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Case Comments

Constitutional Law—Due Process: No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings

Petitioners were charged with acts of juvenile delinquency under Pennsylvania\(^1\) and North Carolina\(^2\) law. McKeiver and Terry were charged with offenses which, if committed by adults, would have constituted felonies and misdemeanors, respectively, under Pennsylvania law, while Burrus and forty-four other black children were charged with offenses ordinarily constituting misdemeanors in North Carolina.\(^3\) The North Carolina charges arose out of a series of racial demonstrations in Hyde County. Each petitioner unsuccessfully requested trial by jury in the juvenile delinquency proceedings and these denials were upheld by the respective state supreme courts. On appeal, the United States Supreme Court affirmed the Pennsylvania and North Carolina decisions,\(^4\) holding that trial by jury in state juvenile delinquency

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3. McKeiver was charged with robbery, larceny and receiving stolen goods. Conviction in a criminal prosecution on the same charges would involve the following maximum penalties: For robbery, a fine of $5,000 and imprisonment for ten years, PA. STAT. ANN. 18 § 4704 (Purdon 1963); for larceny, a fine of $2,000 and imprisonment for five years, id. § 4807; and for receiving stolen property, a $1,000 fine and five years in prison, id. § 4817.

The juvenile court system was founded on the assumption that youths are not as blameworthy as adults and that a more enlightened treatment would have a greater likelihood of curtailing their criminal activity. Therefore the juvenile was viewed as an object of assistance rather than retribution. This led judges to pay more attention to the social background of the individual than to the jurisdictional basis for his presence before the court. In practice the court often assumed the form and function of a social service agency at the expense of its judicial function. As a result of this shift in emphasis, rights generally regarded as constitutionally required in adult criminal prosecutions were considered unnecessary in juvenile delinquency proceedings.

This system continued throughout the United States during the first half of the twentieth century without ever being subjected to significant evaluation. The United States Supreme Court had never passed upon the constitutionality of the denial to children of rights considered fundamental to adults. Only occasionally did any member of the judiciary criticize the juvenile court system. But nonjudicial criticism of the juvenile courts' cavalier treatment of the rights of juveniles mounted steadily

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5. The Court was divided 6-3 in No. 322 and 5-4 in No. 128, Brennan, J., joining the dissenters Douglas, Black and Marshall, JJ., in the latter case.


8. *Id.*


in the decade prior to the 1967 landmark decision of In re Gault.\textsuperscript{12}

In Gault the Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."\textsuperscript{13} Specifically the Court held that, in delinquency proceedings which could result in incarceration, due process requires that each defendant be afforded (1) adequate notice of charges; (2) the right to be represented by counsel; (3) the privilege against self-incrimination; and (4) the right to confrontation and cross-examination of sworn witnesses. While broadly criticizing the theory of the juvenile courts,\textsuperscript{14} the Court nevertheless emphasized the limited nature of its holding: "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing . . . ."\textsuperscript{15} Yet the Court did not clearly specify the test for determining which other rights granted to adults should also be given to children in juvenile delinquency proceedings. By its rather sweeping dicta, its narrow ruling and its failure to unambiguously establish criteria for future decisions, the Court retained the freedom to either extend or limit the rights of juveniles and remain within the scope of Gault.

This ambiguity as to the implications of Gault has led predictably to a certain amount of disagreement. Gault has been read by numerous courts and commentators as endorsing a se-

\textsuperscript{12} 387 U.S. 1 (1967). Gerald Gault, 15, was taken into custody on the complaint of a neighbor that Gerald and a companion had made a lewd phone call. The petition against him was filed and the hearing held the next day. The petition, which was not served upon Gerald or his parents, alleged little more than the boy was a minor and that he was delinquent.

Neither at this hearing nor at the one following were there any sworn witnesses or transcripts of the proceedings. The complainant did not appear, despite a request by Mrs. Gault that she do so. At no time was Gerald or his mother informed of their rights to counsel or to remain silent.

At the conclusion of the second hearing, Gerald was committed as a juvenile delinquent to the State Industrial School for an indeterminate period that could have lasted up to six years. The law which Gerald allegedly violated was punishable when applied to an adult by a $5 to $50 fine and/or a maximum imprisonment of two months.

\textsuperscript{13} \textit{Id.} at 13.

\textsuperscript{14} The Court said: "The constitutional and theoretical basis for this peculiar system is—to say the least—debatable." \textit{Id.} at 17.

\textsuperscript{15} \textit{Id.} at 30. The Court was quoting from Kent v. United States, 383 U.S. 541, 562 (1966).
lective item-by-item approach to the incorporation of due process protections into the juvenile court system. Such an approach would entail a "balancing" process in which the protection a particular right is designed to provide is weighed against the positive benefit of denying the right in the juvenile court context or the special characteristics of the juvenile court which make the protection unnecessary.16 Others have interpreted Gault as logically compelling juvenile courts to give juveniles all of the procedural protections afforded adults.17

The source of this disagreement seems to be largely a result of the lengthy discussion in Gault of the beneficial aspects of the juvenile court system. Justice Fortas concluded that "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."18 One interpretation of this discussion in Gault is that if a substantial benefit is lost by affording a specific procedural protection, the Court would be unwilling to say that due process demands the loss of that benefit. Yet it also can be argued, as in the dissent in McKeiver,19 that Gault, in its concern for deprivation of liberty and the stigma of a finding of delinquency, logically compels wholesale incorporation of adult due process protections into the juvenile court system.20 If this interpretation is given to Gault, the Court's analysis of the benefits of the system can be explained as simply an attempt to dispel the traditional notion that juvenile courts can provide special benefits only by denying due process protections usually afforded in adult criminal prosecutions. This view finds significant support in the fact that the benefits which the Gault court discussed pertained to the post-adjudicative stage of the juvenile court process, viz., correctional facilities separate from adults, avoidance of the stigma of criminality and retention of civil rights.21 It is difficult to see how constitutional protections would interfere with these benefits. As Professor Paulsen paraphrased Gault, the "legitimate

16. See, e.g., cases cited note 28 infra.
19. See note 65 infra.
20. See Glen, note 17 supra, at 437.
aims of specialized courts for children will not be impaired by applying due process standards to them."

The Supreme Court failed to resolve these differing views of Gault in In re Winship, holding that due process requires that guilt be proved beyond a reasonable doubt in state criminal cases and in juvenile delinquency proceedings based upon a criminal act which may result in deprivation of liberty. The analysis of the majority opinion, written by Justice Brennan, suggests that the Court took into consideration whether the reasonable doubt standard "would risk destruction of beneficial aspects of the juvenile process." This would indicate a balancing approach to juvenile rights. Yet, as in Gault, it was again left unclear whether an opposite finding in this respect would have changed the result. If not, this would support the wholesale incorporation interpretation of Gault. That the opinion is inconclusive on this point is suggested by the fact that two members of the majority for whom Brennan wrote in Winship later rejected the balancing approach in McKeiver.

State and lower federal court cases involving the right to trial by jury demonstrated the difficulty in applying the Gault and Winship opinions to issues beyond those expressly considered therein. The United States Supreme Court had held in Duncan v. Louisiana that the Sixth Amendment guarantee of trial by jury in criminal prosecutions was a part of the Fourteenth Amendment due process requirement in state criminal proceedings except in the case of petty offenses. Lower courts were divided concerning the application of this right to juveniles. The majority view prior to McKeiver was, as it was prior to Gault, that the right to trial by jury was not a constitutional requirement in juvenile court proceedings. This was justified in various ways. The jury was thought to detract from the informality of the juvenile court, a beneficial element in the system which, it was argued, was not intended to be eliminated by the Gault decision. Alternatively, courts concluded that the Bill of Rights

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24. Id. at 366.
27. See Annot., 100 A.L.R.2d 1241 (1965).
is not applicable to juvenile delinquency proceedings because such proceedings are nominally civil,\(^2\) or simply that Gault did not compel such a holding.\(^3\) However, several other courts did hold that in light of Gault and Duncan due process required that the juvenile be given the right to trial by jury.\(^9\) Despite these conflicting opinions, the Supreme Court refused to review the question\(^3\) until the McKeiver case.

In McKeiver the Supreme Court was divided over the question whether incorporation of adult rights into juvenile proceedings should be selective, and if so, what the standard for such selection should be. Justice Blackmun, joined by the Chief Justice and Justices Stewart and White, eschewed the civil/criminal labelling method of ascertaining what rights juveniles are to be accorded. The standard derived from Gault, he declared, is fundamental fairness, which he defined largely in terms of the accuracy of the findings of fact.\(^3\) For various reasons, the four justices concluded that this standard of fundamental fairness had been met in the controversies before the Court notwithstanding the denial of a jury trial. The thirteen numbered concluding paragraphs of the opinion present two basic arguments supporting the

\(^{29}\) In re Fucini, 44 Ill. 2d 305, 311, 255 N.E.2d 380, 383 (1970); In re Johnson, 254 Md. 517, 531, 255 A.2d 419, 426 (1969); People v. Larry K. & Samuel K., 58 Misc. 2d 526, 529, 296 N.Y.S.2d 404, 407 (Sup. Ct. 1968); People v. "Y.O. 2404," 57 Misc. 2d 30, 32, 291 N.Y.S.2d 510, 514 (Sup. Ct. 1968); In re Agler, 15 Ohio App. 2d 240, 247, 240 N.E.2d 874, 878 (1968). This is a surprising rationale in view of the Gault Court's explicit rejection of the argument that juvenile proceedings being civil rather than criminal, the Bill of Rights is not applicable. In re Gault, 387 U.S. 1, 50 (1967).


