 18, 121 S.E. 29 (1924). In some cases the two doctrines have been correctly distinguished. After a finding of insufficient intent to dedicate, the court has examined the facts to ascertain whether the conditions precedent for prescriptive easement have been met. See, *e.g.*, Nicholas v. Salisbury Hardware & Furniture Co., *supra*.

[30] Transue v. Croffoot, 179 Kan. 219, 294 P.2d 216 (1956); City of Spokane v. Catholic Bishop of Spokane, 33 Wash. 2d 496, 206 P.2d 277 (1949). Where, in addition to acceptance, there is a question of intent to dedicate, the two doctrines are more nearly parallel. In that instance some courts have drawn an analogy to prescription and have often required a satisfying of the same elements, including adverseness and use for a twenty year period. Feuer v. Brenning, 201 Misc. 792, 115 N.Y.S.2d 384 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 1033, 112 N.Y.S.2d 382 (1952), *aff'd*, 304 N.Y. 881, 110 N.E.2d 173 (1953).

[31] The court cited Scott v. Shackelford, 241 N.C. 738, 86 S.E.2d 453 (1955); Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944); and Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937). These cases deal with prescriptive easements, *not* dedication.

[32] Tise v. Whitaker-Harvey Co., 146 N.C. 374, 59 S.E. 1012 (1907). Acceptance may be shown by proof of public use for a lesser period of time than that required for prescriptive easements or adverse possession. Fitzhugh v. Goforth, 228 Ark. 568, 309 S.W.2d 196 (1958); City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658 (1919); W.T. Congleton & Co. v. Roberts, 221 Ky. 712, 299 S.W. 576 (1927); North Beach v. North Chesapeake Beach Land & Improvement Co., 172 Md. 101, 191 Atl. 71 (1937).

[33] Gunn v. Fontes, 148 Cal. App.2d 351, 306 P.2d 928 (Dist. Ct. App. 1957); Atlantic Coast Line R.R. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959); Henry Walker Park Ass'n v. Mathews, 249 Iowa 1246, 91 N.W.2d 703 (1958); North Beach v. North Chesapeake Beach Land & Improvement Co., *supra* note 32. Length of time of user is more important and consequently may be required to continue for a longer period of time when also relied on to create a presumption of dedication. City of Kansas City v. Burke, 92 Kan. 531, 141 Pac. 562 (1914).

consonant with the potential use in light of the surrounding circumstances.[34]

In the final analysis the status of the doctrine of acceptance of dedication by user in North Carolina is confused. The decided cases have left a wake of conflicting statements and strangely amalgamated concepts which do not entirely agree with the better reasoned authorities. At least in the context of the principal case,[35] a simple solution would be to acknowledge that the general public, relying on the manifested intent to dedicate streets in a subdivision, could make the offer irrevocable by user without thereby imposing a duty of maintenance on the public authorities.

JAMES M. TALLEY, JR.

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

Of extreme practical importance to the practicing bar is the contribution statute, G.S. § 1-240,[1] around which a maze of questionable procedural rules has been judicially constructed.[2] Considerable

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

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

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

[2] See 40 N.C.L. REV. 633 (1962).

uncertainty also exists as to the act's current substantive effect, and legislative revision would seem to be in order.

One important question to be considered if the statute is revised will be whether to codify or eradicate the present rule recently reaffirmed in *Herring v. Jackson*[3] that a liability insurance carrier may not be subrogated to its insured's right to contribution against a joint tortfeasor. This dubious doctrine, peculiar to this state, was announced by our court over twenty-five years ago in *Gaffney v. Lumbermen's Mut. Cas. Co.*,[4] where the original defendant insurer attempted to implead the joint tortfeasor and his liability carrier. It was said there that since the right to contribution was purely statutory in derogation of the common-law rule that joint tortfeasors had no such remedy, "a most liberal construction of the statute will not permit the writing into it of the liability insurance carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein."[5] It may well be questioned whether a truly "liberal" court in that instance would not have written the word "insurers" into the statute, relying upon the equitable theory of subrogation.[6] Other courts have not found themselves incapable of performing this very task[7] and liability insurance carriers are generally held to be entitled to such rights without question where they exist in favor of their insureds.[8]

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[3] 255 N.C. 537, 122 S.E.2d 366 (1961), discussed in *Civil Procedure (Pleading and Parties), Ninth Annual Survey of North Carolina Case Law*, 40 N.C.L. REV. 494 (1962).

[4] 209 N.C. 515, 184 S.E. 46 (1936), discussed in 15 N.C.L. REV. 289 (1937). A default judgment had been entered and returned unsatisfied against defendant's insured prior to the action.

