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A. Substantial Evidence on the Whole Record

The Atlantic Coast Line Railroad Company had an agent at each of two stations. It applied to the North Carolina Utilities Commission for permission to consolidate the agencies with the time of one agent divided between the two stations. The commission denied the application and the superior court affirmed the commission's order, but in State ex rel. Util. Comm'n v. Atlantic Coast Line R.R.? the Supreme Court reversed the judgment of the superior court. In so doing the Court set out the statutes requiring that the commission make no decision "unless the same is supported by competent material and substantial evidence upon consideration of the whole record," and authorizing reversal of a commission decision unsupported by such evidence "in view of the entire record." The Court noted the undisputed evidence of the railroad that on a normal day the existing full time agent at one of the stations involved had nothing to do for more than half of the day, and at the other station had nothing to do for more than six of the eight hours he was on duty. In the light of this and other similar evidence the Court concluded that the commission's findings to the effect that the public convenience and necessity could not be met under the railroad's proposal were not supported by the evidence.

The decision has the support of well considered cases. The United States Supreme Court in a landmark case? held that where the applicable statutes? require the reviewing court to look to the whole record in determining whether an NLRB decision is sup-
ported by substantial evidence, the reviewing court in applying the
test must look, not just to the evidence supporting the board’s de-
cision, but also to the evidence the other way. “The substantiality
of evidence must take into account whatever in the record fairly
detracts from its weight.” What could happen in the absence of
the rule that the whole record must be considered in determining
whether an agency decision is supported by substantial evidence is
vividly illustrated by an example ascribed to an appellate judge:
“[If] one discredited witness said the cat was black, and 10 unim-
peached witnesses declared it to be white, there was substantial evi-
dence to support a finding by the agency that the cat was black.”

The principal case is also supported by an earlier North Carolina
decision involving the closing of an agency at a station. The un-
disputed evidence showed an annual loss at the station of 572 dollars
even crediting the station with all revenues derived from shipments
originating or received there, and that there was no possibility of
expanding the business or revenues at the station. Nevertheless the
commission denied the application to close the agency station. The
Court held that the commission’s order was not supported by com-
petent, material and substantial evidence in view of the whole
record, although one large receiver of carload shipments had testi-
fied that if there were no agent at the station inconvenience and
delay would result.

A dictum in *Petree v. Duke Power Co.* is in contrast with the
above rule that in deciding whether an agency’s findings are sup-
ported by substantial evidence on the whole record the reviewing
court will take into account the evidence the other way and see if
in the light of it the supporting evidence is still substantial. The
Court said, “It is so well settled that if there is *any* evidence upon
which the Commission can base its findings they must be upheld
we need cite no authorities.” This is precisely the view that the
“whole record” rule was designed to abolish. However, the *Petree*

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6 Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). The
“whole record” requirement is discussed in 4 DAVIS, ADMINISTRATIVE LAW
TREATISE § 29.03 (1958).
7 STASON & COOPER, THE LAW OF ADMINISTRATIVE TRIBUNALS, 416 (3d
ed. 1957).
8 State ex rel. Util. Comm’n v. Atlantic Coast Line R.R., 233 N.C. 365,
64 S.E.2d 272 (1951).
10 Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951); 4
DAVIS, ADMINISTRATIVE LAW TREATISE § 29.03 (1958).
case involved an appeal from a compensation award by the Industrial Commission. The statute providing for the appeal states that the award "shall be conclusive and binding as to all questions of fact." The appeal is for errors of law. The section does not contain a provision comparable to that governing appeals from the Utilities Commission authorizing reversal for lack of competent, material and substantial evidence "in view of the entire record." It is true that the Court has held that if the Industrial Commission's findings are unsupported by competent evidence this is reversible as an error of law. But, as stated in the above dictum, the Court has repeatedly adhered to the view that if there is any competent evidence in support of the Commission's findings they must be upheld.

There seems to be no valid reason why findings of the Industrial Commission should be accorded greater weight than those of the Utilities Commission; why the findings of the latter should be subject to the "whole record" rule but those of the former should not.

Moreover, there is a basis on which the "whole record" rule can be applied by the Court to the findings of the Industrial Commission. North Carolina has a statute making provision for judicial review of the decisions of administrative agencies of the state. This general judicial review statute provides that it is applicable "unless adequate procedure for judicial review is provided by some other statute." The Court has held that judicial review provided by another statute is adequate "only if the scope of review is equal to that under" the above general judicial review statute. A writ of certiorari had been obtained to review the decision of a zoning board of adjustment. The Court said, "While G.S. 160-178 provides expressly for a review 'by proceedings in the nature of certiorari', this is an 'adequate procedure for judicial review' only if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 et seq." Id. at 480, 128 S.E.2d at 883. The Court concluded that the finding of fact upon which the

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23 Logan v. Johnson, 218 N.C. 209, 10 S.E.2d 653 (1940). Such was the holding in Petree v. Duke Power Co., 268 N.C. 419, 150 S.E.2d 749 (1966) from which the dictum quoted in the text was taken.
would seem to mean that the general judicial review statute provides the minimum scope for judicial review.\textsuperscript{19} That statute provides for reversal of an agency decision if it is “unsupported by competent, material and substantial evidence in view of the entire record,” etc.\textsuperscript{20} A review under which the reviewing court must affirm the agency decision if \textit{any} competent evidence sustains it is more restricted in scope than that under the “entire record” rule and therefore would seem to be inadequate under the general judicial review statute and to be replaced by its “entire record” rule.

The Court’s apparent position that the judicial review in another statute is adequate only if it is equal in scope to that under the general judicial review statute appears well advised. Particular statutes, each providing for review of some one administrative agency of the state, vary widely for no apparent reason except that they were separately drafted at different times by different draftsmen. Making the scope of the judicial review provided in the general review statute a minimum would produce more uniformity. One result would, of course, be to make the “whole record” rule of the general review statute applicable to other agencies even though their particular statutes do not go that far. Such a result seems compatible with well considered legislative policy favoring the “whole record” rule since it is provided for not only in the general judicial review statute but also in the statutory provisions for review of the licensing boards of the state\textsuperscript{21} and in the recently revised statute for the regulation of public utilities,\textsuperscript{22} as well as in the Federal Administrative Procedure Act.\textsuperscript{23}

\textbf{B. Appeal as in the case of Consent References}

The needless variety in particular North Carolina statutes each providing for judicial review of some one administrative agency is illustrated by the statute providing for an appeal to the superior court from an action by the N.C. State Board of Dental Examiners based its decision was not supported by competent, material and substantial evidence in view of the entire record as required by N.C. GEN. STAT. § 143-315(5) (1964).

\textsuperscript{21} North Carolina Case Law—Administrative Law, 42 N.C.L. REV. 600, 603 (1964).

\textsuperscript{22} N.C. GEN. STAT. § 143-315(5) (1964).

\textsuperscript{23} N.C. GEN. STAT. § 150-27(5) (1964).

\textsuperscript{24} N.C. GEN. STAT. § 62-94(b)(5) (1965).

depriving a dentist of his license. The appeal is on the record and shall be heard "as in the case of consent references." In N.C. State Bd. of Dental Examiners v. Grady the Court held that this means that the reviewing court like the referee is to make its "own independent determination of the truth of the matters in dispute." This scope of judicial review goes to the opposite extreme from that requiring the court to sustain the agency if there is any competent evidence to support its decision, and requires the court to decide on the facts for itself. It is hard to see why greater weight should on judicial review be accorded the decisions of, for example, the State Board of Certified Public Accountant Examiners or the State Board of Barber Examiners than the State Board of Dental Examiners.

C. Jurisdictional Determinations

When on judicial review the question arises whether an administrative agency had jurisdiction to make the decision involved, the scope of the review is greatly expanded over that usually afforded. In Hicks v. Guilford County the Industrial Commission found a juror to be an employee of the county and awarded benefits under the North Carolina Workmen's Compensation Act. The Court on appeal pointed out that whether the employer-employee relationship existed is jurisdictional and therefore the finding of the commission "is not conclusive but is reviewable by the court on appeal." The Court then held the juror not to be an employee of the county within the Workmen's Compensation Act and did so by looking to the law concerning the selection and functioning of jurors.

26 "Id. at 543, 151 S.E.2d at 27 (1966).
28 The reviewing court, for example, must itself consider the evidence in the record and find the jurisdictional facts without regard to the agency's finding. This rule and its application are discussed by Hanft, Administrative Law, North Carolina Case Law, 44 N.C.L. Rev. 889, 892 (1966).
30 "Id. at 365, 148 S.E.2d at 242 (1966).
31 The same result was reached by the same process in Board of County Comm'rs v. Evans, 99 Colo. 83, 60 P.2d 225 (1936), followed without discussion in Seward v. County of Bernalillo, 61 N.M. 52, 294 P.2d 625 (1956). By the same process the opposite result was reached in Industrial Comm'n v. Rogers, 122 Ohio St. 134, 171 N.E. 35 (1930).
A liberal attitude toward administrative agency procedures was expressed in two cases involving appeals from the Utilities Commission. In *State ex rel. Util. Comm'n v. Southern Ry.* the Court sustained the commission's disapproval of an increase in switching charges by twenty-nine railroads where their evidence was insufficient. In so doing the Court quoted with approval:

The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can only be had in courts, is not conducive to the best results. . . . All doubts as to the propriety of means or methods used in the exercise of a power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law.

In *State ex rel. Util. Comm'n v. Carolina Tel. & Tel. Co.*, the commission granted an applicant a certificate of public convenience and necessity permitting it to operate a mobile radio service for communication with persons in automobiles, and required the telephone company serving the area to interconnect its system with the mobile system of the applicant. The superior court reversed, and the Court affirmed the reversal. The Court held that the certificate of the telephone company included such mobile service, and another applicant may not be granted a certificate where the telephone company is ready, able and willing to render the service; further that the commission had no statutory authority to order the interconnection of the two systems.

The Court noted that the commission is required by statute to apply the rules of evidence applicable in civil actions "insofar as practicable." Nevertheless, said the Court, procedure before the commission is not as formal as that in the superior court. On the question of applicant's ability to serve, the commission could take into account facts arising after the hearing and shown by exhibits filed thereafter, when the adverse party has had notice that such exhibits have been filed with the commission for inclusion in the record. The adverse party then has the right to demand reopening

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34 267 N.C. 257, 148 S.E.2d 100 (1966).
of the hearing in order to permit cross-examination and rebuttal evidence. However the adverse party, the telephone company, had sought no such reopening.

**ZONING ORDINANCE—VARIANCE BY BOARD OF ADJUSTMENT**

*Austin v. Brunnemer* involved an application for a permit to erect an automobile paint and body repair shop. The county zoning ordinance prohibited the erection of any building in the zoned areas except those specifically permitted. The ordinance provided that the Board of Adjustment could, under circumstances and conditions specified in the ordinance, modify or vary its provisions. The board on appeal from the building inspector denied the permit on the ground that the building would violate the ordinance since automobile paint and body shops were not in any permitted classification, and that no sufficient reason was shown why the ordinance should be modified. The Court, however, pointed to another provision of the ordinance empowering the board to authorize variance from the terms of the ordinance in hardship cases within prescribed conditions and limitations. The Court reasoned that variances under this provision were not a change or modification of the ordinance. The provision for such variances is as much a part of the ordinance as any other provision. The case was ordered remanded to the board to exercise its discretion in the matter.

The Court treated as valid the provision for variance from the terms of the ordinance, but did not discuss the validity of the provision authorizing the board to modify or vary the terms of the ordinance itself. There is authority for the view that even the latter provision would not be invalid as a delegation of legislative power where the ordinance provides a sufficient standard to be followed by the board and its action is subject to judicial review for failure to exercise its discretion in accordance with provisions therefor.

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The Court did make the cryptic statement, "Any changes in the zoning regulations can be made by the Board of Commissioners." *Id.* at 700, 147 S.E.2d at 184 (1966).

Huebner v. Philadelphia Sav. Fund Soc., 127 Pa. Super. 28, 192 Atl. 139 (1937); 1 YOKLEY, ZONING LAW AND PRACTICE §§ 4-19 (3d ed. 1965). In St. John's Roman Catholic Church v. Board of Adjustments, 125 Conn. 714, 723, 8 A.2d 1, 5 (1939) the court quoted with approval, "A board of appeals . . . is created to keep the law, running on an even keel, by varying,
Exercise of Administrative Function by Court

In the case of *In re Varner* the Court stated that on appeal from a county board of education's order denying reassignment of a pupil to another school the superior court is to hear the matter de novo as if it were before the court in the first instance, and that the court has the same powers to make the reassignment as does the board.