\(^{32}\) An opportunity to do so arose in DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968). The Nebraska Supreme Court was of the opinion, by a 4-3 margin, that juvenile offenders were entitled to trial by jury, but the appeal failed since under the Nebraska constitution, the vote of five justices is needed to declare a statute unconstitutional. The Supreme Court dismissed the appeal, Black and Douglas, JJ., dissenting. DeBacker v. Brainard, 396 U.S. 28 (1969). The ground for the dismissal was that the case antedated Duncan v. Louisiana, 391 U.S. 145 (1968), and that Duncan was to be applied only prospectively. DeStefano v. Woods, 392 U.S. 631 (1968).

fairness of juvenile nonjury trials and militating against the constitutional requirement of trial by jury in juvenile proceedings.

First, Justice Blackmun noted that the weight of authority is against such a requirement. He observed that neither the authoritative Task Force Report on Juvenile Delinquency and Youth Crime,34 the Uniform Juvenile Court Act,35 the Standard Juvenile Court Act,36 nor the Legislative Guide for Drafting Family and Juvenile Court Acts37 had favored trial by jury in delinquency proceedings.38 Furthermore, he noted that at least 29 states and the District of Columbia denied the juvenile the right to a jury trial, and in most states the denial had been upheld as a matter of constitutional law since Gault.39

The opinions expressed in the model acts and by the President's commission, however, cannot be regarded as convincing constitutional authority. Moreover, although the general practice among the states has been a factor considered in deciding whether specific procedural protections are fundamental to due process,40 the Gault case itself clearly emphasized that such a consideration is not decisive.41 Gault rejected the contention that due process protections were unavailable to juveniles because juvenile court proceedings are civil rather than criminal.42 In doing so, the Court departed from the general view of the state courts during the previous half-century of the courts' existence.43 Thus in this context, a rigid adherence to precedent can be regarded as little more than a make-weight argument.

The second major idea contained in Justice Blackmun's conclusions is implicit in the sum of the other enumerated points. Basically it is that the benefits to be preserved by withholding

34. See Task Force Report, note 11 supra, at 38.
35. See Handbook of the National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act § 24(a) (1968).
39. Id. at 548-49.
42. Id. at 50.
43. See Antieau, note 11 supra, at 388; Paulsen, note 11 supra, at 549.
the right to jury trial far outweigh the importance of the right in contributing to the fairness of the proceeding. A jury, Justice Blackmun warned, might remake the juvenile proceeding into a fully adversarial process which would be repugnant to the goal of informality. He speculated that the use of juries would also cause delay and would lead to public trials. On the other hand, he could perceive no protection provided by the right to a jury trial which could outweigh the benefits of informality, speed and confidentiality. A jury, he observed, would not necessarily be fairer, nor would it strengthen the fact-finding function of the juvenile court.

Accepting arguendo Justice Blackmun's analysis of Gault—that a balancing test should be used to determine whether to selectively incorporate adult rights into juvenile proceedings—his application of that test is deficient as to both the supposed benefits of denying juveniles a jury trial and the protection provided by the right to a jury trial.

First, Justice Blackmun's opinion fails to articulate persuasive policy considerations which would outweigh the advantages of the right to a jury trial. The importance of informality to the rehabilitative process has been seriously questioned. It has been argued by many that a more formal hearing will impress upon the juvenile the gravity of his offense, with resulting therapeutic and/or deterrent effects. In fact, the Gault court questioned the rehabilitative value of informality. In accord with this changing attitude it is submitted that informality is a highly overrated element and an insubstantial reason for excluding the jury trial from the body of procedural due process for juveniles. That juries would cause long delays in the juvenile court system is refuted by the experience of those jurisdictions which do allow juries in juvenile proceedings. Juries in fact are rarely requested by juveniles. Finally, to argue that the possibility of

45. Id. at 550.
46. Id. at 547. It has been suggested that a jury of adults in a juvenile proceeding may prove to be harsher and more arbitrary than would a judge. George, Juvenile Delinquency Proceedings: The Due Process Model, 40 U. Colo. L. Rev. 315, 327 (1968). But see Note, Juveniles and Their Right to a Jury Trial, 15 Vill. L. Rev. 972, 994 (1970).
47. S. Wheeler & L. Cottrell, Jr., note 7 supra, at 37-38; Parker, Instant Maturation for the Post-Gault "Hood", 4 Fam. L.Q. 113 (1970); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col. L. Rev. 281, 284 (1967); Comment, note 11 supra, at 1217.
public trials is a detrimental facet of the jury trial is not compelling without further elaboration as to the supposed resulting evils. Even within the Court there is no unanimity as to the desirability of public trials for juveniles.\(^{50}\)

The second deficiency of the opinion is that it does not consider adequately the purpose of the right to a jury. In emphasizing the importance of accurate factual findings to insure fairness in juvenile court proceedings, to the exclusion of other considerations, Justice Blackmun's opinion clearly represents a departure from \textit{Gault}. That decision did not look solely to the fact-finding advantages of constitutional protections in determining whether such rights are necessary to insure fundamental fairness in delinquency proceedings. \textit{Gault} looked instead to the basic protections offered the defendant by the particular right in question—including protection against oppression by the state. For example, in holding that juveniles are entitled to the privilege against self-incrimination, the Court did acknowledge that forced confessions, especially those of children, tend to be unreliable. But it was not this inaccuracy of fact-finding on which the \textit{Gault} Court based this decision. As the Court there noted:

\begin{quote}
The roots of the privilege are ... far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.\(^{51}\)
\end{quote}

Under any "balancing" process, then, the Court should include an examination of the protection provided by the particular right, extending beyond a mere discussion of its positive effect on the accuracy of factual determinations. The function served by the right to a trial by jury is clearly spelled out in \textit{Duncan v. Louisiana}: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."\(^{52}\) The right, said the Court, reflects a reluctance to give power over a man's life and liberty to one person.\(^{53}\) The fear of the arbitrary use of power is equally applicable to juvenile court proceedings. Justice Blackmun cannot find support in \textit{Gault} for failing to face this vital policy consideration.\(^{54}\)

\(^{50}\) See text accompanying note 57 infra.

\(^{51}\) \textit{In re Gault}, 387 U.S. 1, 47 (1967). Earlier in its opinion, the Court said that denial of due process to juveniles had resulted in instances "of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." \textit{Id.} at 19-20.

\(^{52}\) 391 U.S. at 155.

\(^{53}\) \textit{Id.} at 156.

\(^{54}\) In professing to follow \textit{Gault} while at the same time departing from any sound interpretation of that case, the post-Warren Court has
In concurring and dissenting in *McKeiver*, Justice Brennan also employed a balancing test. Unlike Justice Blackmun, however, he perceived that *Gault* went beyond a concern solely for accurate fact-finding. Due process, Justice Brennan maintained, "commands, not a particular procedure, but only a result . . . ."56 One result it commands, he said, is the protection of the individual from the government, and in assuring this protection the Court is required to inquire into the adequacy of the particular proceeding under attack rather than relying on generalizations about the juvenile court system as a whole.56 Justice Brennan's scrutiny detected no fault in the Pennsylvania proceedings. In Pennsylvania, he pointed out, there is no ban on the public trial in juvenile proceedings, while in the North Carolina cases the public was excluded from the hearings. While in the adult proceeding the right to a jury is necessary to prevent oppression, he explained, the same function can be adequately handled in the juvenile court by the public trial, by virtue of a greater community concern for juvenile offenders than for adult offenders.57 Hence Justice Brennan dissented in the North Carolina cases but concurred in the Pennsylvania decision.58

Justice Brennan adequately considers the purpose of the right to trial by jury, but fails in two respects to properly weigh the factors which supposedly would render the right unnecessary in juvenile delinquency proceedings. First, it is doubtful at best that a greater community concern for juveniles in fact exists. The Blackmun opinion noted the lack of resources and dedication in the juvenile court system,59 and the Task Force Report on Ju-
One reason for the failure of the juvenile courts has been the community's continuing unwillingness to provide the resources—the people and facilities and concern—necessary to permit them to realize their potential and prevent them from taking on some of the undesirable features typical of lower criminal courts in this country.60

Second, Justice Brennan does not state how public trials can prevent oppression by the government. Even if the community is more concerned with juvenile offenders than with adult offenders, only the most sensational offense could catch the public eye, and even then, only in cases of manifest abuse of judicial power could the public exert so much as an indirect pressure upon the court. A jury trial induces 12 hopefully objective citizens to focus their attention on a particular case, thereby diminishing the likelihood that the accused, no matter how obscure, will be a victim of the arbitrary exercise of power.

While different in substance, both the analysis of Justice Brennan and that of Justice Blackmun utilize an approach that takes into consideration the characteristics of juvenile proceedings which might produce a result different from that which would ensue were the rights of adults at issue. To those who dissented in both cases, such special characteristics are irrelevant; Justice Douglas, joined by Justices Black and Marshall, reiterated Justice Black's position in Gault that a juvenile accused of a crime "is entitled to the same procedural protection as an adult."61 Juvenile proceedings in which a crime is alleged, contended the dissenters, are in effect criminal proceedings since they often result in confinement for the commission of a proscribed act.62 Hence, it was argued, Duncan v. Louisiana63 foreclosed the issue, and no analysis such as that pursued by Blackmun and Brennan was necessary. Thus the crucial point of departure between the opinions of Justices Blackmun and Douglas did not focus upon the right to trial by jury at all, but upon the broader question of

61. McKeiver v. Pennsylvania, 403 U.S. 528, 559 (1971). In Gault, Justice Black wrote in his concurring opinion:

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years [see note 12 supra], I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.