[5] *Id.* at 519, 184 S.E. at 47-48.

[6] See note 14 *infra* and accompanying text.

[7] Silver Fleet Motor Express, Inc. v. Zody, 43 F. Supp. 459 (E.D. Ky. 1942); State *ex rel.* McCubbin v. McMillian, 349 S.W.2d 453 (Mo. Ct. App. 1961); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950).

[8] *E.g.*, Preferred Acc. Ins. Co. of New York v. Musante, Berman & Steinberg Co., 133 Conn. 536, 52 A.2d 862 (1947); Hawkeye-Security Ins. Co. v. Lowe Constr. Co., 251 Iowa 27, 99 N.W.2d 421 (1959); Leitner v. Hawkins, 311 Ky. 300, 223 S.W.2d 988 (1949) (rule discussed although insured sought contribution without objection after settlement); Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Western Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 251 N.W. 491 (1933). See also Annot., 60 A.L.R.2d 1366, at 1388 (1958 & Supp. 1962); Annot., 171 A.L.R. 271 (1947) supplementing Annot., 75 A.L.R. 1486 (1931).

The UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(e) (1955) provides: "A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the

Apparently defendant insurer in *Gaffney* did not believe the court meant what it said, for after satisfying the judgment and causing it to be assigned to a trustee, the insurance carrier recovered a default judgment against the joint tortfeasor[9] and then proceeded to sue his insurer for contribution. The theory advanced was that if G.S. § 1-240 did not confer the right, the equitable principle of subrogation did without regard to the provisions of the statute. A demurrer was sustained and affirmed.[10]

These decisions did not attain their real importance, however, until the enactment of the Motor Vehicle Financial Responsibility Acts of 1953 and 1957, providing for compulsory liability coverage.[11] The question then arose as to how far these cases extended. The answer came three years ago in *Squires v. Sorahan.*[12] Judgment had been entered against four defendants, an agent and his three principals, one of which had left the state and could not be forced under execution to contribute to payment. Liability insurers of two defendants satisfied the judgment, one paying five-sixths and the other the remainder. After having the judgment assigned to a trustee for the benefit of its insured, the former company in the name of its insured proceeded by petition in the cause for a judgment establishing the proportionate part each judgment debtor should pay. The petition was denied. On appeal, counsel for appellant argued that the earlier decisions were distinguishable in that they merely held that a liability insurer and its insured, upon paying more than a proportionate share of the judgment, could not go directly against the insurer of the other joint judgment debtor, and did not rule out an action against the latter.[13] The supreme court disagreed.

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extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 218 (1955).

[9] See note 14 *infra.*

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

[11] N.C. GEN. STAT. §§ 20-279.1 to -279.39, 20-309 to -319 (Supp. 1961).

[12] 252 N.C. 589, 114 S.E.2d 277 (1960), 12 MERCER L. REV. 276.

[13] Brief for Appellant, p. 17. Counsel for appellant pointed out that the court had recognized without comment in Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936), that plain-

Although producing no substantial change in the North Carolina law, the *Herring* decision, because of the particular facts involved, presented the court with a reasonable opportunity to re-evaluate the *Gaffney* rule. In *Herring* the insured instituted an independent suit for contribution against the joint tortfeasor after plaintiff's insurance carrier had paid the injured party pursuant to a consent judgment in return for the insured's execution of a "loan receipt."[14] Reasoning that the "loan receipt" was merely a subterfuge employed by the insurer in an effort to circumvent and subvert G.S. §§ 1-57

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tiff's action for contribution was grounded on a prior default judgment entered against defendant's insured, establishing his liability as a joint tortfeasor. The argument was also made that the theory of subrogation was improperly presented in that case because instead of contending that the insurer was equitably subrogated to the statutory right of contribution, plaintiff there argued that subrogation provided the right without regard to the statute. Brief for Appellant, pp. 15-16. The court answered that the statute could not "be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort." Squires v. Sorahan, 252 N.C. 589, 591, 114 S.E. 2d 277, 279 (1960). The tenor of the opinion was that the insured was not the real party in interest, but this was not explicitly stated by the court.