CIVIL PROCEDURE (PLEADING AND PARTIES)

*Martin B. Louis*

Introduction

The General Assembly of North Carolina has recently adopted the Proposed New Rules of Civil Procedure, which will change the state's civil practice considerably. "These Rules are derived in large part from the Federal Rules of Civil Procedure, as are the rules of many other states." The Federal Rules need little introduction or commendation. They have been tested in the courts for almost thirty years and have earned almost unanimous acclaim. The late Judge John J. Parker, one of North Carolina's most distinguished jurists, said of them:

It is now almost universally conceded that these rules have given to the federal courts in their civil jurisdiction the best code of practice that is to be found anywhere in this country, or for that matter anywhere in this world."

* 266 N.C. 409, 146 S.E.2d 401 (1966).

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1 See generally 1 *Barron and Holtzoff, Federal Practice and Procedure*, § 9 (Wright ed. 1960). Over twenty states have in essence adopted the Federal Rules. Many others have borrowed from them.

North Carolina procedure had been almost unmarked by this reform movement. Accordingly, it seems appropriate here to contrast briefly the two systems in order to highlight the significant new approach to procedure taken by the new rules.

Procedure is awesomely omnipresent in North Carolina decisions. Few lack at least one point of practice. Indeed there are endless pages of annotations under those provisions of the Code governing demurrer, nonsuit, instructions to the jury, new trial and appeal and error. Such preoccupation with procedure, and its baneful consequences, was condemned by Roscoe Pound in 1906 in his famous address, "The Cause of Popular Dissatisfaction with the Administration of Justice." Regrettably, one would be hard pressed to discern in the latest volumes of the North Carolina Reports significant improvement in the conditions he recounted some sixty years ago.

The hard truth is that such preoccupation is the mark of a legal system's immaturity. North Carolina had, of course, passed beyond Maine's famous observation that "so great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." And it could not foolishly boast, as did the fictitious Baron Surrebutter, that the rules of pleading had been so refined "that nearly half the cases coming recently before the Courts have been decided upon points of pleading." It is fair to say, however, that its Code procedure was still struggling, with no promise of imminent success, to grow beyond its adolescence almost one hundred years after its birth. Elsewhere in the common law world, procedure was receding quietly into the background and more efficiently performing its principal function of facilitating the disposition of cases on their merits. Consequently, judges could devote

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3 Only the little used pre-trial conference provision of the present Code can be traced to the influence of the Federal Rules.

4 Reprinted by the American Judicature Society (1956). This speech is in large part an attack on the procedure of its day. It assails such familiar practices as the "sporting theory of justice" which "awards new trials or reverses judgments, or sustains demurrers in the interest of regular play," rather than "substantive law and justice"; "the injustice of deciding cases upon points of practice"; the complacent patchwork amendment of the Code; "the lavish granting of new trials," and "the waste and delay caused by . . . obsolete procedure."

5 MAINE, EARLY LAW AND CUSTOM 389 (1883).

most of their time to the substantive law, in which, as Judge Craven has noted, "[t]here are enough problems . . . to occupy all of us all of our time."7

This preoccupation also brought in its wake serious delay and an immense squandering of legal resources that a state so lacking in lawyers, judges and per capita income as North Carolina could ill afford. Consider, for example, the verbal effusiveness of attorneys setting forth in their pleadings their opening statements to the jury and the time expended in the resultant judicial editing process;8 the right of every plaintiff to a second day in court if his case is bad enough or his attorney not confident enough;9 the right of an attorney to demand a new trial if he chooses to remain silent in the face of a material variance until it is too late to save the trial in progress;10 the need for countless new trials because a jury is considered more receptive to misstatements of law than the attorney for the losing party;11 the inability to join persons having closely related claims in a single action;12 the requirement that an attorney

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9 The dismissal of a plaintiff nonsuited for insufficient evidence is ordinarily without prejudice. See Walker v. Story, 256 N.C. 453, 124 S.E.2d 113 (1962). Plaintiff may also take a voluntary nonsuit anytime before the announcement of the verdict. N.C. GEN. STAT. § 1-224 (1953).

10 A failure to object to materially variant evidence is not a waiver or implied consent to the trial of the unpleaded issue, as it is in most jurisdictions today. E.g., Fed. R. Civ. P. 15(b). The objection may be raised in North Carolina by motion for compulsory nonsuit at the close of plaintiff's evidence. Whichard v. Lipe, 221 N.C. 53, 19 S.E.2d 14 (1942); Note, 41 N.C.L. Rev. 647 (1963). If there is no allegation whatsoever to support the proof, this defect may be raised sua sponte on appeal for the first time. See Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

11 A party does not waive errors in the trial judge's charge by failing to call them to his attention before the jury goes out. Instead he may sharpshoot the charge for errors after verdict goes against him. See generally Paschal, A Plea for a Return to Rule 51 of the Federal Rules of Civil Procedure in North Carolina, 36 N.C.L. Rev. 1 (1957).

12 McIntosh, North Carolina Practice and Procedure § 644 (2d ed. 1956) [hereinafter cited as McIntosh]. Thus immediate dismissal is required if an infant's action for personal injuries is joined with a parent's
author a novel as well as a brief on appeal, though he is less efficient
than the Xerox machine that has elsewhere replaced him.  

Such a grueling process must often bring the disadvantaged liti-
gant to his knees and persuade even the privileged to shun the "just-
tice" of the courts. In theory it should also offer generous rewards to
attorneys that bill their clients by the hour. In 1853 Dickens de-
cried such "justice" in his novel *Bleak House*. Within a score of
years English civil procedure gladly shed most of these cumbersome
trappings, which almost a century later still burdened our own.

Finally, this procedural fetish often unjustly deprives litigants
of a hearing on the merits of their claims. Every procedural system
must contain such doctrines as variance, waiver, limitations and res
judicata. But their invocation should ordinarily require a genuine
offense to the underlying goal they seek to effect—the efficiency,
order and stability of the judicial process. Recognition and imple-
mentation of this truth is the most significant contribution of mod-
ern procedure. It has eliminated many of the snares in which at-
torneys are inevitably caught and has also increased considerably
the occasions on which, though initially caught, they may free
themselves and continue. Notable examples are the simplification
of pleading and appellate procedure, the liberalization of amendment
and relation back and the requirement that procedural defects must
be raised immediately.

These welcome developments heretofore received a cool reception
in North Carolina. Allowance of relation back is niggardly; allowance
for loss of services. *Campbell v. Washington Light & Power Co.,
166 N.C. 488, 82 S.E. 842 (1914).* Especially egregious are the Court's
newly developed rules forbidding crossclaims for contribution between joint
tortfeasors and crossclaims or third party claims for contractual indemnifica-
82 (1961).* Prof. Brandis has referred to these rules as "overly technical,
illogical, unrealistic, not required by statute, and in defiance of more modern
and efficient notions now well accepted in many other jurisdictions, most
notably in the federal courts." *Brandis, Civil Procedure (Pleading and
Parties), Survey of North Carolina Case Law, 44 N.C.L. Rev. 897, 915
(1966).*

23 Appellant may not simply reprint relevant sections of the transcript of
testimony at trial. His attorney must summarize the evidence in narrative
form. *N.C. Sup. Ct. R. 19(4).* Failure to do so will result in dismissal of
the appeal. *Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111
S.E.2d 538 (1959).*

24 An amendment will not relate back if the complaint is so seriously
defective that it is labeled a statement of a defective cause of action, *George
v. Atlanta & Charlotte Ry., 210 N.C. 58, 185 S.E. 431 (1936), or if a
ance of belated procedural objections is generous, protection of the right to amend is seriously deficient, and enforcement of the minutiae of pleading and appellate procedure is strict. It would at least be understandable if this adherence to strictissimi juris constituted a felt, carefully articulated appreciation of the societal needs it properly embraces. For aught that appears in the decisions, however, it was apparently based on nothing more profound than unquestioning adherence to the ways of the past. But, as Justice Holmes observed so long ago with respect to the law's overly indulgent

recherche du temps perdu:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

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15 Serious defects in the statement of a claim may be challenged for the first time on appeal through a demurrer or tenus. Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 101 S.E.2d 814 (1958); see generally McIntosh § 1194 (Supp. 1964). By contrast modern procedure treats procedural defects as waived if not raised immediately by demurrer or answer. CLARK, CODE PLEADING 531 (2d ed. 1947) [hereinafter cited as CLARK]. Furthermore, modern procedure treats objections to materially variant evidence waived if not made immediately, Fed. R. Civ. P. 15(c). North Carolina does not. See note 10 supra.

16 Although the Supreme Court has liberally articulated the rules governing amendment, it has apparently never found an abuse of discretion in a lower court's denial of leave to amend. See Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966), discussed infra.

17 In Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930), the Court voiced its impatience with the frequent violations of its appellate rules and stated that future cases would be dismissed without explanation of the authority of that opinion. Since that time Shepard's Citations shows approximately ninety citations to that opinion. Admittedly many of these citations were to other aspects of it. Nevertheless, is it not time to inquire whether it is the rules, rather than the attorneys, that are primarily at fault? Consider by contrast to North Carolina's incredibly complex appellate procedure the usual federal practice, whereby appellant merely gives notice of appeal, reprints relevant portions of the record, including the testimony, in an appendix and writes a brief. WRIGHT, FEDERAL COURTS 408-09 (1963). There is no reason why North Carolina cannot eschew its current appellate rigmarole in favor of the simplified modern practice. The Supreme Court of North Carolina, however, constitutionally controls its own appellate procedure, and reform must, therefore, await its enlightenment. Covington v. Hanes Hosiery Mills Company, 195 N.C. 478, 142 S.E. 705 (1928).

Some will say these observations are too hard. The demands made upon the courts are awesome and they will inevitably err. To this plea I must demur. It is not that North Carolina decisions so frequently miss the mark, but that they miss so widely. In evaluating them, it is too often sufficient merely to cite the twentieth century. What possible defense is there to results, excepting those specifically ordained by statute, that adopt or blindly follow, as the simplest hornbook would readily disclose, the almost universally abandoned practices of the dark ages of the law? And why do these decisions so often omit citation to, let alone discussion of, the vast body of contrary modern precedent? Finally, why do the courts persist in these obvious errors, long after they have been patiently and temperately exposed in the pages of this journal, invariably to no avail? Regrettably there are no ready answers to these questions; there are only the serious doubts that the need to put them creates.

I have dwelt at length on these problems in order to point up the serious failings of our present system and the justifications for the wholesale legislative renovation that has recently taken place. Other states have, of course, been similarly plagued by such problems. But many of them more speedily heeded the inevitable voices of reform. In concluding I reprint one reformer's words, which, though uttered in the nineteenth century, will have embarrassing relevance in North Carolina until 1969.

CROGATE: But what I want to know is whether there are no courts, where you can get justice, or something like it, without any special pleading.

SUR. B. Oh, yes. In consequence of an idle and absurd clamour on the part of the public, some inferior courts were established a short time back to enable the common people to sue for small debts and damages under twenty pounds; and in these courts, the proceedings are wholly free from the refinements of special pleading.

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20 See, e.g., cases or rules cited notes 10-15 supra.
20 Ibid.
21 Ibid.
22 In 1959 a bill to give the Supreme Court of North Carolina procedural rule making authority, the means by which most states have adopted new rules of procedure, died in committee, after passing one house of the General Assembly, because the Court demanded constitutional, rather than statutory, authority, over which the General Assembly would have no control.
CROGATE: But, if special pleading is a good thing, why is it done without in these courts?
SUR. B. Because of the expense and delay which the forms of correct pleading would occasion, and because neither practitioners nor judges could be expected to understand the system properly; and moreover, Mr. Crogate, in these trifling matters, the great object is to administer substantial justice in the simplest form and at the least expense.
CROGATE: Well, in my ignorance, I should have thought that would have been the object in great cases as well as small.23

Replies and the Pleadings of the Statute of Limitation

At common law a complaint disclosing on its face the defense of the general statute of limitations24 was not demurrable. The defense had to be raised by a plea in bar or in the answer.25 Plaintiff was required to file a replication,26 now called a reply, and if he failed therein to deny defendant's allegations or to allege that the statute of limitations had been tolled by some circumstance, such as his infancy or defendant's absence from the jurisdiction, his replication was demurrable.