In re Gault, 387 U.S. 1, 61 (1967).
whether or not the juvenile is entitled to all of the procedural protections granted to adults under the due process clause of the Fourteenth Amendment.\textsuperscript{64}

For Justices Douglas, Black and Marshall, the two crucial elements which should call into play the right to jury trial, whether for adult or juvenile, are the possibility of confinement and the allegation of the commission of a crime.\textsuperscript{65} Although \textit{Gault} expressly refrains from such a broad holding,\textsuperscript{66} its underlying rationale does give some support to this view. While recognizing that the juvenile courts at least in theory could provide special benefits,\textsuperscript{67} the \textit{Gault} Court was forced to "confront the reality" of institutionalization for a number of years because of a child's misconduct:

\begin{quote}
It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.\textsuperscript{68}
\end{quote}

In \textit{Gault} the restriction of liberty because of wrongful conduct was referred to as the controlling factor.\textsuperscript{69} In the use of this

\begin{itemize}
\item \textsuperscript{64} Justice Douglas's treatment of the practical aspects of juries in juvenile proceedings is limited to the appending of an opinion by Judge De Ciantis of the Family Court of Providence, Rhode Island. \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 563-72 (1971).
\item \textsuperscript{65} \[W]here a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order "confine-
\item \textsuperscript{66}ment" until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult. \textit{Id.} at 559.
\item \textsuperscript{67} It is perhaps instructive to note that the benefits which the Court in \textit{Gault} enumerated are benefits pertaining to the post-adjudica-
\item \textsuperscript{tive stage of the juvenile court process: (1) separate treatment from adults; (2) avoidance of the criminal label and the attaching stigma; (3) avoidance of civil disabilities resulting from adjudication of guilt of a crime. 387 U.S. 1, 21-27. \textit{See} text accompanying note 21, \textit{supra}. But another beneficial aspect of juvenile proceedings was noted by the Court in \textit{Winship}—the "informality, flexibility, or speed of the hearing at which the factfinding takes place." \textit{In re Winship}, 397 U.S. 358, 366 (1970).
\item \textsuperscript{68} \textit{In re Gault}, 387 U.S. 1, 27 (1967).
\item \textsuperscript{69} The Court declared, for example:
\item A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. \textit{Id.} at 36.
\end{itemize}
sanction the juvenile courts are clearly akin to criminal courts.\textsuperscript{70} That rehabilitation is the goal of the juvenile courts cannot \textit{per se} justify the withdrawal of procedural protections. Rehabilitation is also the theoretical goal of our adult criminal courts.\textsuperscript{71}

Nevertheless, a rule as broad as that proposed by the dissent in \textit{McKeiver} was not necessary to a holding that due process requires the right to jury trial in delinquency proceedings. The approach of Justices Blackmun and Brennan could have produced the same result as that reached by Justice Douglas. Such an analysis could be supported by citing the extreme importance attached to the right of trial by jury in \textit{Duncan v. Louisiana}.\textsuperscript{72} Given the fundamental nature of the right, it could be argued, it should be held a requirement in delinquency proceedings, absent clearly compelling reasons for withholding it. Since the “policy” considerations cited by Justice Blackmun have been seriously questioned,\textsuperscript{73} and since the jury provides a unique form of direct check on judicial power, it could be concluded that juries should be required in juvenile delinquency proceedings which may result in incarceration. Such an argument by the dissent would have brought into sharper focus the weaknesses in the opinions of Justices Blackmun and Brennan, while still not foreclosing the eventual incorporation of other Bill of Rights protections into the juvenile court system.

\textit{“criminal” for purposes of the privilege against self-incrimination} . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called “criminal” or “civil.” And our Constitution guarantees that no person shall be “compelled” to be a witness against himself when he is threatened with deprivation of his liberty. . . .

\textit{Id.} at 49-50.

Thus, in a juvenile system designed to lighten or avoid punishment for criminality, [Gault] was ordered by the State to six years’ confinement in what was in all but name a penitentiary or jail.

\textit{Id.} at 61 (Black, J., concurring).

\textit{Aside from capital punishment, imprisonment is the most severely afflictive sanction employed under contemporary penal law. It is the modern substitute for the brutalities of earlier systems or corporal and capital punishment and is the sanction most commonly employed by our criminal courts for felons.}


\textit{In Williams v. New York, 337 U.S. 241, 248 (1949), the Court observed:}

\textit{Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.}

\textit{See also In re Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716, 719 (1967).}

\textit{391 U.S. 145, 156 (1968).}

\textit{See text accompanying notes 34–39 supra.}
McKeiver v. Pennsylvania has left the jury question to the states, and it is there that the issue ultimately will be resolved on nonconstitutional policy considerations. Recent thinking on juvenile delinquency has provided sound policy reasons for the state's acceptance of jury trials in the juvenile courts. It has already been suggested that formality is no longer viewed with the traditional hostility, and is even considered by many to have overriding beneficial effects outweighing any negative ones.\footnote{74}{See note 46 \textit{supra}.}

The presence of a jury would also serve to emphasize the importance of the fact-finding function of the adjudicatory stage, which has too often been obscured by the rehabilitative role of the court.\footnote{75}{Too often the child simply has been presumed to be in need of rehabilitation while little consideration is given to the facts which are to establish the jurisdiction of the court over the juvenile. This is little short of a presumption of guilt. A recent Indiana Supreme Court decision denying the right to trial by jury in juvenile proceedings reflected such an attitude in declaring that "[t]hese boys don't need a jury, they need rehabilitation." Bible v. State, 254 N.E.2d 319, 328 (Ind. 1970). \textit{See also} People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Mack, \textit{The Juvenile Court}, 23 \textit{Harv. L. Rev.} 104, 107 (1909). Cf. L. Carr, \textit{Delinquency Control} 219 (1950).}

It is at the dispositional stage that what Justice Blackmun called "every aspect of fairness, of concern, of sympathy, and of paternal attention which the juvenile court system contemplates"\footnote{76}{\textit{Id.} at 563-64 (appendix to dissent of Douglas, J.).} could be brought most fruitfully into play. At the adjudicatory stage there is much to be gained by assuring the juvenile "that his case will be decided by 12 objective citizens."\footnote{77}{\textit{Id.}}

As juvenile courts are presently operating, however, the fear of a flood of requests for jury trials and its ensuing case backlog and delay, whether or not such a fear is justified,\footnote{78}{See text accompanying note 49 \textit{supra}.} will undoubtedly discourage many states from experimenting with jury trials in juvenile courts. But an increased awareness of the limited utility of total confinement has resulted in increasing efforts to find alternatives in order to remove many cases from the juvenile justice system at an earlier stage.\footnote{79}{\textit{Post}, Hicks & Monfort, \textit{Day-Care Programs for Delinquents: A New Treatment Approach}, 14 \textit{Crim. \& Del.} 353 (1968); Sheridan, \textit{Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?} 31 \textit{Fed. Prob.} 26 (1967); Stark, \textit{Alternatives to Institutionalization}, 13 \textit{Crim. \& Del.} 323 (1967); Note, \textit{A Proposal for More Effective Treatment of the "Unruly" Child in Ohio: The Youth Services Bureau,} 39 \textit{U. Cinc. L. Rev.} 275 (1970). For the suggestion that a finding of fact with no disposition whatever may be of benefit, see S. Wheeler & L. Cottrell, Jr., \textit{Juvenile Delinquency Its Prevention and Control} 37 (1966).}

Voluntary pre-judicial
referrals to social service agencies are generally approved,80 a
procedure supported by dicta in Gault.81 Another possible al-
ternative gaining increasing support82 is less state interference
of any kind. If these options are pursued, presumably juvenile
courts will concern themselves only with the more serious off-
fenses or the more chronic repeating delinquents, making the
use of juries administratively more feasible.

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80. TASK FORCE REPORT, note 11 supra, at 15; Ferster, Courtless
& Snethen, Separating Official and Unofficial Delinquents: Juvenile
82. Most state statutes defining juvenile delinquency go beyond
the mere violation of state or federal law. See, e.g., CONN. GEN. STAT.
ANN. § 17-53(d) (Supp. 1970) ("indecent or immoral" conduct); MINN.
STAT. § 260.015(5)(e) (1971) (one who "habitually deports himself in
a manner that is injurious or dangerous to himself or others"); IOWA
CODE ANN. § 232.2(13)(d) (1969) (one who "habitually deports himself
in a manner that is injurious to himself or others"). Such laws have
been criticized as being essentially criminal statutes which are too
vague. See Comment, Statutory Vagueness in Juvenile Law: The
Supreme Court and Mattiello v. Connecticut, 118 U. Pa. L. Rev. 143
(1969); cf. People v. Allen, 22 N.Y.2d 465, 470, 293 N.Y.S.2d 280, 282,
239 N.E.2d 879, 880 (1968) (dictum). Criticism has increasingly been
levelled at laws designed especially for children. F. ALLEN, THE
BORDERLAND OF CRIMINAL JUSTICE 55 (1964); Glen, Juvenile Court Re-
form: Procedural Process and Substantive Stasis, 1970 Wis. L. Rev. 431,
443; Haviland, Daddy Will Take Care of You: The Dichotomy of the
Juvenile Court, 17 U. Kansas L. Rev. 317 (1969); TASK FORCE REPORT,
note 11 supra, at 25; Note, note 79 supra; W. SHERIDAN, ED., STANDARDS FOR

The court, by virtue of such laws and broad definitions, has more
power to bring the juvenile under its control. The President’s Crime
Commission warned that much of the extensive official action currently
taken against juveniles

may do more harm than good. Official action may actually help
to fix and perpetuate delinquency in the child through a
process in which the individual begins to think of himself as
delinquent and organizes his behavior accordingly. . . . The
undesirable consequences of official treatment are heightened in
programs that rely on institutionalizing the child. The most
informed and benign institutional treatment of the child,
even in well-designed and staffed reformatories and training
schools, thus may contain within it the seeds . . . of the very
disorder it is designed to cure.