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

Counsel for plaintiff-appellant, representing insurer and insured, informed this writer that the decision to bring the loan receipt arrangement before the court by way of an independent action for contribution in lieu of impleading the joint tortfeasor as a third party defendant in the claimant's suit was reached on the basis of the following facts: Claimant and joint tortfeasor were related and instituted separate suits against the insured in different counties. It was thought that claimant could prove liability and recover at least $15,000, but that insured was not liable for the injury specified in the joint tortfeasor's suit. Also, insured had a substantial claim against the latter. Hence, settlement was made with claimant for $8,750, the policy limit being $10,000, and a counterclaim was filed along with the answer to the joint tortfeasor's subsequent action. The joint tortfeasor failed to establish negligence as the proximate cause of the injury for which he had sued, the jury apparently choosing to believe that this injury had been received in a previous accident, but the insured established the joint tortfeasor's negligence and recovered over $4,000 on his counterclaim as to which the joint tortfeasor had failed to plead contributory negligence. The stage was then set to test the "loan receipt" in an independent action for contribution since the issue of defendant's negligence was res judicata under the rule of Stansel v. McIntyre, 237 N.C. 148, 74 S.E.2d 345 (1953).

and 1-240, the court held that the settlement represented not a loan but payment under the policy. Thus, the insurer—not its insured—was the real party in interest under G.S. § 1-57,[15] and since insurance carriers have no right of contribution under G.S. § 1-240 as construed, the judgment of dismissal was affirmed.[16]

No valid quarrel can be made with the unerring logic of the decision. Many cases have approved the "loan receipt" device as a means of avoiding subrogation of the insurer and leaving the insured as the real party in interest, but with few exceptions, all involved claims for damage to the insured's property by fire, collision or similar casualty allegedly caused by the tortious act of a third party.[17] In such situations, the only purpose of a "loan" is to shield insurance companies from the possible prejudice of jurors, since by full payment insurers are universally subrogated to their insureds' rights and may sue in their own names.[18] In fact, the North Carolina Supreme Court has said in dictum no less than three times, including the instant decision, that a "loan receipt" will be respected in such a situation.[19]

In contrast, the only case[20] found allowing an insured to prosecute a contribution suit for the benefit of his liability insurance carrier through the use of a "loan receipt" was decided in a jurisdiction where the insurer, had it chosen, could have sued in its own right.[21] Since in that decision the sole purpose of the "loan" was to avoid

[15] For the North Carolina rules regarding insurance carriers under G.S. § 1-57, see Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 108 S.E.2d 618 (1959) and cases cited therein, discussed in Note, 38 N.C.L. REV. 99 (1959).

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

[17] *E.g.*, Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918); Capo v. C-O Two Fire Equip. Co., 93 F. Supp. 4 (D.N.J. 1950); Gould v. Weibel, 62 So. 2d 47 (Fla. Sup. Ct. 1952); Green v. Johns, 86 Ga. App. 646, 72 S.E.2d 78 (1952); Klukas v. Yount, 98 N.E.2d 227 (Ind. App. Ct. 1951); Sosnow, Kranz & Simkoe, Inc. v. Storatti Corp., 269 App. Div. 122, 54 N.Y.S.2d 780 (1945) *aff'd mem.*, 295 N.Y. 675, 65 N.E.2d 326 (1946). See generally Annot., 157 A.L.R. 1261 (1945), supplementing Annots., 132 A.L.R. 607 (1942) and 1 A.L.R. 1528 (1919).

[18] Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); Service Fire Ins. Co. v. Horton Motor Lines, Inc., 225 N.C. 588, 35 S.E.2d 879 (1945).

[19] Herring v. Jackson, 255 N.C. 537, 545-46, 122 S.E.2d 366, 373 (1961); Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 354, 108 S.E.2d 618, 620 (1959); Cunningham v. Railroad, 139 N.C. 427, 433-34, 51 S.E. 1029, 1031 (1905).

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

[21] Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926).

jury prejudice, the holding was distinguished, our court reasoning that since the insurer there could have prosecuted the action itself had it so desired, the defendant was not adversely affected. In short, *Herring v. Jackson* stands for the proposition that a liability insurance carrier cannot create a cause of action in itself through the use of a "mere fiction." Overall, it is reluctantly conceded that it was asking too much of the court to overturn the established rule on the basis of such a fictitious transaction. Plaintiff-appellant might have argued that the insured was the trustee of an express trust[22] under G.S. § 1-63 or that payment by the insurer was in practical effect payment by the insured through the premiums,[23] but no authority directly in point could have been cited for either proposition. It appears safe to say that the court has spoken the final word on this question,[24] and that any relief from the harshness of the present rule can only come through the legislative process.

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

[22] Dixey v. Federal Compress & Warehouse Co., 132 F.2d 275 (8th Cir. 1942); Miller v. Pine Bluff Hotel Co., 170 F. Supp. 552 (E.D. Ark. 1959); Gould v. Weibel, 62 So. 2d 47 (Fla. Sup. Ct. 1952); Sosnow, Kranz & Simkoe, Inc. v. Storatti Corp., 269 App. Div. 122, 54 N.Y.S.2d 780 (1945) *aff'd mem.*, 295 N.Y. 675, 65 N.E.2d 326 (1946).