Although the reasons for the common law rule had effectively ceased at the time the Field Code was written,27 North Carolina and

24 CLARK 522; Atkinson, Pleading the Statute of Limitations, 36 YALE L.J. 914, 919 (1927) [hereinafter cited as ATKINSON].
25 Where the period of limitations is a condition precedent of the cause of action, such as when it is built into a statute or contract creating the underlying substantive right, the disclosure of its running on the face of the complaint may be challenged by demurrer. Gaskins v. Hartford Life Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963); CLARK 522 n.82.
26 At common law each party was required to continue pleading until the case was at issue; that is, until one party demurred to or denied the other's allegations. SHIPMAN, COMMON LAW PLEADING 31 (3d ed. Ballantine 1923) [hereinafter cited as SHIPMAN].
27 Ordinarily a complaint disclosing on its face the existence of an affirmative defense to the claim asserted exhibits a demurrable defect of substance. Scott v. Statesville Plywood & Veneer Co., 240 N.C. 73, 81 S.E.2d 146 (1954). Its dismissal is, therefore, an adjudication on the merits. Davis v. Anderson Indus., 266 N.C. 610, 146 S.E.2d 817 (1966). But when the disclosed defense is the statute of limitations, plaintiff can often establish circumstances tolling the running of the statute. To avoid cutting off plaintiff's right to allege such circumstances, the common law forbade the use of a demurrer. ATKINSON 921. Instead it required plaintiff to allege these circumstances in his replication if defendant pleaded the statute of limita-
many other Code states chose to adhere to it. Others, now the majority, foreswore it and allowed a demurrer or motion to dismiss. In fact, in many courts today a hearing on the defense, even when not disclosed on the complaint's face, may be provoked immediately by means of a motion for summary judgment.

The North Carolina Code, unlike the common law and other versions of the Code, does not require plaintiff to reply to new matter. He may at his discretion reply, but if he does not he is permitted to amend. ATKINSON 922. But amendment at common law was burdened with technical limitations. Allowing it in this situation also would have suggested that the defect was not substantive, as similar disclosed demurrable defenses were. Furthermore, at early common law defendant could assert only one defense. CLARK 13. If he chose the statute of limitations, he hardly cared whether he raised it by demurrer or plea in bar. Later, however, when he was allowed to plead all his defenses, he was understandably reluctant to prepare and disclose his entire answer before plaintiff demonstrated his ability to avoid the defense disclosed on the face of his declaration. Thus equity and many common law and code jurisdictions began to permit demurrers. CLARK 522; ATKINSON 922-26. In addition they also allowed plaintiff, by amended complaint or new action, to allege circumstances tolling the statute. Gilmer v. Morris, 46 Fed. 333 (C.C.M.D. Ala. 1891); Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266 (1901); Bonnifield v. Price, 1 Wyo. 223 (1875); ATKINSON 922. Since the North Carolina Code did not otherwise bar this improved procedure, its provision forbidding the use of demurrers was unnecessary.

The common law also advanced two other insubstantial objections to permitting demurrers in this situation. First it was said that although the demurrer searched the record, it did not search the back of the declaration, on which the date of filing or service was inscribed. ATKINSON 920-21. Secondly, it was held that matters of time alleged in a pleading were not "material." True, they were not material for purposes of variance or denial. But could they not have been material for the purpose of testing the sufficiency of a pleading? FED. R. Civ. P. 9(f) now makes them material for this latter purpose.

28 North Carolina and a few other states codified the rule. N.C. GEN. STAT. § 1-15 (1953); ATKINSON 921 n.61. Others adhered to it by judicial construction. ATKINSON 924.

29 ATKINSON 925. The Federal Rules of Civil Procedure allow a motion to dismiss when the statute of limitations is disclosed on the face of the complaint. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 281 (Wright ed. 1960).

30 FED. R. Civ. P. 56.

31 N.C. GEN. STAT. § 11-140 (1953) provides that plaintiff must reply to an answer containing a counterclaim that is served upon him or his attorney. N.C. GEN. STAT. § 1-141 (1953) states that plaintiff may demur to an answer containing new matter.

32 There is no language in the Code allowing plaintiff, at his option, to
assumed to have denied or avoided all new matter in defendant's answer. The Code authorizes the trial court, at defendant's request, to order plaintiff to reply. And when the bar of the statute of limitations is disclosed on the face of the complaint, the court should ordinarily so order. But few have sought to use this device and, not surprisingly, many began to resent the seeming impossibility of making plaintiff "put up or shut up" before trial. Thus, the courts began to dispose summarily of such cases before trial in formal pre-trial conference, on motion for judgment on the pleadings and on motion to dismiss in special hearings just before trial began.

Such a hearing was held in Little v. Stevens, where the plaintiff, a Tennessee resident, sued defendant in North Carolina for injuries arising out of an automobile accident in Tennessee. The applicable Tennessee period of limitations was one year; the applicable North Carolina period, three years; and the cause of action file a reply and similar statutes, such as the Federal Rules, have been construed to bar a reply filed without the Court's permission. Beckstrom v. Coastwise Line, 13 F.R.D. 480 (D. Alas. 1953). The North Carolina practice, however, permits plaintiff to file a reply if he desires. Olmstead v. City of Raleigh, 130 N.C. 243, 41 S.E. 292 (1902); James v. R.R., 121 N.C. 530, 28 S.E. 557 (1897). Because North Carolina practice permits the pleadings to be read to the jury, many plaintiffs choose to file replies. See note 8 supra.

N.C. GEN. STAT. § 1-159 (1953) provides in part that "the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires."

N.C. GEN. STAT. § 1-141 (1953). If plaintiff does not avoid the defense in his reply, defendant may demur under N.C. GEN. STAT. § 1-142 (1953), and the demurrer, I believe, should be sustained. This question was left open by the Court in Reid v. Holden, 242 N.C. 408, 416, 88 S.E.2d 125, 131 (1955).


The annotations to N.C. GEN. STAT. § 1-141 (1953) and McIntosh § 1264 cite no cases involving such a motion. This is not conclusive, however. The trial court's ruling on such a motion is discretionary and few would, therefore, attempt to reverse it on appeal.

Speas v. Ford, 233 N.C. 770, 117 S.E.2d 784 (1961). In effect this is equivalent to a hearing before trial on a motion to dismiss. See note 39 infra.

City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961); Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955). None of these cases, or those cited in note 37 supra, or note 39 infra, indicate that plaintiff attempted, or was barred from attempting, to establish at the hearing circumstances tolling the statute of limitations.


accrued more than a year before the action was commenced. The parties apparently agreed that a recently enacted North Carolina statute barred the action if barred in Tennessee. But the trial court specifically found, and plaintiff, therefore, presumably proved, facts that seemed to toll the Tennessee statute of limitations. The trial court, however, ruled without explanation that the statute had run.

On appeal the Supreme Court refused to consider the merits of plaintiff's contentions. Instead it held that the trial court's findings were unavailing because plaintiff had failed to file a reply alleging the ultimate facts on which they were based, and, as it was ordained on Mt. Sinai, proof without allegation is as unavailing as allegation without proof. As a result plaintiff's substantial claim for personal injuries was effectively extinguished without a hearing on the

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41 This statute, to which the Court directed the major part of its opinion (although neither party questioned its interpretation in his brief), is found in the 1955 amendment to N.C. GEN. STAT. § 1-121 (Supp. 1965) and provides "that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State." But for this provision the longer North Carolina statute of limitations would have been applied under ordinary conflict of laws principles. Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945). This aspect of the case will be discussed in the Conflict of Laws section of this Survey.

42 The trial court indicated it would hold a special hearing just before trial to consider this issue, the parties waived jury trial and the trial court included findings of fact in its judgment. Record, pp. 12-15, Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

43 The court found that defendant left Tennessee about three months after the cause of action accrued. Record, p. 13. This departure, plaintiff alleged, tolled the statute of limitations under TENN. CODE ANN. § 28-112 (1955). The trial court also found that plaintiff had previously instituted against defendant in Tennessee a timely action that was dismissed on June 28, 1963, on defendant's plea in abatement. Record, pp. 12-13. TENN. CODE ANN. § 28-106 (1955) provides, like N.C. GEN. STAT. § 1-25 (1953), for the commencement of a new action within one year after a dismissal of a timely action upon any ground other than the merits. Since plaintiff commenced his new action within a year on November 21, 1963, and the plea in abatement had not concerned the merits (it apparently was based on insufficient process), his action, he contended, was not barred.

44 Although the trial court made findings of fact, it made no conclusions of law other than the statement that plaintiff's action was barred. Record, p. 14. Presumably it accepted defendant's contentions, as stated in his brief, that neither Tennessee saving provision was applicable. The merits of these contentions are irrelevant since the Court refused to consider them. It suffices to say that they are clearly debatable, as the Court itself seemed to concede. Little v. Stevens, 267 N.C. 328, 338, 148 S.E.2d 201, 208 (1966).

45 Id. at 338, 148 S.E.2d at 208.

46 The amount claimed was $45,000. It was of little solace to plaintiff
merits. If it were plaintiff's fault, then he has grievously answered for it. In fact, it was not. The Court actually made very questionable new law in utter disregard of a controlling statute. Furthermore, it did so in deciding an issue that had not been raised in the briefs or record on appeal and apparently not even in the trial court.

The Court's starting point was the settled proposition that summary procedures may be invoked if a reply has not been filed. It cited no authority in point, however—and there apparently is none—for its second proposition that plaintiff, in the absence of a suitable reply, cannot establish at the summary hearing circumstances tolling the statute of limitations. There is no warrant or necessity for this rule. A reply to any new matter gives welcome notice to defendant and may also permit the immediate disposition of plaintiff's claim. But defendant may avoid surprise through discovery, and he may smoke out plaintiff by asking the court to order a reply or by invoking summary proceedings. Given these possibilities, the draftsmen of the North Carolina Code chose on balance to make a reply to new matter optional in order to avoid the endless pleadings of the common law. They provided specifically, therefore, in G.S. § 1-159 that plaintiff is deemed to have denied or avoided all new matter in order to bar the very result the Court now reaches. This

that his claim for property damage in the amount of $400, for which Tennessee provided a longer statute of limitations, was not barred.

To be more precise, plaintiff must answer for the fault of his attorney, a fact that courts conveniently overlook in their purges of procedural error.

The Court did cite a seemingly approving dictum in Stubbs v. Motz, 113 N.C. 458, 459, 18 S.E. 387 (1893). This dictum has never been followed, was based on authority not in point and completely overlooked a contrary provision of the Code, now N.C. GEN. STAT. § 1-159 (1953).

In apparent reply to early criticism of her opinion, Justice Sharp added to the version that appeared in the North Carolina Advance Sheets a citation to McINTOSH § 373 (Supp. 1964), which citation appears at 148 S.E.2d 208, and suggested that the author, Dean Dickson Phillips of the University of North Carolina School of Law, supplies "the rationale of this procedure." Ibid. But Dean Phillips suggests only that if a reply is not filed, summary procedures may be invoked. He does not state, or even intimate, that plaintiff will be barred at the hearing from proving circumstances tolling the statute of limitations.

Some courts might also grant a motion by defendant for a more definite statement or for a bill of particulars. Cf. Hanson v. Hanson, 203 Misc. 396, 119 N.Y.S.2d 11 (1953) (compelling plaintiff to state whether a contract was oral or in writing in order to raise the statute of frauds—in effect compelling plaintiff to plead matter in avoidance in his complaint if the contract was admitted to be oral).

Clark 687-88. It should be noted that in many code states, a reply to new matter is mandatory. Id. at 689 n.7.
provision was hardly intended to provide plaintiff with an impenetrable cloak of silence. But it clearly did intend to permit him to establish his case once his silence was broken. Furthermore, it is irrelevant that plaintiff disclosed the defense on the face of his complaint. That fact may justify the termination of his conditional privilege of remaining silent, but it cannot penalize him for relying on it initially. The Court's decision thus effects a pro tanto repeal of G.S. § 1-159, a phenomenon made even more anomalous by the fact that the Court did not even bother to cite or discuss it in its opinion.

Furthermore, the record and briefs show no objection by defendant at any time to plaintiff's proof without allegation. The question was apparently raised by the Supreme Court on its own motion. Most modern courts would hold that the defect was waived at trial. The need for such a rule is especially compelling here. At worst a variance or missing allegation will ordinarily necessitate a wasteful new trial. But here it extinguished plaintiff's claim altogether. If the Court is inclined to legislate in this area, here is legislation all would applaud.

Finally, the Court ignored the universally followed rule, which

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52 This fact does not appear in the Court's opinion. It is of course possible that defendant raised the question in his oral argument.
53 E.g., Dacus v. Burns, 206 Ark. 810, 177 S.W.2d 748 (1944); George v. Jensen, 49 N.M. 410, 165 P.2d 129 (1946):
"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ." This rule, although derived from Rule 15(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, and identical therewith, is but declaratory of a rule long obtaining in this jurisdiction that absence of a pleading to support proof is waived when a party litigates the issue without objection.