TASK FORCE REPORT, note 11 supra, at 8. One-third of all cases handled
in juvenile courts involve repeat offenders. CHILDREN’S BUREAU, U.S.
DEPT. OF HEALTH, EDUCATION AND WELFARE (Stat. Serv. No. 83) JUVENILE
COURT STATISTICS—1964 at 1. It would seem therefore that support for
the narrowing of the grounds of juvenile court jurisdiction is not un-
reasonable.
Constitutional Law—Due Process: Hearing on Issue of Fault Required Prior to Driver's License Suspension Under Financial Responsibility Law

Petitioner was involved in an auto accident in which a five year old girl rode her bicycle into the side of his car. Based on the accident report filed by the child's parents asserting damages of $5,000 for her injuries, respondent Director of the Georgia Department of Public Safety notified petitioner that his license would be suspended unless he furnished proof of insurance, security in the amount of $5,000 or a notarized release from liability. Petitioner's proffered evidence on liability was rejected at an administrative hearing, and he was given 30 days to comply or suffer suspension. At trial de novo in Superior Court, petitioner's evidence was admitted and the court found him free from fault; additionally, it was ordered that his license not be suspended until a tort action was filed against him. The Georgia appeals court reversed and the Georgia Supreme Court denied review. On certiorari, the United States Supreme Court reversed, holding that procedural due process required a suspension hearing to consider whether there was a reasonable possibility that a judgment might be rendered against petitioner as a result of the accident. *Bell v. Burson*, 402 U.S. 535 (1971).

The problems facing uncompensated motor vehicle accident victims have given rise to various types of state legislation, including financial and safety responsibility statutes, compulsory insurance, unsatisfied judgment funds, and compensation plans. The Uniform Vehicle Code reflects the impetus of the majority

2. Although some writers distinguish between financial responsibility and safety responsibility laws, the greatest distinction between them is in the label.
3. Compulsory insurance plans require proof of liability insurance coverage as a prerequisite to automobile registration. Unsatisfied judgment funds provide relief for those who obtain judgments against judgment-proof, uninsured motorists. Compensation plans integrate compulsory insurance into a design to provide recovery according to a fixed schedule for all accident victims regardless of fault. See generally R. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim* 76-189 (1965) [hereinafter cited as Keeton & O'Connell].
of the financial responsibility laws now found in 49 states and the District of Columbia. Basic provisions of financial responsibility statutes of most states are similar. Generally, a driver involved in an accident resulting in personal injury or property damage in excess of a specified amount, usually $100, must submit an accident report to a designated state official. Upon receipt of that report, the designated administrative officer suspends the license (and usually the automobile registration) of the driver and owner of each vehicle involved unless such driver or owner deposits security "which shall be sufficient in [the department's] judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each driver or owner." In the majority of states, including Georgia, such suspension has been mandatory. However, a security deposit has not been required of a driver if, for example, (a) he has had liability insurance or bond in minimum amount fixed by statute, (b) his vehicle was legally parked, (c) he had been released from liability by potential plaintiffs, or (d) he had been adjudicated not liable.

In six states, including Minnesota, statutes have provided that no security deposit will be required if "it appears to the satisfaction of the commissioner that the driver or owner is not liable for any damages resulting from the accident." Even where the statute has not specifically provided for discretionary suspension, that result has been reached by ju-

5. See Keeton & O'Connell, supra note 3, app. C for comparison of the various state provisions. For complete listings of statutes see Grad, Recent Developments in Automobile Accident Compensation, 50 Colum. L. Rev. 300, 307 n.24 (1950); Note, A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform, 21 Vand. L. Rev. 1050, 1081, 1082 app. B (1968). Neither listing is entirely up to date, due to recent legislative changes. The latter reference reported that all 50 states have financial responsibility laws. 21 Vand. L. Rev. at 1050. New Mexico recently repealed the portions of its statute pertaining to suspension of licenses of uninsured motorists, N.M. Laws ch. 59, § 8 (1971).

6. The UVC will be used as the paradigm. Major variations in state laws are noted in Keeton & O'Connell, supra note 3, app. C. Although the financial responsibility law effective in Georgia differs in some respects from the UVC, its pre-Bell operation was similar. Ga. Code Ann. §§ 92A-601-21 (1958).

7. UVC § 10-106.

8. UVC § 7-202(a).

9. See Keeton & O'Connell, supra note 3, app. C.

10. UVC §§ 7-203, 7-207, 7-208.

dicial interpretation in six other states. Thus, a total of 12 states have provided for determination of fault as a prerequisite for suspension under their financial responsibility statutes. The administrative and/or judicial review in states where suspensions have been made without regard to fault determination has been of little value because a hearing in such states generally has been restricted to a determination of whether the owner or operator falls within any of the statutory exceptions to the required deposit of security.

Until relatively recently courts have unanimously upheld financial responsibility laws against various constitutional challenges. In 1961, the court in People v. Nothaus was the first to strike down a financial responsibility law as a violation of due process. Even after Nothaus, financial responsibility statutes have received uninterrupted judicial support until the Bell decision, despite some cases ordering stricter procedural requirements and despite a flurry of recent attacks. While numerous grounds of attack have been employed without success against the statutes, due process, equal protection, and dele-


gation of legislative or judicial function arguments have been the most frequent. The most serious assaults have been mounted on due process grounds, and have been met with three arguments. First, courts consistently have held the purpose of the statutes to be permissible. Different purposes have been found but they have fallen generally into three areas: (1) protection of future victims through inducement to procure liability insurance voluntarily; (2) protection of past victims, either by providing a fund to be used to satisfy any judgment recovered, by encouraging settlement or by providing means of collecting unsatisfied judgments; and (3) promotion of safety. Second, many courts have held that a driver's license is a privilege or a conditional privilege rather than a right, and that the same standards of due process therefore are not applicable. However, even those courts which have recognized the use of the highways as a right (usually a "liberty" as distinguished from a property right) have permitted legislative regulation consistent with due proc-


ess where they have found a "compelling public interest." That
interest usually has been evidenced by statistics dealing with
traffic accident deaths. 27 Finally, the due process attack fre-
quently has been met by employing what may be termed the
"mandatory insurance" reasoning. The rationale of this argu-
ment is that since it is constitutionally permissible for a state to
require proof of financial responsibility as a prerequisite for li-
censing, 28 a state also may allow financially irresponsible op-
erators to drive until they are involved in an accident and then sus-
pend their licenses. 29

In the Bell case, there was no examination of the legislative
history of the statutes and no inquiry into their judicial treat-
ment. Rather, the opinion began by examining the "mandatory
insurance" reasoning and the privilege versus right rationale for
upholding the statute. In accepting the argument that a state
may require proof of financial responsibility as a prerequisite
to licensing, it was pointed out that it does not follow that a state
may arbitrarily revoke licenses once issued. 30 Nor was the opin-
ion based on the privilege-right dichotomy. Rather, the Court
concluded that a driver's license is a personal interest which re-
quires the protection of procedural due process. 31 It was stated
that Georgia's interest in protecting potentially uncompensated
accident victims by its fault oriented financial responsibility
statute did not justify denial of due process to its citizens. 32 The
Court rejected the state's argument that fault and liability were
irrelevant to its scheme to insure financial responsibility by
pointing to the fact that those drivers adjudicated not liable
and those who obtained a notarized release from liability need
not post the otherwise required security. 33 State interest in mini-
mizing administrative cost was also deemed insufficient to jus-
tify denial of due process. 34

The opinion also considered minimal due process standards.

27. Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222
senting opinion).

28. Ex Parte Poresky, 290 U.S. 30 (1933); In re Opinion of the
Justices, 251 Mass. 569, 147 N.E. 681 (1925); In re Opinion of the Jus-
tices, 81 N.H. 566, 129 A. 117 (1925).

29. Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 876,
222 P.2d 1, 5 (1950).

30. 402 U.S. at 539.

31. Id.

32. Id. at 541.


34. 402 U.S. at 540-41.
Declining to go into detail, the Court held that "an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee" would suffice. On the question of whether a post-suspension hearing was sufficient, the Court held that only an emergency would justify suspension prior to the hearing and that the instant case was not an emergency situation. The opinion also allowed for alternative methods of compliance.

In analyzing the Bell decision it should be noted that the opinion dealt only with procedural due process aspects of the application of Georgia's statute—not with its substance. Accordingly, the decision must be viewed as statutory interpretation in that it ruled only on the scope and timing of the hearing required by Georgia's financial responsibility law. The thesis of the following analysis is that the Court's interpretation of the statute which resulted in a procedural rule was not the required interpretation, nor necessarily the most desirable.

It appears that the Court did not properly construe the purpose of the statute and that therefore its "interest" analysis failed to sufficiently appreciate the interest of the state in having only insured or wealthy motorists on its highways. The opinion stated that the single purpose of the security/suspension provisions of the statute was "to obtain security from which to pay any judgments against the licensee resulting from the accident . . . ." Although there is no unanimity of opinion on the subject, it seems more reasonable that the "primary purpose is to assure compensation for victims generally by inducing the voluntary purchase of insurance in order to escape the possibility of suspension or depositing of security." A more comprehensive discussion of the purpose of the Georgia act would have been appropriate.

35. Id. at 540.
36. Id. at 542 n.2.
37. Alternatives mentioned were inclusion of fault determination at the administrative hearings now provided or at de novo judicial proceedings, stay pending adjudication in negligence proceedings, adoption of one of the existing plans in force in other states, and institution of an entirely new regulatory scheme. Id. at 542-43.
38. Id. at 540.
40. Only a week after Bell was decided, Perez v. Campbell, 402 U.S. 637 (1971), struck down a provision in the Arizona financial re-
If encouragement of voluntary insurance procurement is accepted as the primary purpose of financial responsibility statutes, a strong state interest inheres in mandatory license suspension provisions. Although a statute subjecting those who fail to procure insurance to severe sanctions may be open to criticism from a policy viewpoint, proponents can cite convincing statistics which show dramatic increases in insurance coverage after enactment of financial responsibility statutes. Viewed from the perspective of state interest it is not altogether clear that Georgia's suspension procedures were constitutionally deficient and that the procedural rule handed down by the Court was required. Whether institution of fault determination and presuspension hearings will jeopardize the statutory scheme to insure victim compensation is largely speculative, but it is conceivable that its effectiveness will be unimpaired. In its summary treatment of statutory purpose, however, the Court failed to even raise the issue of whether Georgia's interest in having a high percentage of its motorists insured is reasonably related to the statutory scheme of fault oriented financial responsibility or to analyze how that interest relates to the individual interests of drivers and uncompensated victims.