The contention that the insured is the trustee of an express trust, or an action brought in the name of the trustee after assignment of claimant's judgment to him would very likely be unsuccessful. The North Carolina court recently in Ingram v. Nationwide Mut. Cas. Co., 258 N.C. 632, 637, 129 S.E.2d 222, 227 (1963), held in effect that the assignee of a judgment, or the trustee of a judgment debtor, could maintain an independent action for indemnity against a co-defendant "subject to the rule that the payment in full by a judgment debtor operates as an absolute discharge of the judgment, notwithstanding that an assignment is made to a trustee to keep it alive, if the payor is not, aside from the assignment, entitled to contribution, subrogation or indemnity." The court would probably hold that the insurer, not the insured, was the "payor" under this exception to the rule that the trustee may sue. Also, plaintiff insured in *Herring* was really no more than an agent for collection who cannot qualify as trustee of an express trust. Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912). Finally, the court has indicated that the same defenses must be available to defendant against either such a trustee or his *cestui que trust.* Mebane v. Mebane, 66 N.C. 334 (1872).

[23] Fiorentino v. Adkins, 154 Atl. 429 (N.J. Sup. Ct. 1931); Adams v. Book, 244 App. Div. 646, 280 N.Y. Supp. 88 (1935).

[24] "Manifestly, plaintiff cannot, by the 'device' or 'mere fiction' of a 'Loan Receipt' agreement *or otherwise,* confer upon Nationwide a right to contribution when such right is denied by the decisions of this Court." Herring v. Jackson, 255 N.C. 537, 545, 122 S.E.2d 366, 373 (1961). (Emphasis added.)

only by impleading the joint tortfeasor as an additional defendant. By this procedure, plaintiff's judgment against the insured and the latter's judgment against the additional defendant for contribution are entered at the same time, thus preserving the right.[25] The teaching of the *Gaffney* case is that this cross-action must be prosecuted in the name of the insured. Independent actions and motions in the cause for contribution after entry and satisfaction of plaintiff's judgment, whether brought by insurer or insured, afford no relief as shown by the decisions in *Lumbermen's Mut. Cas. Co., Herring,* and *Squires.* It is difficult, if not impossible, to find any rational basis for allowing contribution in the one instance and not in the other. Also, under the decisions interpreting G.S. § 1-57, if plaintiff's judgment exceeds the policy limits by the slightest amount, the cause of action remains in the insured, thus enabling him to bring a subsequent suit for contribution against the joint tortfeasor[26] or his insurer, if the former's liability has been established in a prior action.[27]

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

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

[26] See Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 108 S.E.2d 618 (1959), and cases cited therein, discussed in 38 N.C.L. REV. 99 (1959). Suppose the insurer is liable on its policy up to $10,000 and judgment is entered for $12,000. It would be consistent with the cases discussed in this note if the insured could only recover $1,000 in contribution from the joint tortfeasor, but in accord with current real party in interest rules, the insured may collect $2,000 for himself and $4,000 as trustee for his liability insurance carrier.

[27] Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963). Most policies provide that the insurer shall be liable only for those sums insured is "legally obligated" to pay.

tribution are not allowed.[28] This necessarily means that G.S. §1-240 is completely ineffective as to joint judgment debtors and obligors, at least in the instance when they are active joint tortfeasors,[29] when the judgment is satisfied by the liability insurer or insurers paying the entire sum or more than their proportionate share or shares.

When G.S. § 1-240 was first enacted in 1929, it amounted to an announcement of legislative policy favoring contribution.[30] Considering the fact that nearly all North Carolina motorists now carry liability insurance, it is evident that the statute retains little of its former effectiveness. It is often said that if the rule were otherwise the particular insurer would profit little, since gains from realizing and losses from paying contribution would probably cancel one another in a multitude of cases. It would seem, however, that the validity of this argument depends on whether the different insurance firms write approximately the same number of policies. Also overlooked is the fact that the absence of the right is reflected in higher insurance rates, and it is highly unlikely that the insurer will ever recoup any amount paid in contribution to resident self-insurers and nonresident motorists who are uninsured. Simply stated, the current rule does not treat the particular parties in the specific suit in an equitable manner.