54 If plaintiff's evidence is excluded because of the absence of a suitable allegation, he may take a voluntary nonsuit and begin a new action within a year. If plaintiff is nonsuited for this reason after resting his case, he may similarly begin again within a year. N.C. GEN. STAT. § 1-25 (1953).
55 As note 53 supra shows, courts have often applied this rule without the benefit of a specific statute.
56 Murphy v. Queens Citizens Bank of Clovis, 244 F.2d 511, 512 (10th Cir. 1957) ("The Court of Appeals has no duty to search the record for
it too often honors only in the breach,⁵⁷ that a new issue, especially one of procedure only, will ordinarily not be considered for the first time at the appellate level. The wisdom of this rule is clearly applicable here. Had the question of variance been raised below, the trial court might have permitted plaintiff to amend.⁵⁸ On appeal, however, it is ordinarily inconvenient for the appellate court to hear evidence in order to make this discretionary ruling. Here, however, given the Court’s determination to make law at any cost, how simple it would have been to permit plaintiff to amend.⁵⁹ That the Court

error upon a ground neither briefed nor argued”). Vestal, *Sua Sponte Considerations in Appellate Review*, 27 Fordham L. Rev. 477 (1958). Exceptions to this rule are made when defects of subject matter jurisdiction are disclosed, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908), or manifest injustice might result. Wayne v. New York Life Ins. Co., 132 F.2d 578, 37 (8th Cir. 1942). But even matters affecting the merits may be waived. Cf. Sinclair Refining Co. v. Howell, 222 F.2d 637 (5th Cir. 1955); Black, Sivalls & Bryson v. Shondell, 174 F.2d 587 (8th Cir. 1949). Here, however, the question raised was one of procedure only. It did not affect the merits. Indeed it served to prevent their consideration. As such who would contend that the Court needed to raise the question on its own motion to prevent a miscarriage of justice?

⁵⁷ North Carolina adheres in principle to the rule that new issues may not be raised for the first time at the appellate level. McIntosh § 1800 (Supp. 1964). This principle should embrace badly pleaded complaints that omit essential facts or allegations, especially if these omissions are proved at trial. Some cases even state that an attack on a complaint containing such a defective statement must be made by demurrer immediately. Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949). Nevertheless, the Supreme Court, without regard to doctrinal consistency, Note, 39 N.C.L. Rev. 83 (1960), permits challenges to procedural defects of this type for the first time on appeal through a demurrer or tenus. Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 101 S.E.2d 814 (1958); McIntosh § 1194 (Supp. 1964). The result in this case is, at first blush, consistent with the rule followed in *Stamey* and similar cases, since plaintiff improperly omitted, I shall concede *arguendo*, the essential allegation that the statute of limitations had been tolled. Two important factors not present in *Stamey* were present here, however. First, the very question had already been heard on the merits, despite the missing allegation and without objection by defendant. Second, the case was not remanded to the trial court where plaintiff would have an opportunity to apply for leave to amend. Given the presence of these two factors here, what possible reason was there for such a belated inquiry into the quality of the pleadings, other than a misplaced adherence to the punctilios of common law procedural literalism?

⁵⁸ Cf. Dacus v. Burns, 206 Ark. 810, 177 S.W.2d 748 (1944) (“Had appellant made timely objection by demurrer to the complaint or otherwise, the complaint would have been amended at that time”).

⁵⁹ The Supreme Court may allow amendment “for the purpose of furthering justice.” N.C. Sup. Ct. R. 20(4). Here it should have done so on its own motion. Plaintiff could hardly have anticipated the need for amendment himself, since the issue necessitating it was apparently raised by the Court for the first time in its opinion.
failed under such compelling circumstances to do this or anything else in order to reach the merits is tragic and frightening.

Nevertheless, the Court's action is clear. Hereafter plaintiff's attorneys are advised to file a reply whenever their complaint shows on its face a non-demurrable affirmative defense and the defense is pleaded by defendant. Plaintiffs need not reply, however, to any other new matter. The Code clearly protects their privilege here to remain silent.

AMENDMENT OF PLEADINGS

In recent years the Supreme Court has extended the outer limits of a trial judge's discretion to allow amendment of pleadings. It has also regularly reversed trial judges that fail to exercise their discretion. But it has unfortunately refused to examine the exercise of discretion itself. This year was no different. The Court reaffirmed the principle that an amendment before trial changing the cause of action is permissible if it arises out of the same transaction. It continued to reverse trial judges who dismiss complaints containing defective statements without giving plaintiff an opportunity to seek leave to amend. Finally in Consolidated Vending Co. v. Turner it again affirmed a discretionary denial of leave to amend under circumstances that would have persuaded many other appellate courts to reverse. In this case the first trial had ended in a hung jury. On the eve of the second trial the judge stated that he would exclude certain evidence, admitted at the first, of a setoff to plaintiff's claim, apparently because defendant's answer lacked allegations establishing a suitable foundation for it. Defendant im-

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60 The statute of frauds, as well as the statute of limitations, immediately comes to mind. McIntosh § 1190.
67 Id. at 579-80, 148 S.E.2d at 533-34. The first ruling was not binding, of course, because, inter alia, a mistrial had been declared.
68 Defendant's evidence was eventually excluded for this reason. Id. at 581, 148 S.E.2d at 534-35.
mediately sought leave to amend his answer, but his application was denied. The Supreme Court affirmed without comment except for the statement regularly made in such cases that no manifest abuse of discretion had been shown. 60

From here the abuse seems manifest. How could plaintiff have been prejudiced by an amendment permitting the introduction of evidence already admitted in a previous trial? How could defendant have been accused of non-excusable delay or neglect when the evidence had previously been admitted and its exclusion on the eve of the second trial was undoubtedly a surprise to him? Perhaps answers to these questions exist, but they were not provided. Therefore, given this prima facie case of an abuse of discretion, the Court should have reversed. As the Supreme Court of the United States has observed: "[B]ut outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion, it is merely abuse of that discretion." 70

I am unable to find a single case in which the Court has reversed a discretionary denial of leave to amend. 71 Furthermore, cases reversing other discretionary rulings are extremely rare. It is difficult to explain this fact. 72 The power to reverse is not disputed and there are enough examples of its exercise elsewhere. 73 Moreover, the Court must realize that trial judges who would be reversed for dismissing complaints containing defective statements 74 can, and probably do, immunize the same arbitrary acts from reversal simply by going through the motions of denying an application for leave to amend. How then can the Court reverse in the first situation and almost automatically affirm on the very same facts in the second? It is not sufficient to say only that in the first the trial judge fails to

60 Id. at 581, 148 S.E.2d at 534.
62 There are cases in which it should have. E.g., Perfecting Service Co. v. Product Dev. & Sales Co., 214 N.C. 79, 140 S.E.2d 763 (1965).
63 Some believe this reluctance is based upon the Court's unarticulated feeling that such a finding is a serious affront, distinguishable from mere disagreement over a point of law, to the integrity of the trial judge involved. The Court's failure to reverse for this reason may, on the other hand, be an affront to justice. Furthermore, in other jurisdictions trial judges, who are presumably no more thin-skinned or indifferent to their reputations, manage to survive such alleged reproofs.
64 See generally the federal cases collected in 3 Moore, Federal Practice ¶ 15.10, n.2 (2d ed. 1966).
65 See notes 62 and 65 supra.
exercise his discretion, but in the second he does. The only difference may be the application of a different label.

In most jurisdictions today trial judges are being given greater discretionary power. Consequently appellate courts must exhibit greater willingness to police its exercise. Otherwise it can become an expanding power to act arbitrarily. This policing function is especially important in North Carolina because its strictly enforced rules governing pleading and proof create a great need for liberal allowance of amendments.

Furthermore, the Court should look with special care when defendant is denied leave to amend because he then cannot, like plaintiff, take a nonsuit and file the amended pleading in a new action.

Appellate review of orders denying leave to amend presents special problems in North Carolina because trial judges do not write opinions. There is no reason, however, why they cannot be required to include in such orders a brief statement of reasons. The possibility of appellate scrutiny of this statement would itself curb arbitrary propensities and overly hasty conclusions. It would also serve to identify situations in which the trial judge, under the guise of exercising discretion, erroneously denied leave to amend because of a mistake in the applicable law.

ALTERNATIVE JOINDER OF PARTIES

Two decades ago Professor Brandis demonstrated that North Carolina's permissive joinder rules were seriously dated and that adoption of the flexible, modern approach of the Federal Rules of Civil Procedure was highly desirable. This approach is itself based upon nineteenth century English reforms and their American state counterparts. New York described it in 1935 as follows:

[Footnotes]

76 In the instant case and others applications for leave to amend are often made orally under the pressure of adverse rulings and denied orally on the spot without comment. See, e.g., Brief for Appellant, p. 2, Davis v. Anderson Indus., 266 N.C. 610, 146 S.E.2d 817 (1966) (trial judge sustained demurrer ore tenus at start of trial and denied applications for leave to amend and to take a voluntary nonsuit orally, instantly and without comment).


78 See generally, James, Civil Procedure 412 (1965); Sunderland, Joinder of Actions, 18 Mich. L. Rev. 571 (1920).

Complete freedom should be allowed in the joinder of causes of action as in the joinder of parties, and it is submitted that the correct approach to the joinder both of parties and causes of action is the English one. May the matters conveniently be tried together? The problem is to combine as many matters as possible to avoid multiplicity and at the same time not unduly to complicate the litigation for the jury.79

How short, sweet and irrefutable this is. And how strange it must sound to those still dedicated to the meaningless search for causes that affect all parties and parties united in interest. That these quests will be resolutely pursued in North Carolina until 1969, almost a century after their intellectual interment, is an embarrassing demonstration of the efficacy of local law reform.

To be sure, there were a few forward movements, most notably the Court's allowance of alternative joinder of defendants in Conger v. Insurance Co.80 Although this decision merely embraced well-accepted modern practice81 and the Code's specific allowance of alternative joinder,82 it was praiseworthy because of the unfamiliarly progressive judicial posture it evidenced. Similarly praiseworthy, therefore, is the Court's recent holding in Filter Co. v. Robb83 that a defendant may require the joinder of an additional plaintiff whose claim is alternative to the original plaintiff's.84 Once again Justice Sharp, who wrote the equally excellent opinion in Conger, was compelled to perform some delicate linguistic surgery on the requirement that all causes must affect all parties, and once again the operation was a complete success. Regrettably the Court chose to distinguish on seemingly irrelevant grounds, rather than to

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81 Payne v. British Time Recorder Co. [1921] 2 K.B. 1; Clark 394-96.
82 N.C. GEN. STAT. § 1-69 (1953).
84 Plaintiff Filter Co. sued Robb for the balance due on an account. Robb claimed his contract was with Hunter and successfully moved to join him as an additional plaintiff. Plaintiff Filter Co. alleged that Hunter had acted only as its agent and the trial court sustained Hunter's demurrer for misjoinder of parties and causes. The Supreme Court in reversing noted that complete justice could not be done unless Hunter was joined. He could then avow an interest as principal and remain or admit he was an agent and be dismissed. In fact Hunter may have been a necessary party, in which case the inability to join him would have been intolerable.
overrule, an earlier, contrary decision, but fortunately the distinction will ordinarily be unimportant.

These decisions hopefully evidence a liberalizing trend in the Court's interpretation of the Code's joinder provisions and a potentially friendly reception of the modern joinder provisions of the new Rules of Civil Procedure. They may also lead to a welcome relaxation of current rules restricting the joinder by a single plaintiff of alternative and seemingly conflicting causes of action. Finally they may also evidence a growing inclination on the part of the Court, or some of its members, to look to scholarly discussion of procedural questions.

NEW MATTER AS A JUDICIAL ADMISSION

In Champion v. Waller a unanimous Court held that plaintiff may employ, in defending against a motion for compulsory nonsuit, favorable allegations of new matter in defendant's answer even though such allegations have not been introduced in evidence. This is quite sound and in accord with the majority rule. The decision should have served to clarify the confusion on this point in the North Carolina cases. Unfortunately Justice Lake cited no authority for

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85 Foote v. Davis & Co., 230 N.C. 422, 53 S.E.2d 311 (1949). The distinction given was that the additional defendant there had been brought in on plaintiff's, and not defendant's, motion. Justice Sharp declined to demonstrate this makes. None is apparent. If alternative joinder of plaintiffs is proper, it should not matter whether the alternative plaintiffs join initially or the alternate plaintiff is brought in on his own motion or the motion of either party. Regrettably, by failing to overrule Foote, the Court left the propriety of most of these alternatives open to doubt. My own estimate is that Foote is no longer authoritative.