In attempting to determine an individual driver's interest in retention of his license it was noted that "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood." That reasoning can hardly be questioned. However, the nature of the individual's interest differs significantly when he is allowed to drive without insurance coverage, but is warned that if he does so and is unable to post

42. A comparison of insurance coverage statistics for those states which provide for some form of fault determination with those for states which require mandatory suspension might be helpful. Although it has been asserted that only those laws with "teeth" in them will be successful, there is a dearth of published information on that point. See Administration of Safety Responsibility Laws, 22 INSURANCE COUNSEL J. 465 (1955).
43. 402 U.S. at 539. (Emphasis added).
44. Arbitrary suspension after issuance may deny due process. See note 48 infra.
security when involved in an accident his license will be suspended.\textsuperscript{45} Issuance of the license is conditional—suspension therefore is not arbitrary and can be avoided entirely by procuring insurance which is considered by most drivers to be a normal automobile operating expense.\textsuperscript{46} The Bell court failed to consider the Georgia statute from the perspective of its conditional issuance aspects, but focussed instead on license suspension provisions. Had interests been considered in the suggested context\textsuperscript{47} the Bell conclusions would not have been compelled.\textsuperscript{48}

Although the Bell decision probably will affect every state, it is difficult to estimate its aggregate impact. It is likely that its effect will be least felt in those 12 states which already have provided some procedural safeguards for their suspension provisions. Although an argument can be made that a license suspension provision in a financial responsibility statute is unconstitutional on its face when it fails to provide procedural safeguards,\textsuperscript{49}

\begin{footnotes}
\item[45] See Lystad, supra note 41; Murphy & Netherton, Public Responsibility and the Uninsured Motorist, 1959 Insurance L.J. 491.
\item[47] Latham v. Tynan, 435 F.2d 1248, 1253 (2d Cir. 1970), vacated, 40 U.S.L.W. 3160 (U.S. Oct. 12, 1971). Judge Friendly's dissent called for a full examination of interests including a consideration of hardships caused by the statute as well as its benefits.
\item[48] Shortly before Bell, in Reutzel v. State Dep't of Highways, 186 N.W.2d 521 (Minn. 1971), the Minnesota Supreme Court upheld the Minnesota Safety Responsibility Act against the claim that due process required a presuspension hearing, not on the issue of fault, but on the amount of security. Sniadach v. Family Finance Corp., 335 U.S. 337 (1969), was distinguished on the ground that a prejudgment garnishment procedure which was held to deny due process related only to the creditor-debtor relationship and that the state interest in the citizen-state conflict of interest should not be weighed on the same scale. The Minnesota court deemed Goldberg v. Kelly, 397 U.S. 254 (1970), which held that a welfare recipient was entitled to a hearing prior to termination of benefits, to be more in point than Sniadach since it did involve a citizen-state conflict of interest. However, after an extensive discussion of Goldberg, the Reutzel opinion concluded that license suspension provisions create problems different from deprivation of the necessities of life by termination of welfare payments. They constitute more of an inconvenience which the licensee can avoid by pre-accident purchase of insurance—a normal vehicle operating expense.
\item[49] The current situation in Minnesota reflects the potential for problems of interpretation even where the statute explicitly provides for fault determination and a hearing prior to suspension. In State v. Lanning, File No. 689230 (Hennepin County Mun. Ct., Oct. 13, 1971) a municipal court judge declared that the Minnesota Safety Responsibility Act is unconstitutional on its face for failure to provide explicitly for prior hearings. However, there have been contrary decisions in the same court. Undoubtedly the confusion will continue until there is an au-
\end{footnotes}
it appears that only the administration of the law need be altered to comply with the presuspension hearing requirements of the *Bell* decision. In a majority of states, including Georgia, the required administrative or legislative changes will be more significant. The administrative burden of procedure alteration unquestionably will vary greatly from state to state, dependent on many factors: established administrative and judicial review procedures, funds, personnel, etc. Whether the burden in any state will be sufficiently heavy to render financial responsibility statutes unworkable is largely speculative, but it can be said with some certainty that the *Bell* decision does not toll the death of financial responsibility statutes as a matter of constitutional imperative. The *Bell* opinion made it clear that the problem could be cured by procedural alterations without affecting the substance of the statutes.

The implications for future judicially developed procedural requirements are not entirely clear. *Bell* did not present a detailed outline of the scope of the required hearing. The Court limited itself to a statement that due process required "a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against [a driver] as a result of the accident." The most explicit statement regarding the extent of the required hearing and the scope of judicial review at the time of the *Bell* decision had been made by the California supreme court in *Orr v. Superior Court*. It was held that a license could be suspended if there was credible evidence that could lead to a judgment of liability against the driver without regard to last clear chance or contributory negligence. The court further stated that a reviewing court may not determine fault, but must restrict itself to a review of administrative action. In *Rivas v. Cozens*, a federal case decided after *Bell*, the Cali-

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51. 402 U.S. at 542.
53. The decision on a motion for preliminary injunction was handed down two weeks before *Bell*, 327 F. Supp. 867 (N.D. Cal. 1971). After *Bell* was decided, the court filed a new opinion upholding the California procedure as set down in *Orr*. File No. 70 2554 (N.D. Cal., June 28, 1971).
The California statute and the Orr standard were upheld. The Rivas court, in reliance on the indication from Bell that Georgia's existing hearing procedure would be sufficient if it included fault consideration, approved of California's administrative determination of fault. Such a view rejects any implication that Bell necessitates a strict adversary hearing requirement. However, some doubt as to the validity of that conclusion is raised by Jennings v. Mahoney54 which affirmed a Utah suspension under the Orr standard. Although the Court affirmed the suspension because action was stayed until appellant could present evidence and cross-examine witnesses, it acknowledged that there was a "substantial question whether the Utah statutory scheme on its face affords the procedural due process" required by Bell.55

It is likely that legislative changes will be proposed, particularly by advocates of stringent financial responsibility statutes. Among a wide range of legislative alternatives open to the states,66 one interesting possibility is a statute even more stringent than that involved in Bell. In basing its holding, at least in part, on the fact that liability played a "crucial role" in the Georgia statute, the Court left the path open for a statute totally excluding the concept of liability or fault. For example, a statute which contained an express statement of purpose to encourage insurance coverage, required an automatic minimum security deposit and eliminated the "standard" exceptions to the deposit requirement would seem to be consistent with the Bell logic.57 Whether such a statute would be substantially more effective in achieving financial responsibility among drivers than the current statutes administered under the Bell standards is problematic. In addition to these possibilities, proponents of compulsory liability insurance and no-fault insurance will undoubtedly be active. Experience in operating under the Bell criteria will determine whether some modified form of financial responsibility statutes or an entirely different type of legislation will be used to solve the problem of uncompensated auto accident victims.

54. 40 U.S.L.W. 3216 (U.S. Nov. 9, 1971).
55. Id. at 3217.
56. See note 37 supra.
57. Such laws have been suggested. See Murphy & Netherton, supra note 45, at 498. A prior version of the Georgia statute construed in Bell contained the provisions that a minimum deposit of $500 would be required in all cases. Ga. Laws no. 463, § 2 (1963).
Insurance: Defeat of Subrogation Rights

Plaintiff bought from defendant an “all-risk” insurance policy that included coverage of losses due to the interruption of plaintiff’s business. Subsequently plaintiff entered into a construction contract in which it released the contractor from liability for any business interruption losses which might result during construction on plaintiff’s property. When contractor’s negligence did result in such losses, plaintiff brought suit against the insurer to recover under the policy. The trial court rejected the insurance company’s defense that because insured defeated the insurer’s right of subrogation by releasing the contractor from liability before the accident it thereby precluded its own right to collect on the policy. On appeal, the Minnesota Supreme Court, affirmed, holding that an insured who defeats the subrogation rights of its insurer prior to loss is not precluded from recovery on its policy in the absence of a prohibition in the policy against releasing potential tortfeasors. *Great Northern Oil Co. v. St. Paul Fire and Marine Ins. Co.*, 189 N.W.2d 404 (Minn. 1971). The decision is apparently the first in the country to allow an insured who had defeated subrogation rights after issuance of the policy but prior to loss to recover on his policy.1

Traditionally the common law viewed subrogation as a principle of equity created to place the loss upon the person who should in good conscience and justice bear it. The facts and circumstances of each case were examined to determine which party had the greater equity.2 An insured who defeated the subroga-

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1. One commentator would disagree. In King, *Subrogation Under Contracts Insuring Property*, 30 Texas L. Rev. 62, 86 (1951), the author states than an insured in this position may collect on his policy so long as the policy does not contain an express provision for subrogation, a warranty against or a stipulation for avoidance or discharge of the policy. But the cases cited therein in support of this rule contain only dicta to this effect. None of them deal with an insured having released a potential tortfeasor after issuance of the policy.

2. See 6 *Appleman, Insurance Law and Practice* § 4054 (1942) (footnotes omitted), where it is said:
   
   [T]he doctrine of subrogation does not depend primarily upon statutory or policy provisions, but originates in the general principles of equity, and will be applied or not according to the dictates of equity and good conscience and considerations of public policy. Such doctrine is founded upon the relationship of the parties and upon equitable principles, for the purpose of accomplishing the substantial ends of justice. Subrogation rests on the maxim that no one should be enriched by another's loss. It has also been said that relief by way of subrogation will not be
tion rights of his insurer after sustaining a loss was precluded from recovering on his policy. This rule was considered to be an attempt to prohibit the insured from collecting twice for the same loss.³

Where an insured defeated subrogation rights prior to loss, courts have denied recovery where the policy expressly prohibited defeat of subrogation rights,⁴ and where there was no specific policy prohibition. Some courts have justified their denial of recovery in the latter case on the ground that defeat of subrogation rights was a breach of an “inherent” contract term.⁵ A

grant where the result would be inimical to sound public policy. Burford v. Glasgow Water Co., 223 Ky. 54, 2 S.W.2d 1027 (1928).