It is also safe to assume that insurers are hesitant to settle and lose their contribution possibilities where there is an honest question of joint tortfeasorship and where a compromise settlement cannot be reached with the other carrier. Thus, the no contribution as to insurers rule runs afoul of the general policy of the law favoring settlement[31] and frustrates the purpose of the Financial Responsibility

[28] Greene v. Charlotte Chem. Labs, Inc., 254 N.C. 680, 120 S.E.2d 82 (1961), criticized in 40 N.C.L. REV. 633 (1962). Claimants might possibly utilize this rule as a threat to force settlement.

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

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

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

Section 1 of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, set

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

JOHN BRYAN WHITLEY

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

In North Carolina an oral contract to devise real property is void under the Statute of Frauds,[1] and part performance by the promisee will not remove the contract from the operation of the Statute.[2] However, the promisee who performs services pursuant to such a contract has a remedy on implied assumpsit or *quantum meruit* to recover the value of the services rendered.[3]

Pickelsimer v. Pickelsimer[4] presented the question of whether the third party beneficiary of a contract that is void under the Statute of Frauds may recover on *quantum meruit* the value of services rendered by the promisee pursuant to the contract. In this case the father of an illegitimate child had orally promised the child's mother that he would devise and bequeath to the child a one-fifth part of his estate if she would refrain from instituting bastardy proceedings

out in the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 218 (1955), provides: "(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them *even though judgment has not been recovered against all or any of them.* . . . (d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." (Emphasis added.)

[1] N.C. GEN. STAT. § 22-2 (1953).

[2] Duckett v. Harrison, 235 N.C. 145, 69 S.E.2d 176 (1952); Ebert v. Disher, 216 N.C. 36, 3 S.E.2d 301 (1939); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Albea v. Griffin, 22 N.C. 9 (1838). Part performance by the promisee will remove the oral contract from the operation of the Statute in all but three states. *E.g.*, Betterly v. Granger, 350 Mich. 651, 87 N.W.2d 330 (1957); Holt v. Alexander, 207 Okla. 140, 248 P.2d 228 (1952); Patton v. Patton, 201 Va. 705, 112 S.E.2d 849 (1960). See generally RESTATEMENT, CONTRACTS § 197 (1932); 1 PAGE, WILLS § 10.13 (Bowe-Parker rev. 1960).

[3] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Grantham v. Grantham, *supra* note 2.

[4] 257 N.C. 696, 127 S.E.2d 557 (1962).

against him and perform certain domestic services. The father died having breached his promise.[5] The child sued her father's estate for damages for breach of the oral contract to devise or, alternatively, on *quantum meruit* for the reasonable value of services performed by the mother pursuant to the contract. The North Carolina Supreme Court held that the plaintiff's action for breach of the oral contract to devise was barred by the Statute of Frauds,[6] and that no recovery could be had on *quantum meruit* because "it was her mother who performed the services—not the plaintiff."[7]

The court recognized the right of a third party to enforce a contract made for his benefit.[8] However, the court pointed out that since this right is necessarily dependent upon the existence of a valid contract,[9] it could not arise from an oral contract that is void under the Statute of Frauds. In determining that the plaintiff was not entitled to recover on *quantum meruit,* the court stated:

> While the law will not permit one person to take the labor of another without compensation when it was performed and received in expectation of payment, it does not follow as a corollary that a third-party beneficiary under a void contract can recover for labor which another performed, even though such labor provided the consideration for the void contract.[10]

It is believed that the principal case marks the first direct determination of a third party beneficiary's rights on *quantum meruit* in any jurisdiction.[11] Notwithstanding the novelty of the question

[5] The complaint alleged the value of a one-fifth part of the father's estate to be approximately $250,000.00. By her father's will, the child was bequeathed the sum of $1,000.00, plus $75.00 a month until she reached the age of eighteen.

[6] "An indivisible oral contract to devise both real and personal property is also void." 257 N.C. at 698, 127 S.E.2d at 559. *Accord,* McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Humphrey v. Faison, 247 N.C. 127, 100 S.E.2d 524 (1957).

[7] 257 N.C. at 703, 127 S.E.2d at 563.

[8] *Accord,* Brown v. Bowers Constr. Co., 236 N.C. 462, 73 S.E.2d 147 (1952); Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949).

[9] See Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956). See generally RESTATEMENT, CONTRACTS § 140 (1932); 4 CORBIN, CONTRACTS § 818 (1951); 2 WILLISTON, CONTRACTS § 364A (3d ed. 1959).

[10] 257 N.C. at 704, 127 S.E.2d at 563.

[11] The research for this note has disclosed no cases in which the third party beneficiary of a void contract was denied the right to recover the value of services rendered by the promisee pursuant to the contract. However, in Graham v. Graham, 134 App. Div. 777, 119 N.Y. Supp. 1013 (1909), the defendant had orally agreed with the plaintiff to convey land to a third person in consideration of services to be performed by the plaintiff. The

presented, the court was compelled to deal extensively with cases supporting the plaintiff's position.