86 Ordinarily defendant should want to join the alternate claimant and settle the matter in one trial. But if defendant feels for strategic reasons that his chances for victory are better in separate actions, he would remain silent. Plaintiff, under the Foote rule, could not then join the alternate claimant.


88 In both Conger and Filter Co. Justice Sharp cited approvingly to articles by Professor Brandis urging these results. See note 76 supra. See also Brandis and Graham, Recent Developments in the Field of Permissive Joinder of Parties and Causes, 34 N.C.L. Rev. 405 (1956).


90 Id. at 428, 150 S.E.2d at 785.

91 STANSBURY, NORTH CAROLINA EVIDENCE § 177 (2d ed. 1963). The author notes that in some cases the Court has held that favorable “nonresponsive” allegations in the answer must be introduced in evidence.

92 McCORMICK, EVIDENCE 508 (1954).

93 STANSBURY, NORTH CAROLINA EVIDENCE § 177 (2d ed. 1963); Brandis,
this proposition and also ignored directly contrary cases, particularly the unanimous holding of the Court earlier the same year in Edwards v. Hamill.94

Is it possible that the right hand does not know what the left is doing? Or was the contrary rule not sufficiently erroneous to offset Justice Lake's familiar aversion to the overruling of past decisions?95 Or was he unable to muster a majority for this drastic action? Whatever the reason for this egregious oversight and whatever comfort the Court finds in the availability of conflicting rules from which to pick and choose in support of its reaction to a particular case, the situation is small comfort to attorneys and trial judges.

Furthermore, this is not an unfamiliar problem. As Professor Brandis has noted:

There is inconsistency in the North Carolina cases. I have said a good many times, and not wholly facetiously, I assure you, that I can offer even money that you can name any point of North Carolina civil procedure you can think of, and if I can find as many as two cases on it, I can find some inconsistency.

Now, by and large, what we do is to continue two conflicting lines of authority on the same question. We do not overrule. Only those nefarious gentlemen in Washington unsettle the law and unhallow tradition by overruling prior cases. We just keep plugging away with both our lines of authority, and this, I must say, maintains balance, if not stability, and of course satisfies all of the requirements of stare decisis.96

The presence of this problem in our decisions to such a degree evidences a fundamental failing in the Court's conception of the law and its function with respect to it. Choosing at will between conflicting decisions is incompatible with the rule of law; it is ad hoc justice and to some not law at all.97 As Justice Frankfurter once remarked, a court must not "sit like a kadi under a tree dispensing justice according to considerations of individual expediency."98 And

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94 266 N.C. 304, 145 S.E.2d 884 (1966) (non-responsive allegations must be introduced in evidence), discussed by Brandis, note 93 supra.
95 Rabon v. Rowan Memorial Hospital, Inc., 269 N.C. 1, 25, 152 S.E.2d 485, 499 (1967) (dissenting opinion).
to countenance such conduct in the name of stare decisis is like robbing Peter to pay Paul.

On the other hand, the judicial function clearly involves more than the perfunctory application of immutable rules. Courts most constantly reexamine the past with the understanding that the responsibility for correcting mistakes or outmoded rules on which persons have not acted in substantial reliance\textsuperscript{9} is theirs and not the legislatures'. This task is especially vital in this day of vast social and economic change. Decisional law is responsive to such change, and it is no longer necessary, fashionable or acceptable for courts to mask this fact. Thus when the Supreme Court finds questionable cases in point, it should either affirm, distinguish\textsuperscript{10} or disavow them openly. Its current willingness to allow conflicting authority to stand is plainly objectionable.

CONFLICT OF LAWS

*Seymour W. Wurfel*

The year 1966 brought some increase in the number of cases involving conflict of laws problems which reached the North Carolina Supreme Court. Whether this reflects merely a general expansion of litigation or possibly a new awareness on the part of the bar of conflict of law issues is debatable. These cases fell into the classifications herein considered.

**COLLATERAL ATTACK OF SISTER STATE JUDGMENT**

*Thomas v. Frosty Morn Meats, Inc.*\textsuperscript{1} presents an interesting aspect of the constitutional mandate that full faith and credit shall be given in each state to the judicial proceedings of every other state. Plaintiff, a resident of New York obtained a default money

\textsuperscript{9} Even in cases involving possible substantial reliance on past decisions, the Court may, and sometimes should, overrule prospectively. E.g., Rabon v. Rowan Memorial Hospital, Inc., 269 N.C. 1, 21, 152 S.E.2d 485, 499 (1967).

\textsuperscript{10} Needless to say, I do not approve the use of meaningless distinctions to effect the pro tanto overruling of cases. See, e.g., note 85 supra.

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\textsuperscript{1} 266 N.C. 523, 146 S.E.2d 397 (1966).
judgment in New York against defendant, a North Carolina corporation. This judgment recited that summons and complaint were "... personally served on the defendant ... by ... the Sheriff of Lenoir County, North Carolina." Plaintiff sued on this unpaid in personam New York judgment in North Carolina and it was stipulated that the original cause of action arose in New York. The defendant asserted that there was no valid service, no jurisdiction of the defendant and that the New York judgment was void. Defendant's motion for judgment of nonsuit was granted, but the judgment was reversed on appeal.

The North Carolina Supreme Court said:

want of jurisdiction of the person is an affirmative defense in a suit on a foreign judgment and the burden is on defendant to establish it, unless it affirmatively appears from plaintiff's pleadings or the judgment sued on that the court had no jurisdiction of defendant. . . . There is a decided trend in favor of in personam jurisdiction based on . . . personal service beyond the territorial jurisdiction of the forum state. Most of the states have by statute so provided in certain circumstances, and the courts have held that such statutes do not violate due process; this is especially true in actions against foreign corporations.2 . . . The fact that defendant, a North Carolina corporation, was served with process beyond the territorial jurisdiction of the New York court is not, nothing else appearing, sufficient to establish want of jurisdiction of defendant by the New York court, as against the principle that jurisdiction will be presumed until the contrary is shown. The validity and effect of a judgment of another state must be determined by the laws of that state. It does not appear that the court below had before it the judgment roll and proceedings in the New York case nor that it considered the laws of New York, as interpreted by court decisions of that state, in passing upon the jurisdictional question. The basis upon which decision to nonsuit was placed, the service of summons outside the state of New York, is inconclusive in the light of the record before us. The defendant will have the opportunity, when the cause comes on again for hearing, to show, if it can, from the proceedings had in the New York court and the laws of that state that there was no legal and valid service of process.3

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3 266 N.C. 523, 526-27; 146 S.E.2d 397, 400.
The broad language that "... validity ... of a judgment of another state must be determined by the laws of that state" surely does not purport to restrict the rule of the Supreme Court of the United States regarding domicile as a foundation for jurisdiction. In Tilt v. Kelsey, the United States Supreme Court in a probate matter held, "it is open to the courts of any state, in the trial of a collateral issue, to determine, upon the evidence produced, the true domicil of the deceased."\(^4\) Again in Williams v. North Carolina the United States Supreme Court in considering divorce jurisdiction said, "when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of the court of another State which finds an absence of domicil where such a conclusion is warranted by the record."\(^5\)

Presumably Thomas is intended to extend only to situations where domicile is not an essential jurisdictional fact and only to instances where the jurisdiction-acquiring procedure prescribed by the sister state and its exercise of such purported jurisdiction does not violate principles of federal due process of law. So limited, Thomas then seems to comport with the formula adopted by the United States Supreme Court in Adam v. Saenger\(^6\) where it declared; "since the existence of the federal right (to have full faith and credit accorded to the California judgment) turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here. . . . The question presented by the pleadings is the status of a cross-action under the California statutes, not under those of Texas." In Adam the California cross-complaint statute was found not to violate due process and the Texas court was held to have erred in refusing to give full faith and credit to the California judgment rendered on the cross-complaint.

In its opinion in Thomas, the North Carolina Supreme Court did not cite Tilt, Williams nor Adam. The question of res judicata was not reached since there was no contest of the jurisdictional issue in the New York court.

The action taken of reversing and remanding was entirely ap-

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\(^4\) 207 U.S. 43, 53 (1907).
\(^5\) 325 U.S. 226, 234 (1945).
propriate since the North Carolina Court was careful to preserve the right of the defendant upon a retrial, by affirmative evidence to establish, if such was the fact, that under the circumstances the exercise of in personam jurisdiction by the New York court violated due process of law. This issue is left open for determination by the North Carolina courts, subject to review by the Supreme Court of the United States.

**The North Carolina "Borrowing Statute"**

In *Little v. Stevens*,\(^7\) plaintiff, a resident of Tennessee, and defendant had an automobile accident on April 18, 1962 in a shopping center parking lot in Shelby County, Tennessee in which plaintiff sustained personal injury and property damage. Suit was brought in North Carolina on November 21, 1963. Defendant left Tennessee in July 1962 and was present in North Carolina from that time until after suit was filed. The Tennessee statute of limitations requires that personal injury actions must be filed within one year after the cause of action accrues, and property damage actions within three years. Defendant pleaded the Tennessee statute of limitations and the trial court dismissed the personal injury cause but retained the property damage suit. An appeal from this judgment afforded the North Carolina Supreme Court a needed opportunity to clarify the effect of G.S. § 1-21 as amended by Pub. L. 1955, ch. 544.

In its original purport before 1955, G.S. § 1-21 was essentially a tolling provision extending the time in which actions could be brought beyond those specified in other sections of the North Carolina statute of limitations. In pertinent part it reads:

> If, when the cause of action accrues . . . he is out of the state, action may be commenced . . . within the times herein limited, after the return of the person into this State, and if, after such cause of action accrues . . . such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action.

The opinion points out that in *Bank v. Appleyard*\(^8\) the court held the effect of G.S. § 1-21, in that form, was to prevent the North Carolina statute of limitations from running where a cause

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\(^7\) 267 N.C. 328, 148 S.E.2d 201 (1966).
\(^8\) 238 N.C. 145, 77 S.E.2d 783 (1953).
of action accrued against a person then without the state until that person, came into the state if he had never before resided here, or returned here if he had been temporarily absent. Thus even if a plaintiff's claim had been barred for thirty years in the state of its origin it was revived by the entry or re-entry of the defendant into North Carolina and could be sued upon thereafter in North Carolina for the full period of the North Carolina limitation.

It was to cure this result that the Legislature in 1955 added to the end of G.S. § 1-21 this language:

Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

G.S. § 1-21 with this addition, received initial judicial attention in the Federal District Court for the Western District of North Carolina in Snyder v. Wylie. There, by a highly sophisticated process it was held the amendment was only a limitation on the tolling statute and not a borrowing statute. The North Carolina Supreme Court after considering Snyder and saying "that admiration for its artistry tempts its adoption," rejected its reasoning and conclusion. The Court after examining the legislative history of the proviso and ascribing to its language its ordinary meaning concluded it is "a limited borrowing statute which bars all stale foreign claims."

In disposing of Little the Court then said:

Since we hold that our statute borrows the one-year period prescribed by Tennessee, defendant's plea based thereon imposed upon plaintiff the burden of showing that he could have maintained his action in Tennessee on ... the date on which this suit was instituted. ... Plaintiff has not, in any pleading, set out facts which would repel defendant's plea in bar. ... 'Proof without allegation is as unavailing as allegation without proof.'

This decision, fortunately, renders nugatory the sophistry of Snyder. It leaves North Carolina with a borrowing statute under which, as to non-resident plaintiffs, the North Carolina statute of

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10 267 N.C. at 334, 148 S.E.2d at 205.
11 Id. at 336, 337, 338, 148 S.E.2d at 207.
12 Id. at 336, 337, 338, 148 S.E.2d at 208.
limitations or that of the loci, whichever is shorter, applies. Under it, presumably a plaintiff who is a resident of North Carolina at the time the action accrues may file suit at any time within the North Carolina statute of limitations. Unfortunately, this latter point is obscured by apparently inconsistent statements. First the opinion states: "the proviso . . . bars the maintenance here of all foreign claims by nonresidents which are barred in the state in which they arose." Next the opinion reads: "If . . . the proviso be treated as a limited borrowing statute, no action barred in the state of origin may be litigated here." Still later the Court says "we conclude we have a limited borrowing statute which bars all stale foreign claims." However, the purport of the 1955 proviso is that a plaintiff who is a North Carolina resident at the time the action accrues is limited only by the North Carolina statute of limitations and not by that of the loci. Hopefully, it may not take one more judicial opinion to give full effect to what appears to have been the clear legislative intent.