Many of the cases in this area simply imply that there are good reasons for the existence of subrogation, and therefore the right of subrogation must be protected. See Aetna Cas. Co. v. Phoenix Co., 285 U.S. 209 (1932). These “good reasons” include, besides the prevention of double recovery, the idea that as between the insurer and the wrongdoer, the latter should bear the loss, and that subrogation is a right of the insurance contract which must be maintained to preserve that contract as one of indemnity. See Auto Owner’s Protective Exch. v. Edwards, 82 Ind. App. 556, 563, 136 N.E. 577, 579 (1922), where it was said, “Manifestly it would be unjust to compel the insurer to suffer the consequences of the wrongful act of another.” In Aetna the court stated that subrogation was a “necessary incident to petitioner’s contract, for only by resort to it could the character of the contract as indemnity be preserved.” 285 U.S. at 214.

4. See, e.g., Kennedy Brothers v. Iowa State Ins. Co., 119 Iowa 29, 91 N.W. 831 (1902); Southard v. Minneapolis, S.P. & S.S.M.R.R., 60 Minn. 382, 62 N.W. 442 (1895); Bloomington v. Columbia Ins. Co., 84 N.Y. Supp. 572 (1903); Fayerweather v. Phoenix Ins. Co., 118 N.Y. 324, 23 N.E. 192 (1890); Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N.W. 908 (1899). The case law in this area comes for the most part from cases in which the insured party was shipping goods. The carrier would insist in his bill of lading that he have the benefits of the shipper’s insurance taken out on the goods in order to avoid liability for any loss. Such a clause would effectively cut off the insurer’s right to sue the negligent carrier. Insurers therefore began to insert in their policies a provision that if the insured defeated the subrogation rights of the insurance company by such a bill of lading, it was not liable on the policy. For a good discussion, see R. Keeton, INSURANCE LAW, BASIC TEXT, 165-56 (1971).

In the instant case, the provision in the policy was:

(H) SUBROGATION. In the event of any payment under this policy the Company shall be subrogated to all the Insured’s rights of recovery therefore against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

The Insured shall do nothing after loss to prejudice such rights. 189 N.W.2d at 406.

5. In Down’s Farmers’ Warehse. Ass’n v. Insurance Co., 41 Wash. 372, 373, 376, 83 P. 423, 424, 425 (1906), the policy provided for subrogation in the event of payment and that “such right shall be as-
conflicting rule, found only in dicta, is that an insured may re-
cover in the absence of both an express provision for subrogation
and a provision prohibiting defeat of subrogation rights. The
courts have allowed the insured to recover only when he has re-
leased the tortfeasor prior to issuance of the policy. It was
thought that the insurer could have protected itself by learning
from the insured whether he had entered into any exculpatory
agreements.

Until *Great Northern* the Minnesota court had not indicated
what position it would take on the issue of defeat of subrogation

signed . . . on receiving such payment . . . .” The policy did not have
a specific provision calling for avoidance of the policy if the insured
should defeat subrogation rights. Yet the court denies the insured re-
cover, saying the insured had destroyed a valuable right given to
the insurer. *See also* Carstairs v. Insurance Co., 18 F. 473 (4th Cir.
1883). This justification apparently rests on the unfounded and, it
has been argued, false assumption that insured parties are well aware of
subrogation rights. In King, *supra* note 1, at 89, it is said, “[T]he ordi-
nary insured is a layman who is unfamiliar with the technical quirks
of the law of subrogation, and, in all probability he has never read or
had called to his attention prior to his ‘accident’ the subrogation clause
in his policy.” The court in *Great Northern* recognizes this probability
when it says the insured is seeking to recover only that which he had a
right to assume he paid the defendants a premium to insure. In a
footnote the court says:

The action may have been no more deliberate . . . than that of
an owner of an automobile who . . . exculpates the garage
owner from any liability for loss of the automobile, and who,
subsequently suffering loss of the vehicle resulting from the
garage owner's negligent failure to keep the garage door locked,
quite naturally would assume that he would recoup his loss un-
der the insurance policy covering his automobile.

The reasoning behind this seems to be that the insurer has the
right of subrogation only with respect to rights actually pos-
sessed by the insured at the time the loss occurs, so that if the
insured has by prior agreement effectively prevented any claim
from arising in himself, the insurer has no right to complain.

N.W. 691 (1912); Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508,
2 N.E. 103 (1885); Pelzer Mfg. Co. v. Sunfire Office, 36 S.C. 213, 15 S.E.
562 (1892). In *Pelzer* it was said:

Insurance companies . . . are presumed to know what facts and
circumstances are material to the risk offered much better than
the persons who are applying for the insurance, and if they
choose to accept the risk without inquiry, and, when a loss oc-
curs . . . common honesty and fair dealing forbid that this shall
operate as a forfeiture of the policy . . . .

36 S.C. at 269, 15 S.E. at 583. In *Jackson* the court notes that the in-
surer did not care to see the receipts the insured had received from the
carrier whereby the insured had exonerated the carrier from liability.
after issuance of the policy, but prior to loss. The leading case in Minnesota, Bacich v. Homeland Insurance Co., stated the general rule that a release of liability given to a tortfeasor by the insured bars the insured’s right of action on the policy. By the facts of Bacich, however, the rule only applies to a release given after loss has occurred. The instant case distinguishes Bacich on this basis.

The court in Great Northern follows the traditional notion that subrogation is a tool of equity depending upon a balancing of the equities of the parties. In balancing the equities the court focuses on three considerations which favor recovery by the insured. First, the insurer could easily have protected himself from losing his subrogation rights by inserting an appropriate provision in the policy. The insurer should have been familiar with the possible methods by which an insured could defeat subrogation rights and could have protected itself when it was drawing up its contract. The insured, on the other hand, as the court points out, may have been ignorant that it was defeating subrogation rights when it released the contractor from possible future liability. This assumption seems tenuous if dealing with a large business, but it appears to be correct in the majority of cases where the insured is a non-commercial entity. Furthermore, it would seem inequitable if an insured were denied recovery for committing an act not prohibited by his policy.

Second, the court notes that public policy favors upholding the kind of exculpatory clause the insured entered into with the negligent contractor. The insured, the court notes, should be able to promote its business interests by avoiding overlapping insurance coverage. The insured and its contractor should not both be required to carry insurance covering the same loss. One of the purposes behind subrogation law is ensuring that as between the insurer and the wrongdoer the latter should bear the loss.

8. 212 Minn. 375, 3 N.W.2d 665 (1942).
9. The insured had recovered his fire loss from the wrongdoer by means of a suit in which he recovered his damages via the cancellation of a mortgage debt he owed the wrongdoer on the building destroyed. The court denied him the right to recover again from the insurer.
10. See note 2 supra.
11. The insurer had provided in the policy: “The Insured shall do nothing after loss to prejudice such rights.” No clause prohibited a release prior to loss.
12. See note 3 supra. Some have argued that this is an improper goal. The tortfeasor is not a wrongdoer, but rather a victim of momentary inadvertence. Why should he bear the loss as opposed to the insurer who has been paid a premium which arguably compensates for
But where public policy upholds the validity of exculpatory clauses, there is essentially a policy determination that there are reasons for society not seeking to undo the contract. Equity in such a case does not demand that the loss be shifted from the insurer in order to place it upon the person who caused it.

Finally, the court argues that the hazard which caused the loss was covered and reflected in the premium. The insurer had argued that the insured’s release enlarged the risk to which the insurer was exposed by releasing the building contractor from liability. The court’s conclusion is in accord with the argument that subrogation returns represent a windfall to the insurer. The insured’s premium represents what the insurer must be paid to earn a reasonable return on its investment. The returns the insurer receives from its successful legal actions against persons who have caused the loss are not taken into consideration when computing the premium. Such recoveries represent “extra” profit or, in a sense, overcompensation for the risk the insurance company bears. Therefore, the risk which the insurer bears would not be enlarged beyond what it contracted to insure against when it is denied subrogation.

Without further discussion, the court notes that the arguments presented by the insurer are not without merit. However, an analysis of these arguments persuasively demonstrates the propriety of the court’s decision. First, the insurer argued that there was no basis for treating an insured who had subrogation rights before loss differently from one who had defeated them after loss. This argument fails to consider that the major rationale for subrogation, prevention of double recovery, is not a paramount consideration where subrogation rights are defeated prior to loss. The key distinction between an ante-loss settlement, i.e., release of liability, and a post-loss settlement is that in the former the insured has no idea what the extent of

that loss? In King, supra note 1 at 64, it is noted that the tortfeasor, since he has suffered damage himself, is “likely to be in a relatively poor position to reimburse the insurer.”

13. While subrogation returns may enter indirectly into the computation of premium rates, they constitute a relatively inconsequential factor. Investigation reveals that subrogation is not specifically included by name as one of the very many items which go into premium computations. . . . Some companies include subrogation returns in a residual salvage account which is one of the less important sources of the company’s income. Moreover, since subrogation returns are subject to the fluctuating attitudes of the courts they are peculiarly unreliable bases of actuarial prediction.

Comment, Insured’s Right of Subrogation Against Insured Who Has Recovered a General Verdict, 42 COLUM. L. REV. 1368, 1371 n.12 (1942).