One such case was *Redmon v. Roberts.*[12] In *Redmon,* the father of an illegitimate child had orally promised the child's mother that, if she would refrain from instituting bastardy proceedings against him, he would devise the child a share of his estate equal to that of his other children. When the father died intestate, the child sued his estate for breach of the oral contract to devise. In answer to the defendant's contention that recovery was barred by the Statute of Frauds, the court, citing prior North Carolina cases,[13] stated, "this Court and Courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered."[14] The plaintiff, a third party beneficiary, was permitted to recover. In *Pickelsimer* the court, in overruling *Redmon,* pointed out that the general proposition announced there was not sustained by the North Carolina cases[15] cited in support thereof. Indeed, in none of the cases cited in *Redmon* did the court uphold and enforce the oral contract to devise or convey. Rather, the defendant was compelled to pay the reasonable value of what he had received on the theory that it would be inequitable to allow the defendant to repudiate the oral contract and at the same time retain benefits derived thereunder at the expense of the plaintiff.

Two Kentucky cases[16] were also cited in support of the general proposition announced in *Redmon.* In each case, the father of an

plaintiff fully performed and, upon repudiation of the contract by the defendant, brought an action to recover the reasonable value of his services. Apparently speaking to the defense that the action lay in the third party, the New York court stated: "In the case at bar the premises were not to be conveyed to the promisee, but to a third party. But, the agreement was unenforceable because not written. There was no contract, therefore, upon which the beneficiary could sue. To the promisee alone is raised the implied contract to repay the value of the services rendered in performance of the voidable parol contract, which the promisor afterwards refused to perform." *Id.* at 779, 119 N.Y. Supp. at 1014.

[12] 198 N.C. 161, 150 S.E. 881 (1929).

[13] Brown v. Williams, 196 N.C. 247, 145 S.E. 233 (1928); Deal v. Wilson, 178 N.C. 600, 101 S.E. 205 (1919); McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915); Faircloth v. Kenlaw, 165 N.C. 228, 81 S.E. 299 (1914); Lipe v. Houck, 128 N.C. 115, 38 S.E. 297 (1901); Whetstine v. Wilson, 104 N.C. 384, 10 S.E. 471 (1889).

[14] 198 N.C. at 164, 150 S.E. at 883.

[15] See cases cited note 13 *supra.*

[16] Bowling v. Bowling's Adm'r, 222 Ky. 396, 300 S.W. 876 (1927); Doty's Adm'r v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904). These two cases were based on the prior case of Benge v. Hiatt's Adm'r, 82 Ky. 666 (1885).

illegitimate child had orally promised the child's mother, in consideration of her surrender of custody or her forbearance to institute bastardy proceedings against him, that he would give land to the child or make him an equal heir with his other children. The father, having received the promised consideration, breached his promise. The child brought suit in each case to enforce the father's oral promise. The Kentucky Court of Appeals held the promises unenforceable under the Statute of Frauds, but allowed the plaintiff to recover the value of the property orally promised because the mother's performance could not be accurately valued in monetary terms.[17]

These cases were particularly favorable to the plaintiff's position in *Pickelsimer,* since Kentucky, at the time the cases were decided, was one of the small minority of states, including North Carolina, which did not recognize the doctrine of part performance.[18] Nevertheless, the court refused to follow the Kentucky cases, pointing out that in neither opinion had the Kentucky court mentioned the fact that the plaintiff, a third party beneficiary of an unenforceable con-

[17] Kentucky, in a long line of decisions, had fashioned a unique measure of damages for the situation in which the services rendered were not adaptable to accurate monetary evaluation. In such a situation, the measure of damages was deemed as a matter of law to be the value of the promised realty. Walker v. Dill's Adm'r 186 Ky. 638, 218 S.W. 247 (1920); Waters v. Cline, 121 Ky. 611, 85 S.W. 209 (1905). Kentucky, in the recent case of Miller v. Miller, 335 S.W.2d 884 (Ky. 1960), has apparently abandoned the rule. See note 18 *infra.* In Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929), the North Carolina court uttered a dictum approving the trial court's application of this standard. It may have been followed in Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933), although it is difficult to determine whether the recovery in that case was limited to the value of the plaintiff's services. It was dealt with and disapproved in Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933), though it has been suggested that the facts of that case would not warrant interpreting the court's treatment to be an express repudiation. See Note, 39 N.C.L. REV. 98 (1960). If the *Grantham* case did not operate as an express repudiation of the rule, it is believed that there is language in the principal case sufficient to prevent its adoption in North Carolina in the near future.