FORUM NON CONVENIENS

Though the case which motivated it was decided considerably earlier than 1966, this opportunity should not be missed to invite the attention of conflicts enthusiasts to a current law note which deals comprehensively with the treatment accorded in North Carolina to the doctrine of the inconvenient forum as a ground for declining to exercise jurisdiction.

LAW GOVERNING OUT-OF-STATE TORTS

The recent assault upon the traditional lex loci delicti as determinative of the substantive law applicable to out-of-state torts slackened in 1966. Presumably this is only a temporary lull and plaintiffs questing "deep pockets" will resume the attack.

The Court continued to stand fast in the two cases coming before it. In neither was any contention to the contrary raised. In a

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13 Id. at 333, 148 S.E.2d at 204.
14 Id. at 334, 148 S.E.2d at 205, 206.
15 Id. at 336, 148 S.E.2d at 207
17 45 N.C.L. Rev. 505 (1967).
suit resulting from an automobile collision with a train at a crossing in Ohio the Court opened its opinion with this terse observation:

Since the accident out of which this action arose occurred in Ohio, the law of Ohio governs the rights and duties of the parties. . . . The law of North Carolina governs the procedure to be followed in the trial of the action in the courts of this State.20

In a truck-caterpillar collision case arising out of the construction of the beltway around Washington, D.C., the Court with equally commendable brevity said:

The accident in which plaintiff was injured occurred in Virginia. The action having been instituted in North Carolina, liability must be determined according to the substantive law of Virginia, of which we must take judicial notice. G.S. 8-4. . . .21

**Family Law**

In *In Re Marlowe*22 the original marital domicile was Florida. The husband obtained a divorce for the adultery of the wife. The Florida decree awarded custody of two young children to the mother with right to visitation in the father, and recited that "the property settlement and separation agreement entered into by . . . the parties is . . . made a part of this final decree. . . ." Both parties remarried, the husband moved to North Carolina, and the wife, having separated from her second husband, left the children with their father in North Carolina and went to live with her parents in Texas.

The wife after five months instituted a *habeas corpus* proceeding in North Carolina to regain custody of the children. The respondent father offered no evidence and the trial judge signed an order awarding custody to the mother, which in part read: "the courts of this State must give full faith and credit to the divorce decree of the State of Florida for that said decree does not appear to be an interlocutory order but a final order."23 The transcript showed the trial court indicated he would hold inadmissible evidence of (1) the alleged unfitness of the mother because of incidents occurring before the Florida decree and which were known to the respondent husband at the time; (2) the fitness of the husband to

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22 268 N.C. 197, 150 S.E.2d 204 (1966).
23 Id. at 198, 150 S.E.2d at 206.
exercise custody since the date of the decree; (3) the unfitness of
the mother except after the Florida decree; (4) what would be in
the best interests of the children except after the Florida decree.
Respondent husband excepted to these statements and appealed.

The Court reversed and remanded, saying the trial judge

was correct in holding that the Florida decree of divorce was
final, but the control and custody of minor children cannot be
determined finally. Changed conditions will always justify in-
quiry by the courts in the interest and welfare of the children,
and decrees may be entered as often as the facts justify.\textsuperscript{24} \ldots The
Florida decree awarding \ldots custody to the petitioner is entitled
to full faith and credit as to all matters existing when the decree
was entered and which were or might have been adjudicated
therein. \ldots The decree has no controlling effect in another State
as to the facts and conditions arising subsequent to its rendition.\textsuperscript{25}

Upon remand, the trial court was ordered to determine whether:

\ldots circumstances have so changed since the entry of the Florida
decree that it will be for the best interest of (the children) to be
placed in the custody of the respondent. If no change of condi-
tion is found to have occurred, justifying the change of custody,
the petitioner will be entitled to an order in accord with the
Florida decree.\textsuperscript{26}

There may be more here than meets the eye, but it does seem
the legal views expressed by the trial and appellate courts are not
divergent except perhaps for an ambiguity as to what the trial court
meant by "final," and the materiality of evidence as to the present
custodial suitability of the husband. If on remand again "No evi-
dence was offered," all the trial court could do would be to enter
another order awarding the petitioner wife custody. The Supreme
Court opinion seems, in the interest of the children, to be an exhor-
tation to the respondent to offer evidence of change of circumstances
occurring after the entry of the Florida decree. That such an offer
of proof was not made in the initial proceeding in the trial court
appears to be unusual. Possibly such an offer would have been futile,
but why was it not made?

The basic proposition of law here reaffirmed, that a custody

\textsuperscript{24} Id. at 199, 150 S.E.2d at 206.
\textsuperscript{25} Id. at 199, 200, 150 S.E.2d at 206.
\textsuperscript{26} Id. at 200, 150 S.E.2d at 206.
award is always open to revision upon a showing of change of circumstances subsequent to the award, is unassailable.

The other family law case,²⁷ also with a Florida background, presented an interesting blend of contract, choice of law and public policy problems. The decisive question was raised by the wife, as plaintiff and appellant: is a separation agreement executed in Florida prior to the wife's return to North Carolina to live enforceable in this state in the wife's action for alimony without divorce, when such contract, though valid under Florida law, did not comply with G.S. § 52-12 (now reenacted as G.S. § 52-6), providing for a privy examination and certificate of the examining officer that the contract is not unreasonable or injurious to her?

The trial court answered this in the affirmative and dismissed plaintiff's complaint seeking an increase in the amount of child support over the 120 dollars a month provided for in the separation agreement. The Supreme Court reversed and remanded, with a number of interesting observations.

The Court noted at the outset that since the agreement was signed in Florida where plaintiff and defendant were both residents at the time, its validity and construction were to be determined by the law of Florida, on the basis of the general rule that a contract is to be construed according to the law of the place where it is made. The Court then recognized decisions that deal with contracts to be performed in another state and hold that the law of the place of performance governs generally as to matters relating to performance. The Court declined to follow these cases, however, finding no authority to apply the doctrine to a separation agreement, and pointing out that while the agreement in question implied that the wife intended to leave Florida, she was not required to do so.

It would seem that since the agreement was binding on plaintiff under Florida law, her request for an increase in child support would have to be denied. The Court went on, however, to consider favorably plaintiff's contention that the agreement could not be enforced in this state, despite its validity under the applicable law of Florida, because it violated the public policy as then declared in G.S. § 52-12. The Court said that while an agreement like the one at issue would not be rejected as void solely because of failure to comply with the privy examination provision, it would be set aside if it was estab-

lished that it was unreasonable or injurious to the wife. After noting the burden of proving this question of fact was on the party attacking the validity of such agreement, the Court remanded the case with the following instructions:

If it be found as a fact upon competent evidence that the agreement when executed was unreasonable or injurious to the wife, then it will not be recognized as valid and enforceable in this state. If it be found as a fact that it was not unreasonable or injurious to the wife, it will be recognized as valid and enforceable as if in full compliance with the North Carolina statute.

The settled public policy of North Carolina is concerned with substance rather than form. 28

This novel ruling seems to say that the public policy of North Carolina as now enunciated in G.S. § 52-6 is to enforce foreign separation agreements which do not comply with the statute if they are found to be reasonable and noninjurious to the wife when executed, but to strike them down if such agreements upon examination are found to have been unreasonable or injurious to the wife when executed. The statute certainly enunciates no such public policy regarding separation agreements executed between North Carolina domiciled spouses. Quaere, does a direction to engage in specific fact finding on the merits in each case have anything to do with "settled public policy" as that term is used in the language of conflict of laws?

The Court went on to point out, as "worthy of exploration by counsel prior to the next hearing," that Florida law permits modification of the amount of payment for the support of the wife provided in a separation agreement and that in North Carolina separation agreements are not final as to the amount to be provided for the support and education of minor children. These judicial observations, appear to afford a by-pass around the public policy bramble here established in connection with the extra-state reach of G.S. § 52-6, at least for this particular case.

WHAT LAW GOVERNS LIABILITY FOR PAYMENT OF A PROPORTIONATE SHARE OF THE FEDERAL ESTATE TAX?

In Bank v. Wells, 29 a case of first impression in North Carolina, the Court fashioned and clearly enunciated a new conflicts rule. The

28 Id. at 126, 152 S.E.2d at 310.
decedent died domiciled in Nevada, having devised to North Carolina residents pursuant to a general power of appointment certain real property situated in North Carolina and administered under a North Carolina trust. The Nevada executor and two ancillary administrators from North Carolina sued one of the appointees in this state to have him pay a pro-rata share of the federal estate tax, the will containing no express direction regarding apportionment. The Court first upheld the constitutionality of § 2207 of the Internal Revenue Code which entitled the plaintiffs to recover the tax, there being no will provision to the contrary. While the Court could have stopped there, it went on to set out a new conflicts rule which also allowed the plaintiffs to win under the Nevada apportionment statute:

> When questions of apportionment of estate taxes arise in courts of a state of the situs of a trust whose assets are includible in decedent's gross estate for tax purposes, the law of the situs refers to the law of decedent's domicile to resolve the questions.2

In reaching this result the Court adopted the New York Conflicts rule on this issue.3

**Intrinsic Fraud is Not Subject to Collateral Attack**

The vehicle for a lucid distinction between intrinsic and extrinsic fraud was a case in which no multi-state element was present. Since this opinion sharply distinguishes between intrinsic fraud for which a foreign judgment may not be collaterally attacked and extrinsic fraud which may be attacked collaterally, its inclusion is deemed appropriate.

In *Johnson v. Stevenson*, the testators had left a life estate to their son and his wife with remainder to the son's grandchildren in a will probated in 1940. Plaintiff, the testators' daughter, received nothing and never filed a caveat to the will. A quarter of a century later she brought this separate action to impress a constructive trust for her benefit on certain real estate then distributed and now held by defendants, alleging that the execution of the will was procured

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2 Id. at 280, 281, 282, 148 S.E.2d at 122, 123.
3 Id. at 285, 148 S.E.2d at 125.
5 269 N.C. 200, 152 S.E.2d 214 (1967).
by "undue influence" consisting of "fraudulent acts." Affirming the action on the trial court in sustaining the defendants' demurrer, the Court held that since the right of direct attack by caveat gave her a full and adequate remedy, equitable relief by way of constructive trust was not available to her.

The Court went on, however, to discuss the difference between extrinsic and intrinsic fraud, noting decisions in other courts which allow an heir to establish a constructive trust collaterally despite the probate of a will where it is proved that the decree of probate was obtained by extrinsic fraud, as a result of which the plaintiff was deprived of an opportunity to caveat.\(^{35}\) Several examples of extrinsic fraud, which can only be attacked by independent action, were set out by the Court: false representations causing plaintiff to defer filing a caveat until the time limit therefor had elapsed;\(^{36}\) false statements made in procuring probate of the will, as a result of which the heir did not receive notice of the proceedings in time to file a caveat;\(^{37}\) false statements purporting to show service of notice on next of kin;\(^{38}\) and intentional failure to disclose to the probate court the existence of a pretermitted heir.\(^{39}\)

Intrinsic fraud, on the other hand, must be attacked by motion in the cause in which the judgment was rendered, and relates to matters pertaining to the judgment itself, such as perjury, and not to the manner in which the judgment is procured whereby the losing party is deprived of having an adversary trial of the issue.\(^{40}\) Since the plaintiff alleged no fact which tended to show any fraud in connection with the probate of the will or any interference with her right to caveat, the Court held she had not pleaded extrinsic fraud as distinguished from intrinsic fraud and thus had not stated a cause of action.

This case may prove to be useful in multi-state situations.

That Slippery Word "Resident"

A final case of conflict of law interest deals with the perennial problem of legally defining the word "resident."\(^{41}\) While the Court

\(^{35}\) Id. at 204, 205, 152 S.E.2d at 218.
\(^{36}\) Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758 (1933).
\(^{39}\) Purinton v. Dyson, 8 Cal. 2d 322, 65 P.2d 777 (1937).
\(^{40}\) 269 N.C. 200, 205, 152 S.E.2d 214, 218.
was primarily concerned with construing the word resident as used in an insurance coverage clause in a situation where all the significant facts occurred in North Carolina, the case should have some bearing on questions of definition concerning the family grouping of "resident" and "domociliary" in the conflicts sense.