14. 189 N.W.2d at 408.
damage will be, should a loss occur. Accordingly, the ante-loss
settlement will never approximate the size of the loss. For
example, in Great Northern the small reduction in price the
insured may have received on the construction job was but a
small fraction of the actual loss. Denying the insured recovery
in such a situation on the basis of prevention of double recovery
would not be justified.\footnote{5}

Further, the insurer contended that the insured had deprived
it of a valuable right afforded by the insurance contract—the
right to recoup its loss from the one primarily liable. This argu-
ment ignores the fact that subrogation rights were not created
for the benefit of insurance companies, but were a method of deny-
ing the insured a double recovery and denying the wrongdoer an
escape from the loss he caused.\footnote{6} Any “rights” accruing to the
insurer are simply the necessary expedients to accomplish these
ends. Thus, as in Great Northern, where these ends are absent,
no such “right” should accrue to the insurer. In addition, the in-
surer’s argument incorporates the notion that subrogation is so
well known an incident of insurance contracts as not to require
spelling out in the contract.\footnote{7} This notoriety may exist among
insurers, but it has been argued to be non-existent among in-
sureds.\footnote{8}

At a minimum the court in Great Northern has emphasized
that it will require insurance companies to inform insureds in
their policies what activities will prevent recovery on their poli-
cies.\footnote{9} Perhaps it also indicates a movement toward allowing
third persons in some circumstances to take advantage of the in-
sured’s policy. By leaning heavily upon the equities in its reso-

\footnote{5} If a double recovery theory is applied, it should only operate
to reduce insured’s recovery from the insurer to the extent that his con-
struction contract cost him less because of the exculpatory clause con-
tained in it.

\footnote{6} “The right of the subrogation is not a right that insures . . .
recovery . . .” Gerlach v. Grain Shippers Mut. Fire Ins. Ass’n, 156
Iowa 333, 336, 136 N.W. 691, 692. It has also been said that subroga-
tion is not an absolute right, but one which depends upon the equities of

\footnote{7} See Down’s Farmers’ Warehse. Ass’n v. Insurance Co., 41 Wash.
372, 373, 376, 83 P. 423, 424, 425 (1906).

\footnote{8} See note 5 supra.

\footnote{9} The decision is a step in the direction of allowing subrogation
only when the insurer has fully explained subrogation rights and the
terms of forfeiture under the policy. Nothing in the decision precludes
insurers from inserting a provision into the policy prohibiting the in-
sured from defeating subrogation rights and saying nothing to the in-
sured about it.
lution, the court retains the power to determine just what those circumstances are, and to protect insureds from overreaching by insurers.
Statute of Frauds: Oral Agreement Promising Performance By Third Party Upheld Against Promisor

The original English Statute of Frauds1 required written evidence2 of certain obligations for them to be enforceable. The provision of the Statute of Frauds regarding promises to answer for the debt of another was intended to prohibit both the imposition of a bad debt by perjury and an expansion of a promise or words of encouragement when the promisor had received no benefit.3 The Minnesota Statute of Frauds provides:

No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

1. Every special promise to answer for the debt, default or doings of another . . . .4

Thus, to hold a party liable under a surety arrangement in Minnesota there must be written evidence of the promise.

In J.J. Brooksbank Co., Inc. v. American Motors, 184 N.W.2d 796 (Minn. 1971), plaintiff, a car rental agency, alleged an oral agreement with defendant American Motors' fleet manager, whereby the defendant was to arrange for the sale and repurchase of automobiles for use in plaintiff's business. Defendant told plaintiff that a franchised dealer would deliver the cars and handle the repurchase of them one year later. In 1963 plaintiff purchased and resold a fleet of cars pursuant to this plan. The dealer provided plaintiff with a written repurchase agreement for the automobiles, and plaintiff made out a purchase order addressed to American Motors which was sent to the dealer. In the fall of 1964, plaintiff purchased 10 more automobiles. Although plaintiff had been assured by defendant that the dealer would repurchase them, no written repurchase agreement was provided for three of these 1965 model vehicles. Defendant later notified plaintiff that it did not intend to repurchase these three cars. Plaintiff sold the cars at an auction and brought suit for the dif-

ference between the auction receipts and the amount that would have been received under the purported agreement with defendant. The complaint was technically defective, and the court refused to allow amendment. At the close of plaintiff's evidence, the trial court directed a verdict for defendant on the basis that the facts alleged an oral collateral undertaking by defendant, enforcement of which is barred by the Statute of Frauds. A second action, alleging a promise on the part of defendant to secure a dealer to repurchase, was dismissed on the basis of res judicata. The two actions were consolidated on appeal. The Minnesota Supreme Court held that the evidence raised a question of fact—whether defendant's assurances that the automobiles would be repurchased was an original undertaking or merely a promise to guarantee the dealer's obligation to repurchase—and since only in the latter case is the enforcement of the promise barred by the Statute of Frauds, a directed verdict was erroneous. The court reversed and remanded for a new trial to determine whether the promise was original or collateral.

The terms "original" and "collateral" have been used to distinguish between promises which are respectively without and within the Statute of Frauds. Two major tests have developed for determining which promises are original and which are collateral. The first, the “entire credit” test, requires that in order

5. The complaint alleged that defendants themselves agreed to repurchase the cars. However, such an agreement was prohibited by defendant's franchise agreements with its dealers. 184 N.W.2d at 797-98.

6. It appears from the record that the amendment was refused because the court found that the complaint as amended contained the same allegations as the original complaint. 184 N.W.2d at 798.

7. See, e.g., Leonard v. Vredenburgh, 8 Johns 29 (N.Y. 1811), which states this test in the following manner: "If the whole credit is not given to the person who comes in to answer for another, the undertaking is collateral." Id. at 37.

The leading Minnesota case, Cole v. Hutchinson, 34 Minn. 410, 26 N.W. 319 (1886), utilized the entire credit test with two qualifications applicable, at least, to promises to pay for goods or services. First, the promisor must receive credit as the purchaser of the goods rather than as the guarantor. Second, the proof of the identity of the one who has received the credit of the promisee is controlled by the circumstances under which the goods are delivered. Thus, when the promisee delivers the goods, the actions and words of the parties determine whether the promisee should view the promisor as purchasing goods to be delivered to another or whether the promisee should view the promisor as guarantor of the purchase price of goods actually purchased by a third party. Cole emphasized that a promise may be collateral even though the debt of the third party was not in existence at the time the promise was made.

See Maurin v. Fogelberg, 37 Minn. 23, 32 N.W. 858 (1887); 3 WILLISTON ON CONTRACTS § 462 (1960).
for the obligation to be original as to the promisor, the reason for the promisee's act must be based entirely on considerations linked to the promisor, rather than to a third party creditor. Thus, it is said that the "entire credit" for the promisee's act is given to the promisor. This test is primarily applicable to a situation where the promisor promises to perform for the promisee if the promisee confers a benefit upon a third party who is usually designated as the debtor. If the promisee furnishes goods or services to the third party on the basis of the third party's promise to pay, and the promisor merely promises to pay the promisee in the event that the third party defaults, the promise on the part of the promisor is collateral and must be in writing to be enforceable.

The second major test which has been used to distinguish between collateral and original promises is the "leading purpose" test. This test has been stated as follows:

The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promisor is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own.8

Thus the "leading purpose" test focuses upon the promisor's reason for making the promise and requires that the oral promise be enforced if the promisor was benefited by the performance of the promisee. This benefit is considered as evidence that the promisor's leading purpose was to promote his own interest. Although these two tests are the primary ones which have been proposed to distinguish between original and collateral promises, many other tests have also been considered.9

Whether the leading purpose test or the entire credit test is


9. Williston lists seven commonly suggested tests: (1) A promise which is in form a guaranty performable only on default by a principal debtor is within the statute; (2) A promise to pay a debt of another for which the other continues to be liable is within the statute; (3) A new promise is presumptively within the statute unless the original debt is discharged; (4) The governing distinction is the purpose of the promisor whether to gain an advantage for himself or to secure it for another; (5) A promise which amounts in substance to a promise to pay the debtor's debt is not within the statute; (6) Whether a new and beneficial consideration has been received by a new promisor is vital; (7) The test submitted to be the accurate one except in regard to joint promises, is whether a promisor is, to the actual knowledge of the creditor, a surety; if so, his promise is within the statute. 3 Williston on Contracts § 462 (1960).
used, the question of whether the promise is original or collateral is one of the intent of the parties. The form of the promise should be considered, and if no circumstances conflict with the form of the promise, the prima facie presumption created by the form is controlling. However, when evidence is conflicting or language ambiguous, the jury must determine in the light of all circumstances surrounding the agreement what the intent of the parties was in order to decide who was the recipient of the credit, or what was the leading purpose of the promisor. Therefore, the form of the promise is not necessarily determinative of intent if circumstances such as the receipt of benefit by the promisor warrant the opposite conclusion.


11. For example, in Askier v. Donnelly, 157 Minn. 502, 105 N.W. 494 (1923), the alleged promise "I will see that you get your pay" was declared to be collateral. The court's opinion indicated that the plaintiff did not try to explain why he used language recognizing the debt as the debt of another. Judgment was directed for the defendant because plaintiff had not unequivocably promised to pay.

12. E.g., Conrad v. Clarke, 106 Minn. 430, 119 N.W. 214, rehearing denied 106 Minn. 434, 119 N.W. 482 (1909); Amort v. Christofferson, 57 Minn. 234, 59 N.W. 304 (1894); Maurin v. Fogelberg, 37 Minn. 23, 32 N.W. 858 (1887); Winslow v. Dakota Lumber, 32 Minn. 237, 20 N.W. 145 (1884). See also 3 WILLISTON ON CONTRACTS § 465 (1960); Riesenfield & Mussman, Suretyship and the Statute of Frauds: A Survey of Minnesota Law, 31 MINN. L. REV. 1, 18 (1946); Annot., 20 A.L.R.2d 246 (1951).

Regardless of which test is used there are other basic premises which the courts recognize in the determination of whether a promise is original or collateral. For instance, it is generally recognized that an oral contract cannot come within the purview of the Statute without a main or substantive liability of a third party to which it is collateral. See Cole v. Hutchinson, 34 Minn. 410, 26 N.W. 319 (1886); Yale v. Edgerston, 14 Minn. 144 (1869). See also Kilbride v. Moss, 113 Cal. 432, 45 P. 812 (1896); CORBIN ON CONTRACTS § 395 (1950); 3 WILLISTON ON CONTRACTS § 454 (1960); Calamari, supra note 8, at 333.