[18] Doty's Adm'r v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904). In Miller v. Miller, *supra* note 17, the Kentucky court may have adopted the doctrine of part performance. The plaintiff, a third party beneficiary of a contract within the statute of frauds, was permitted to recover the promised realty. Theretofore, when the value of services rendered pursuant to the oral contract was impossible of monetary evaluation, the person suing had been permitted to recover the value of the promised realty as a matter of law. See note 17 *supra.* Whether *Miller* should be interpreted as placing Kentucky among those states which recognize the doctrine of part performance is questionable, since nowhere in the opinion is the doctrine mentioned, and it is not certain that the same result would be reached in cases where the services are possible of monetary evaluation. For further reflection on the Kentucky position, see 50 KY. L.J. 220 (1961).

tract, was recovering on *quantum meruit.* Indeed, in one of the cases, the Kentucky court implied that the plaintiff was recovering for breach of the oral contract, although in the same case it held the oral contract unenforceable under the Statute of Frauds.[19]

With *Redmon* and the Kentucky cases disposed of, the court then had to decide whether or not the law will imply a promise on the part of one who receives services from another to pay their reasonable value to a third person. This question was partially resolved by reference to the measure of damages in a *quantum meruit* action. The court stated that recovery on *quantum meruit* "is always on the basis of the reasonable value of the services rendered by the one and accepted by the other, less any benefits received by the one."[20] It was reasoned that since the plaintiff had not rendered the services, the law would not imply a promise to pay her their reasonable value. Instead, if any action on *quantum meruit* arose from the facts of the principal case, it belonged to the mother who had rendered the services.

The principal case reflects a desire to eliminate the confusion engendered by the loose language employed and the result achieved in the *Redmon* case. An analysis of that case would indicate that a *quantum meruit* recovery is predicated on the oral contract to devise, subject only to a limitation on the amount of damages recoverable. Such a position would be wholly inimical to the Statute of Frauds, since the policy of that Statute dictates that no agreement to devise realty, whether express or implied in fact, can be enforced unless

[19] In Doty's Adm'r v. Doty's Guardian, *supra* note 18, the defendant contended that no recovery could be had on the contract since it contemplated future illicit relations between the mother and the father. The Kentucky court, in answering this contention, stated: "If this were a suit by the mother for her services we have no question the principle should be applied, *but it is not a suit for her services. It is a suit by the child." Id.* at 219, 80 S.W. at 807. (Emphasis added.) The court held the oral contract unenforceable, pointing out that part performance would not cure the result, and then stated: "*The contract* is not otherwise within the statute of frauds, and while appellee can not be adjudged the land, the value of the thing promised may be estimated, and compensation for the *breach of the contract* may be adjudged . . . ." *Id.* at 220, 80 S.W. at 808. (Emphasis added.) The language employed and the result achieved in this and other Kentucky cases lead this writer to wonder whether Kentucky is not actually allowing an action for breach of the oral contract to devise subject to a special measure of damages to vindicate the policy behind the statute of frauds.

[20] 257 N.C. at 704, 127 S.E.2d at 563. *Accord,* Doub v. Hauser, 256 N.C. 331, 123 S.E.2d 821 (1962); Gales v. Smith, 251 N.C. 692, 111 S.E.2d 854 (1960).

reduced to writing. Thus, in recent cases,[21] the court has been careful to point out that a *quantum meruit* recovery is not based on the oral agreement between the parties, but rather on a contract which the law implies to prevent unjust enrichment. If this theoretical distinction is actually sustained in practice, then the principal case would appear to be beyond question.

The court in *Pickelsimer* was faced essentially with the question of whether or not there may be a third party beneficiary of a contract implied in law. Ordinarily, the right of a third party to maintain an action on a contract is dependent on the manifest intention of the parties to the contract to benefit the third party thereby.[22] On the other hand, a contract implied in law arises wholly without regard to the intentions of the parties. Instead, it arises from the equities of a particular situation. It is not a contract at all in the true sense, but rather a legal fiction created by the court as a means for vindicating the policy against unjust enrichment.[23] If the intention of the parties does not control the creation of the contract implied in law, then the requisite intent for the creation of third party rights would also be lacking. Nothing else appearing, when one has received services from another under circumstances which permit the inference that the recipient intended to pay and the other party expected compensation for the services, the law will not imply a promise to pay their reasonable value to a stranger.