Here the automobile liability insurance policy extended coverage to any "relative" of the insured, and defined relative to mean "a relative of the named insured who is a resident of the same household." The insured's 29 year old son, who had had an accident and whose "residence" in his father's house was denied by the insurance company, was leading a somewhat unsettled life at the time. Although he had left home at age 18 to work in Virginia, he returned after a year, staying several months until his marriage when he left again. Thereafter, he entered the Army for two years, and then, after separating from his wife, went to Greenville, South Carolina for a year. On his return to this state, he worked at a mill in Shelby, staying at his sister's house. When he changed work shifts after five months, he moved back to his father's house to take advantage of more convenient transportation arrangements. Although he had found a room in Shelby which he planned to inhabit, he was still living in his father's house at the time of the accident which occurred two weeks after he had last moved in. Throughout this entire period, apparently, he had used his home as his permanent mailing address, and "thought of his father's house as his home." The trial court had found the son to be a resident of his father's household and thus covered by the policy, and the Supreme Court affirmed. The Court pointed out that while the word "resident" is in common use, "it is difficult to give an exact, or even a satisfactory definition, for the term is flexible, elastic, slippery, and somewhat ambiguous." Thus, the Court said, when an insurance company chooses to use a slippery word to define those covered by the policy, "it is not the function of the court to sprinkle sand upon the ice by strict construction of the term." Insurance policies, the Court noted, should be construed to be as inclusive as is reasonable. If the application of this principle should result in coverage somewhat broader and more inclusive of the "slippery" area than the company

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42 Id. at 433, 146 S.E.2d at 412, 413.
43 Id. at 437, 146 S.E.2d at 415.
44 Id. at 438, 146 S.E.2d at 415.
contemplated, the Court said, "the fault lies in its own selection of the words by which it chose to be bound." The key to this problem, the Court added, "is that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense."

The possible application of this treatment of "resident" to conflicts cases not involving insurance is made clearer when it is realized that the judicial tendency to favor definitions which result in allowing insurance protection cannot be considered a controlling policy rational in this case. At the time of the accident the son was driving a dealer's car with a view towards purchase, and the dealer's insurer would have been liable by the terms of its policy unless the driver himself could collect from another fund. Thus, an insurance company was going to have to pay no matter how the term "resident" was defined, and there was no particular need to construe the word loosely. It is therefore possible that the Court's definition here may have some relevance outside the insurance context.

**CONSTITUTIONAL LAW**

_Daniel H. Pollitt* and Frank R. Strong**_

Compared with the period reviewed a year ago, that now under review discloses both similarities and differences. Procedurally, the Supreme Court of North Carolina continued to be concerned with the reach of major decisions of the Supreme Court of the United States in the administration of state criminal justice. Right to counsel, protection against unreasonable search and seizure, and the voluntariness of confessions precipitated considerable litigation. _Escobedo_ and _Mapp_ were in full operative effect; _Malloy_ and especially _Miranda_ were casting their lengthy constitutional shadows.

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Professor Pollitt prepared the sections on Freedom of Religion and Procedural Rights. Professor Strong prepared the sections of Federalism, Personal Rights, Political Rights, Property Rights and Separation of Powers.
At the same time, other cases presented older procedural rights in new postures. Substantively, the year just past witnessed much greater involvement with federalistic issues and somewhat less with property rights. Civil rights issues were conspicuous by their absence, problems in religious liberty took their place, the issue of equality in political representation entered a new phase, and the constitutional doctrine of separation of powers generated further enunciation of the delicate role played by the judiciary in its relation to the legislative assembly.

**Federalism**

Division of powers between a central government and political subdivisions is quite typical of nations of large land area. In a very meaningful sense, federalism is the territorial expression of the doctrine of separation of powers. A federalized government is a complicated one, as Mr. Justice Frankfurter was wont to observe. Attention to federal-state relationships often obscures the importance of state-state relationships in a federal system. Article IV of the Constitution of the United States, especially the full faith and credit clause, deals with this aspect of federalism, and to it must be added the fourteenth amendment by virtue of one aspect in the Supreme Court's interpretation of the ubiquitous due process clause. *Pennoyer v. Neff*¹ and *Allgeyer v. Louisiana*² are the germinal decisions. The former treats of the limits of state judicial jurisdiction, the latter of the limits of state legislative jurisdiction. Combined, the two limitational concepts can be thought of as involving territorial due process, to distinguish this aspect from procedural and from substantive due process. Federal-state relationships, in turn, are of several dimensions. During most of the nineteenth century the great constitutional issue was the extent to which the states could tax and regulate interstate commerce in the absence of Congressional preemption. For this century the crucial issue in federalism has of course been the constitutional extent of Congressional power under the grants to Congress in article I, sec. 8 and section 5 of the fourteenth amendment; yet the range of state power in an era of active federal power continues to be a much litigated matter. And, important as are the issues of federalistic

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¹ 95 U.S. 714 (1877).
² 165 U.S. 578 (1897).
legislative power, the middle portions of this century are witness to fundamental conflicts in viewpoint regarding the legitimate scope of federal judicial power vis-a-vis the states.

Decisions of federalistic classification, for the period under review, were more noteworthy for their range than for their intrinsic importance. The extent to which the full faith and credit clause requires North Carolina courts to honor the judgments and decrees of the courts of sister states was involved in *Thomas v. Frosty Morn Meats, Inc.*[^3] and *In re Marlowe.*[^4] These decisions are considered elsewhere in this Survey[^5]. A third decision of conflicts coloration will be considered later in this section because the primary issue was the constitutionality of a Congressional tax enactment.

Although *Gulf Oil Corp. v. Clayton*[^6] is headnoted solely to the commerce clause, the trial court and the Supreme Court recognized it as a hybrid, involving as much a question of territorial due process. Technically, the issue was the includability in the net income base, to which would be applied the statutory allocation formula, of dividends paid to Gulf Oil Corp., a Pennsylvania corporation, by four subsidiary corporations in each of which Gulf owns fifty per cent or more of the voting stock. The facts showed that "no benefit inured to plaintiff by reason of the corporate kinship" and "no products from any of the subsidiaries ever had any connection whatever with North Carolina."[^7] In granting to Gulf relief from an additional assessment made by the Commissioner of Revenue on the basis of inclusion of the dividends from the subsidiaries, the trial court relied upon *Hans Rees' Sons v. North Carolina*[^8] where an earlier corporate income tax statute of this state had been held unconstitutional in its application to a New York corporation manufacturing in North Carolina and selling abroad. Examination of the Supreme Court opinion discloses that the difficulty there was directly with the allocation formula; contrary to the corporation's contention the business was held to be unitary in character, thus

[^3]: 266 N.C. 523, 146 S.E.2d 397 (1966).
[^7]: Id. at 18, 147 S.E.2d at 524.
[^8]: 283 U.S. 123 (1931).
creating for North Carolina a tax base consisting of the total net income from buying, manufacturing, and selling.

Affirming the trial court in the instant case, the Supreme Court of North Carolina correctly found in the opinion in *Hans Rees' Sons* the governing constitutional theory for resolving the issue before it despite the technical difference:

Thus, it is only when the parent and subsidiary are engaged in a 'unitary business' that G.S. § 105-134(2) (a) may be constitutionally applied without reference to whether dividend income is attributable to transactions within the taxing state. In purporting to tax dividends from subsidiaries 'having business transactions with or engaged in the same or similar type of business as the taxpayer,' the Legislature was undoubtedly attempting to describe a unitary business in terms of its two most common indicia. In its application to such a business, the statute is clearly constitutional. We do not assume that the Legislature intended it to refer to any situation to which its application would be unconstitutional.9

Because clearly based upon the commerce clause as well as the fourteenth amendment, the *Gulf* case also classified as one involving state taxation of interstate commerce. In the only other case of this classification decided during the period now reviewed, the Commissioner of Revenue enjoyed better results. *Excel, Inc. v. Clayton*10 involved the constitutionality of North Carolina sales taxes imposed upon sales by a domestic equipment manufacturer to three federally licensed common carriers of freight. In each instance, the equipment was purchased for use by the carriers in trucking terminals outside of North Carolina; sales were f. o. b. taxpayer's North Carolina plant, with delivery accompanied by waybills showing out-of-state destination; and movement interstate was by the purchasing carriers themselves. Two of the three purchasers were foreign corporations; their orders and remittances were all made from offices outside this state. The third carrier, a domestic corporation like *Excel, Inc.*, ordered and remitted intrastate. Imposition of sales taxes was sustained in all three situations, against the contention that the sales were immune by virtue of statutory recognition of limitations upon North Carolina's taxing power to be found in the Constitution of the United States.11

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There is no question of North Carolina's power to tax the sales made to the domestic carrier; intent to use the goods out-of-state does not immunize the sales from state taxation. In the other two instances the sales bear many of the earmarks of the interstate sale. Immune from state taxation until the unsettling decision of McGoldrick v. Berwind-White Coal Mining Co. nearly thirty years ago, the tax status of the interstate sale has since been a puzzle. However, the facts of Excel saved the Court from the necessity of struggling with that constitutional quagmire. For here shipment in response to interstate orders is not made across state lines; in actuality, the purchasers take delivery in North Carolina. The sales are thereby stripped of their interstate character, and are accordingly subject to taxation by North Carolina.

First National Bank of Nevada v. Wells presented some federalistic issues of state-state relationships but essentially it forced the Court into a determination of the validity of a section of the federal estate tax. The overriding question was whether North Carolina domiciliaries, devisees of North Carolina real estate, could be forced to bear aliquot parts of the federal tax on the estate, which constituted the source of the devises. Pearl Wells, beneficiary of a testamentary trust created by her deceased husband, had before her death exercised the power given her by the trust instrument to appoint the trust corpus but had failed to indicate in her will how the tax burden was to be borne by those taking from her. Resisting apportionment were the three devisees of North Carolina real estate, despite an order to this effect by a court of Nevada, of which the testatrix had been a domiciliary, and the clear direction of 26 U.S.C. § 2207. Defendants' contentions were that the Nevada court order was ineffective for lack of judicial jurisdiction over them and that the federal statute was unconstitutional as violative of the tenth amendment.

Taking the second contention first, the Court correctly treated

\[12\] Minnesota v. Blasius, 290 U.S. 1 (1933) (property tax).

\[13\] 309 U.S. 33 (1940).


\[15\] Dep't of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941).

Fernandez v. Wiener\(^7\) as decisive. The tenth amendment is a slender reed upon which to rely, for it does not operate to restrict those powers, both express and necessary and proper therewith, which art. I, sec. 8 has delegated to the Congress. There is no question of the power of Congress to lay an excise tax \textit{qua} tax, even though it may have incidental regulatory effect, nor of Congressional power to make suitable provision for its collection. With respect to the Nevada court order, defendants won a pyrrhic victory; the order itself was held to be of no effect because of lack of judicial jurisdiction over defendants, yet the Nevada apportionment statute on which the order was based was ruled to be the proper State law to apply because it was the law of the testatrix's domicile. Legislative jurisdiction in Nevada, despite the validity and applicability of federal statute law, was rested upon Riggs v. Del Drago,\(^8\) in which the United States Supreme Court sustained the New York apportionment statute as not conflicting with 26 U.S.C. \S\ 2207 and hence not in contravention of the supremacy clause.