Another premise is that acts by the parties subsequent to the transaction, such as charging the price to a certain person, or demanding payment, are competent evidence but should be treated in the nature of admissions. Cole v. Hutchinson, 34 Minn. 410, 411, 26 N.W. 319, 320 (1886). Thus, evidence to refute the implication of such an act is freely allowed. See, e.g., Amort v. Christofferson, 57 Minn. 234, 59 N.W. 304 (1894) (jury found an original promise even though creditor requested note from third party); Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N.W. 145 (1884) (goods were charged on company's books to third party).


14. Rolfsmeyer v. Rau, 198 Minn. 213, 216, 269 N.W. 411, 412 (1936). See Davis v. Patrick, 141 U.S. 479 (1891); Timm v. Alton, 150 Minn. 450, 185 N.W. 510 (1921); Amort v. Christofferson, 57 Minn. 234,
The basic premise the Minnesota courts have operated under in construing this provision of the Statute of Frauds has been that the Statute must be narrowly construed. This results in as many promises as possible being held to be without the Statute and, therefore, enforceable. Any evidence of a promise to pay or evidence of benefit to the promisor is deemed sufficient to present a jury question as to the type of promise. Consequently, only a very few cases which hinge upon the issue of whether a promise is collateral or original are not submitted to the jury in Minnesota.

The fact situation of the *Brooksbank* case is peculiar because the alleged promise was to secure a dealer to repurchase rather than to pay a certain amount. However, the purchase and repurchase prices were agreed upon by American Motors and the plaintiff, even though the repurchase price was paid by the dealer. The court points to the fact that defendant initiated these negotiations and the fact that plaintiff believed the underlying agreement was with defendant as evidence from which one could conclude that the agreement was original. Emphasis is placed on the fact that the plaintiff and defendant understood the nature of the promise differently. The plaintiff-promisee had an inaccurate understanding of the relationship between the promisor and the third party. Plaintiff believed, as evidenced by the charge in his first complaint, that the dealer was an agent of American Motors. The fact that the purchase order was made out to American Motors and was given to the dealer

59 N.W. 304 (1894); Grant v. Wolf, 34 Minn. 32, 24 N.W. 289 (1885); Wilson v. Hentges, 29 Minn. 102, 12 N.W. 151 (1882); Nichols, Shepard & Co. v. Allen, 22 Minn. 283 (1875); 3 WILLISTON ON CONTRACTS § 465 (1960); Riesenfeld & Mussman, *supra* note 12, at 18, 30. See Hall v. Oleson, 168 Minn. 308, 310, 210 N.W. 84 (1926); Upton Mill & Elevator Co. v. Baldwin Flour Mills, 147 Minn. 205, 209, 179 N.W. 904, 905 (1920); Osborne & Co. v. Baker, 34 Minn. 307, 309, 25 N.W. 606, 609 (1885).


19. *E.g.*, Bruce v. Walters, 180 Minn. 441, 231 N.W. 16 (1930); Askier v. Donnelly, 157 Minn. 502, 195 N.W. 494 (1923).

20. Id. at 798.
also supports this proposition. Lack of mutual understanding strengthens the plaintiff's argument that a jury question exists.\textsuperscript{21} The court also points to the interest which defendant had in plaintiff's purchase of the automobiles as evidence on which a finding of an original promise could be based.

The court's analysis, while not mentioning any specific test or standards, is more consistent with the leading purpose test than the entire credit test because of the emphasis on benefit to the promisor. For instance, the court mentions that the purpose of defendant's fleet sales program—to increase public awareness of American Motors cars—is evidence of the defendant's interest in promisee's performance which consisted of the purchase of the cars.\textsuperscript{22} Thus, by pointing out evidence of defendant-promisor's interest, the court indicates that the jury is justified in concluding that promisor's leading purpose was to serve his own interests.

In Minnesota both the leading purpose and the entire credit tests exist, and each has been used frequently.\textsuperscript{23} However, the distinction between the two tests often has been blurred by the court. The entire credit test generally has been used to determine if a promise was original or collateral when the promise was made prior to the creation of the debt,\textsuperscript{24} while the leading purpose test has been used where there was a pre-existing debt.\textsuperscript{25}

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 800.
\textsuperscript{23} E.g., Marckel v. Raven, 186 Minn. 125, 242 N.W. 471 (1932); Conrad v. Clarke, 106 Minn. 430, 119 N.W. 214, rehearing denied 106 Minn. 430, 119 N.W. 482 (1909); Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N.W. 145 (1884).
\textsuperscript{24} See, e.g., Bennett v. Thuet, 98 Minn. 497, 108 N.W. 1 (1906); Amort v. Christofferson, 57 Minn. 224, 59 N.W. 304 (1894); Maurin v. Fogelberg, 37 Minn. 22, 32 N.W. 858 (1887); Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N.W. 145 (1884).
\textsuperscript{25} Prior to Brooksbank there were indications that the Minnesota court would apply the leading purpose rule where there was no pre-existing debt. See Kenney Co. v. Horne, 194 Minn. 357, 360, 260 N.W. 358, 359 (1935); Conrad v. Clarke, 106 Minn. 430, 433, 119 N.W. 214, 215 (1909); King v. Franklin Lumber, 80 Minn. 274, 83 N.W. 170 (1900); Riesenfield & Mussman, supra note 12, at 32.

In Burkel v. Pro-Vid-All Mills, 273 Minn. 287, 141 N.W.2d 143 (1960), relied upon in Brooksbank, there was no pre-existing debt and defendant-promisor was to allow plaintiff-promisee's salary to be paid by a third party owner from the sale proceeds rather than the profits. Defendant financed a business owned by a third party in which plaintiff was employed. Although the operation was financially unstable, defendant induced plaintiff to remain in the third party's employ by promising that plaintiff was to be paid from the proceeds of sales, regardless of the profits. In essence, Burkel and Brooksbank present the same
The emphasis which *Brooksbank* places upon the benefit the defendant-promisor received from the agreement with plaintiff is consistent with the policies underlying the Statute of Frauds. Where a party has received no benefit from a disputed promise, he should not be held to an oral promise and should be bound only by the exact terms of a written one. However, if he has received some benefit, he should be held to his promise even though the promise was not in writing. In such a case, this benefit is evidence of the nature of the promise in lieu of a written memorandum.

The leading purpose test is preferable to the entire credit test in that it better protects only one who has received no benefit from his oral promise. For example, if the purpose of the promisor's oral promise was to secure his own benefit or interest, then under the leading purpose test the promise would be original and enforceable. However, under the entire credit test, despite the fact that the promisor may have received something of value, he would not be held to his promise if the promisee had any basis for relying upon the credit of a third party, either partially or wholly. Thus the entire credit test ignores the crucial consideration of whether the promisor benefited from the acts of the promisee.

Since the main inquiry in cases such as *Brooksbank* is to determine the parties' intent, the court's emphasis on the lack of mutual understanding of the nature of the promise is important. A promise cannot come within the statute if the creditor was justified in supposing it to be a primary obligation. *Brooksbank* believed that the dealer was an agent of American Motors. If this relationship had existed, American Motors' promise to pay the dealer's debts would be original and not be within the Statute. Moreover, if the promise to get the dealer to repurchase had been a joint promise on the part of the dealer and American Motors, the promise would be original.

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situation: a promise by a party, who will benefit from the performance of the promisee, that a third party, who is closely tied to the promisor, will do a particular act. In both cases the promisor as well as the third party benefited. Thus the fact that a party is to benefit from performance by the promisee strongly indicates that the promise will be regarded as original.


27. "[T]he real character of a promise depends largely on whether the parties mutually understood it to be a collateral or a direct promise." 184 N.W.2d at 799. See *Davis v. Patrick*, 141 U.S. 479, 489 (1891). See also cases cited in note 13 supra.


29. See *Arant*, supra note 3. There are no Minnesota cases.
Motors for the benefit of both, the Statute of Frauds would not have been applicable.\textsuperscript{30} Thus, if Brooksbank had no reason to know that this was not a joint promise, or that the dealer was not an agent of American Motors, it seems equitable that the promise should not be enforced, as long as the promisor received some benefit.\textsuperscript{31}

Again, the leading purpose test is preferable to determine the intent of the parties. That test focuses directly on intent by considering why the promisor entered into the agreement. On the other hand, the entire credit test considers on whose credit the performance of the promisee was based. It is desirable that the Minnesota Supreme Court has used only the leading purpose test in its most recent cases, because that test goes more directly to the point in terms of the traditional concerns behind the Statute of Frauds.

Undoubtedly, oral agreements such as the one in the instant case are entered into every day. Realistically, it seems only logical to consider the agreement to be an original undertaking on the part of American Motors. At trial there was conflict as to exactly what American Motors' fleet sales representative promised, but no attempt was made to say that the fleet representative did not negotiate with the plaintiff. Defendant's pretrial statement suggests that the real reason why American Motors and the dealer would not buy back the three automobiles was that they considered them to be ineligible for repurchase because they thought that the cars had not been used in rent-a-car service and that the cars had excessively deteriorated. However, these issues were not relied upon by the courts in their opinions. A narrow construction of the Statute of Frauds can serve to keep companies honest and prevent them from using technicalities to avoid agreements whenever they become angry with the other party. This is as it should be. Cases such as Brooksbank serve as a warning that companies may not avail themselves of the Statute of Frauds to renege on one of their normal business undertakings from which they have received something of value. Also, the case serves to remind promisees of the possible dangers of not requiring a written memorandum of such an agreement.

The decisions which have announced the rules for the application of the Statute of Frauds to contracts of guaranty have not


\textsuperscript{31} See RESTATEMENT OF SECURITY § 90 (1941).
established definite criteria for determining when the promise is collateral or original. Doubt remains as to the amount of benefit the promisor must receive, whether this benefit is to be quantitatively or qualitatively measured, and each case must turn on its facts. Yet this indefiniteness is desirable if one considers that the objective of the court is to determine the intent of the parties at the time the promise was made. It is important to allow the jury sufficient discretion so that the credibility of the witnesses may be a factor in the determination of what type of promise was made. At the same time the court may order a directed verdict for the defendant in cases where there is no evidence of benefit to the defendant.