Yet, it is not altogether clear from the cases that the only contract being enforced in the *quantum meruit* situation is the contract implied in law. In the absence of some agreement between the parties, it would be difficult to prove facts giving rise to a contract implied in law. Accordingly, evidence of the oral contract is admissible to show facts and circumstances permitting the inference that payment for the services was intended on the one hand and expected on the other.[24] Such evidence may also be used to rebut any presumption that the services were rendered gratuitiously.[25] Though evidence of the oral contract for these two purposes would be suffi-

[21] *E.g.*, Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947).

[22] See Traders Land Co. v. Abbott Realty Co., 207 N.C. 453, 177 S.E. 335 (1934).

[23] Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953); Queen v. DeHart, 209 N.C. 414, 184 S.E. 7 (1936); Montgomery v. Lewis, 187 N.C. 577, 122 S.E. 374 (1924).

[24] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Nesbitt v. Donoho, 198 N.C. 147, 150 S.E. 875 (1929).

[25] Wells v. Foreman, 236 N.C. 351, 72 S.E.2d 765 (1952).

cient to establish facts giving rise to the contract implied in law, the use of such evidence is not limited to these purposes. Indeed, the contract price is admissible as evidence, though not conclusive, of the reasonable value of the services.[26] It has been observed that use of the contract price, notwithstanding proper instructions to the jury, may result in enforcement of the oral contract itself.[27] Certainly, in cases where the promisee has fully performed and the services are not susceptible of monetary evaluation, the contract price might well be the only evidence on this subject for the jury to consider.

Heretofore, the court has been confronted with the situation in which only two parties were involved—the promisor and the promisee of the oral contract. In that situation, the only question to be decided is whether the law implies a promise from the promisor to the promisee to pay the reasonable value of the services. It would never be contended that payment should go to anyone other than the promisee who rendered the services, since no other parties are involved. Even if there is a third party beneficiary of the oral contract, this result should not be altered if the terms of the oral contract are excluded from consideration in this determination. But once the terms of the oral contract are admitted to show circumstances permitting the inference that the services are to be paid for,

[26] When the defendant has promised to devise the plaintiff specific property in consideration of the services, the value of the property is admissible as some indication of what the parties deemed the services to be worth. In Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933), the oral promise was to devise and bequeath all the property which the promisor might own at her death. The court held the value of the estate to be admissible as some evidence, though not conclusive, of the value of the services. *Accord,* Norton v. McLelland, 208 N.C. 137, 179 S.E. 443 (1935); Deal v. Wilson, 178 N.C. 600, 101 S.E. 205 (1919); Faircloth v. Kenlaw, 165 N.C. 228, 81 S.E. 299 (1914). *But cf.* Doub v. Hauser, 256 N.C. 331, 123 S.E.2d 821 (1962), where the defendant promised to devise the plaintiff "his share of the farm." The plaintiff attempted to introduce the value of the defendant's estate as some evidence of the value of the services rendered. The court held the evidence inadmissible for this purpose. *Accord,* Sawyer v. Weskett, 201 N.C. 500, 160 S.E. 575 (1931). Conceivably, had the tendered evidence been limited to the value of "his share of the farm," it would have been admissible. See generally ANNOT., 65 A.L.R.2d 945 (1959).

[27] "While this rule purports to fix the amount of compensation, it practically overrules the statute of frauds; since the jury will ordinarily fail to discriminate between evidence of the contract as an enforceable obligation, and evidence of the contract to show what reasonable compensation is." 4 PAGE, WILLS § 10.29 (Bowe-Parker rev. 1961). See also 2 CORBIN, CONTRACTS § 328 (1950).

should they not also be admitted to show circumstances permitting the inference that payment is to be made to a third party?

Two writers, in anticipating the question presented, have expressed conflicting views as to the result achieved in the principal case. Professor Williston prescribes the view adopted by *Pickelsimer*,[28] whereas Professor Corbin apparently approves the decisions in *Redmon* and the Kentucky cases.[29] Neither writer gives reasons for his view. It is believed that if the court's announced policy against enforcing the oral contract is actually realized in the *quantum meruit* situation, the result in the principal case is desirable. But if, as assumed in *Redmon*, the court is actually enforcing the oral contract subject only to a limitation on the amount of damages recoverable, then, perhaps, it is somewhat arbitrary to deny recovery to the third party beneficiary solely on the ground that she did not render the services.

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[28] 5 WILLISTON, CONTRACTS § 1455A (rev. ed. 1937). The same result is prescribed by implication in RESTATEMENT, CONTRACTS § 356 (2), comment *b* (1932).

[29] 4 CORBIN, CONTRACTS § 810 n.1 (1951).