The opinions in Dilday v. Board of Education\(^9\) disclose Justice Sharp for the Court majority and Justice Lake for himself sparring over the transcendental question of the authority of the Supreme Court of the United States in the interpretation of provisions of the Constitution of the United States which apply to the states. The occasion for the great debate arose from an effort of citizens and taxpayers of Beaufort County to prevent the county board of education from using the proceeds of publicly-voted bonds to construct a consolidated and integrated high school. Along with assertions that statutorily prescribed procedures had not been followed by the board, plaintiffs contended that the bonds were voted in the belief that the new high school would be a consolidated school for white children only. This intent may be granted, Justice Sharp says, but "It is a dream which anyone familiar with the Federal decisions should know cannot be realized." The reference is basically to Brown v. Board of Education.\(^{20}\) Then follow these statements:

The Constitution of the United States takes precedence over the Constitution of North Carolina, and, for all practical purposes, the Federal Constitution means what the Supreme Court of the

\(^{7\}266\text{ U.S. }340(1945).\)
\(^{8\}317\text{ U.S. }95(1942).\)
\(^{9\}267\text{ N.C. }438,148\text{ S.E.2d }247,148\text{ S.E.2d }513(1966).\)
\(^{20\}347\text{ U.S. }483(1954).\)
United States says it means. It boots a [sic] little that the members of the Board of County Commissioners, the Board of Education, and the majority of their constituents share the conviction that the Brown case did violence to the Constitution as it was understood by its authors and by those who ratified it. The Brown case is binding upon us.\footnote{21}

This passage was too much for Justice Lake; the proposition "that a court of last resort can do no wrong," he said, is "a dangerous fallacy." Insisting that the language of the supremacy clause is clear and explicit, the Justice drives home his point of disagreement by contending that "the Constitution does not declare a decision of the United States Supreme Court to be the supreme law of the land. On the contrary, it declares that such decision is not the 'law of the land' if it is in conflict with the Constitution, itself."\footnote{22} He concedes that all courts, state and federal, "must now decide cases . . . as if the decision of the United States Supreme Court in Brown v. Board of Education . . . were a correct interpretation of the Fourteenth Amendment to the United States Constitution, but I cannot concur in the statement that it is so. . . ."\footnote{23}

The issue in judicial federalism thus presented is as old as the Virginia-Kentucky Resolutions. John Marshall made no claim in Marbury v. Madison\footnote{24} that the Constitution means, in an in rem sense, what the Supreme Court of the United States says at any time that it means, nor did Joseph Story assert such power in Martin v. Hunter's Lessee.\footnote{25} During the nineteenth century the United States Supreme Court's supremacy in the interpretation of the federal constitution was challenged North as well as South. Since Brown re-stirred the controversy, opposition has taken the form of legislative, executive, and judicial assertions of the constitutional right of a state to interpose its sovereignty between its people and "lawless" decisions of the Supreme Court. Far from shaken by doubt, however, the United States Supreme Court has in our time claimed the very authority that Justice Sharp attributes to it. The occasion was the legal aftermath of the tragedy at Little Rock. In Cooper v. Aaron,\footnote{26} the Court, its unanimity emphasized by the form in which the opinion was

\footnote{21}{267 N.C. 438, 451, 148 S.E.2d 513, 521-22 (1966).}
\footnote{22}{Id. at 456, 149 S.E.2d at 347.}
\footnote{23}{Id. at 456, 149 S.E.2d at 347.}
\footnote{24}{5 U.S. (1 Cranch) 137 (1804).}
\footnote{25}{14 U.S. (1 Wheat.) 304 (1816).}
\footnote{26}{358 U.S. 1 (1958).}
given, formally took the step from Marbury which a century and a half had come to accept in practice despite continuing, intermittent challenge. Asserted the nine Justices:

This decision [Marbury v. Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the fourteenth amendment by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.'

There the matter rests—an issue undoubtedly resolved for all foreseeable future, as Justice Sharp assumes, yet still capable of stirring vigorous denial as evidenced by Justice Lake's exceptions to the majority's forthright recognition of the facts of constitutional life.

**FREEDOM OF RELIGION**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." 28

There were two unusual claims to Religious Freedom in the period covered by this survey.

*State v. Bullard* 29 was a "narcotics" charge. The police found peyote in the possession of Bullard, and he admitted to possession but explained that as a member of the Neo-American Church, the use of peyote was an integral part of his religious ceremonies. The trial judge charged the jury that "even if you should find that this defendant was a member of a religious sect whose rites made use of marijuana or peyote," the court charges you that "this would not constitute a defense or a legal excuse for such possession." 30 The appeal argued that this charge to the jury was an interference with religious freedom. 31 The North Carolina Supreme Court rejected this contention:

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27 *Id. at 18.*
28 U.S. Const. amend. XIV.
31 The California and Arizona courts have reversed or dismissed narcotic convictions when the person in possession (an Indian) used the peyote as part of his religious practices. Arizona v. Atlakai, Criminal No. 4098, Coconino County, July 26, 1960; People v. Woody, 394 P.2d 813 (Cal. 1964).
The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law nor in morals.\[^{32}\]

The second "Freedom of Religion" case is *In re Williams*.\[^{33}\] A minister, called to testify in a criminal case concerning information he had obtained in his professional capacity, refused to do so because it "would be in violation of his professional ethics and of his dignity as a minister of an established religion."\[^{34}\] The Court recognized that the "free exercise of religion is impaired . . . by governmental compulsion of that which one's religious belief forbids"; but added that "the freedom to exercise one's religious beliefs is not absolute" and must yield in the face of "a compelling state interest."\[^{35}\]

The Court affirmed the contempt conviction because: "The effective operation of its courts of justice is obviously a compelling state interest;" and because while religious beliefs are not lightly to be brushed aside, they must yield to the interest of state "in doing justice between the state and one charged with a serious offense."\[^{36}\]

Most religious denominations put a seal on the confessional and prohibit the minister from divulging anything he learns in confidence in the course of his professional obligations.\[^{37}\] This religious mandate is generally recognized by the courts, and there are few decided cases in the appellate courts for many years back. Those that exist recognize that the court compulsion to testify is a "violation of the fundamental law, which guarantees perfect freedom to all classes in the exercise of their religion."\[^{38}\]

The only recent analogous situation is when a Jehovah Witness is summoned as a juror and refuses to perform his duties out of

\[^{33}\] 269 N.C. 68, 152 S.E.2d 317 (1967). See the discussion of a different aspect of this case under the heading Right To Notice and Hearing.
\[^{34}\] Id. at 77, 152 S.E.2d at 325.
\[^{35}\] Id. at 79-80, 152 S.E.2d at 326.
\[^{36}\] Id. at 81, 152 S.E.2d at 327.
\[^{38}\] Stokes and Pfeiffer, *Church and State in the United States*, 556 (1964).
religious scruples—a literal application of the Biblical admonition "Judge not that you will not be judged." A federal court balanced the first amendment rights to religious freedom against the seventh amendment rights to trial by jury, and found the former more precious. A Minnesota court reached an opposite result, finding the balance in favor of the state's right to compel jury duty to effectuate the constitutional right to a trial by jury. The Supreme Court of the United States summarily reversed.

PERSONAL RIGHTS

Cruel and Unusual Punishment

Criminal defendants continued, in the period under review, efforts to upset sentences on the contention that their length made them cruel and unusual within the meaning of the constitutional prohibitions. Of the three reported cases, the principal one was State v. Bruce. Here the defendant challenged imposition of two life sentences to run consecutively, one for kidnapping and one for rape. In State v. Davis imprisonment on each of a total of nine counts under four indictments had been challenged; State v. Taborn concerned sentences of quite unequal length meted out to three defendants tried under identical bills of indictment charging the common crime of armed robbery.

Failure attended these efforts of accused, as was true in State v. Stubbs, discussed in the review of the immediately prior period. In all the judicial reasoning was identical; to quote from State v. Bruce, "We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." With due deference, this formulation of the law, which makes statute rather than constitution the measure of personal right, must again be

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31 In Re Jenison, 265 Minn. 96, 120 N.W.2d 515 (1963).
32 N.C. Const. art. I. § 14, and U.S. Const. amendment VIII are all but identical in wording.
34 267 N.C. 126, 147 S.E.2d 570 (1966).
38 268 N.C. 174, 184, 150 S.E.2d 216, 224 (1966).
challenged as a flat contradiction of the basic doctrine of American constitutional law that legislative action, like that of the other branches of government, is subject to the fundamental law of state and federal constitutions. In the review of constitutional decisions a year ago it was suggested that this unfortunate formulation arose from cross-citation of decisions like *Bruce* and *Stubbs* with decisions involving the different problem of longer imprisonment on resentence following success in upsetting the original conviction.49 A student evaluation of *Stubbs* in the same volume of the *Review* laid the trouble at the door of judicial assumptions of the unreviewability on appeal of trial-court sentences if within the range provided by statute.50

In the principal recent case, *State v. Bruce*,51 the Court went abroad for precedent in support of its position. Both *Chavigny v. State*52 and *State v. McNally*53 were factually similar to *Bruce* in that they also involved consecutive life sentences. But it is significant that in each of those opinions the rule laid down was that if the statute prescribing sentence does not violate the constitution, then any sentence in conformity to it cannot be deemed excessive. Such was the formulation of the rule by the North Carolina Supreme Court in *State v. Salisbury*54 but subsequently overlooked.

Perhaps this is only a tempest in a teapot, inasmuch as it is inconceivable that the Court intends in this context to challenge established constitutional doctrine. But even as a problem in correct formulation of legal rule, there is a further complicating difficulty. For it is also accepted constitutional doctrine that although a statute may be valid on its face it can be so administered as to produce unconstitutionality. Normally, administration is the responsibility of the executive branch whereas here it lies with the judiciary. Yet this makes no difference on the constitutional level; the judicial branch, no less than the executive and legislative branches, is subject to constitutional limitation. Both the Connecticut and Florida courts explained their statement of the controlling rule by observing that

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49 STRONG 938-939.
50 Note, 44 N.C.L. Rev. 1118 (1966).
51 See note 9 supra.
53 152 Conn. 598, 211 A.2d 162 (1965).
54 230 N.C. 589, 55 S.E.2d 185 (1949).
any sentence conforming to a valid statute cannot be constitutionally excessive "since it is within the power of the legislature and not the judiciary to determine the extent of the punishment which may be imposed on those convicted of crime." But reliance upon separation of powers cannot relieve the judiciary of responsibility for its own adherence to direct constitutional restrictions like that against cruel and unusual punishment. Here, as in other areas of constitutional law, it is essential to understand the vital distinction between direct and indirect limitations on governmental power.

Possibly the entire matter continues to qualify as a tempest in a teapot inasmuch as the constitutional guarantee in issue "has been concerned with type, as opposed to length, of sentence." Yet in an age of burgeoning constitutional protection of the person and his essential liberties, it would be a mistake to measure the future by the past. Even North Carolina's past has something to offer. The student evaluation of *Stubbs*, to which reference has already been made, uncovered *State v. Driver* "where the court held clearly that a five-year sentence for wife beating was cruel and unusual and that there could be no such anomaly as an 'unconstitutional judgment of an inferior Court affecting the liberty of the citizen, not the subject of review by the Court of Appeals, where every order or judgment involving a matter of law or legal inference is reviewable.'" Most attempts of the convicted to upset sentences on the ground of excessiveness will probably fail; on the other hand, such challenges deserve a more careful scrutiny than the Supreme Court of North Carolina has given them in recent years.

**POLITICAL RIGHTS**

Decisions of the Supreme Court of the United States, of the lower federal courts, and of state courts are rapidly giving definitive

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66 State v. Bruce, 268 N.C. 174, 185, 150 S.E.2d 216, 225 (1966) [quoting from the Connecticut case].
67 Nemeth v. Thomas, 35 U.S.L. WEEK 2320 (N.Y. Sup. Ct. Dec. 1966), is a straw in the wind. A sentence of 606 days in the workhouse for an indigent scofflaw unable to pay $3,335 in traffic fines was held violative of the eighth amendment transmuted into the fourteenth.
68 78 N.C. 423 (1878).
content to the requirement of *Reynolds v. Sims* that state legislative assemblies be apportioned as nearly as is practicable according to population. Collateral issues are now emerging as courts and commentators probe the full implications of one of the major Supreme Court determinations of this century. One of these issues which has precipitated considerable litigation concerns the applicability of the *Reynolds* requirement to local elective bodies such as city councils, county boards of commissioners, school boards, etc.

This question was one of several at the constitutional level presented to the Supreme Court of North Carolina in *Hobbs v. Moore County*. In continuing litigation over administrative organization of the schools in Moore County, certain citizens and taxpayers challenged the validity of the Assembly's latest legislative solution. That solution called for a county-wide election to determine whether the three school administrative units, into which the county had been divided, should be merged; and, should the merger be approved, as it has been, for interim appointment and election thereafter of a Moore County Board of Education of seven members. All seven were to be named at large, but five were to be residents, respectively, of each of the five districts into which the county had been divided by legislation of the early forties. Reference to the earlier law discloses that that division was by townships, the first district to consist of a single township and the other four of two townships each.

Plaintiffs contended, *inter alia*, that the latest statutory provision is void under the interpretation of the equal protection clause of the fourteenth amendment in *Reynolds v. Sims* and earlier apportionment decisions. Devoting only a short paragraph to the contention, the Court found no merit in it. "Under this Act, every member of the Board of Education is to be elected by the voters of the entire county voting at large. Since two of the seven members are, themselves, to be 'at large' members, it follows that three of the seven members comprising the entire Board may be residents of the same...

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60 377 U.S. 533 (1964).
62 A good general discussion, including consideration of the earlier decisions, is Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Columbia L. Rev 21 (1965).
election district referred to in this statute, if the people of the county, voting at large, see fit to elect them."

If Reynolds is to apply to local elective bodies, plaintiffs seemed to have a stronger point than the Court conceded to them. Census data for 1960 reveal great population disparity among the separate townships, and among the pairing of townships, under the districting of the county by the 1943 statute. This being so, the residency requirement effects malapportionment in fact despite the provision for county-wide election. Professor John Sanders had in 1965 called attention to the constitutional hazard in the "district residence—at large nomination and election" system then employed by 36 North Carolina counties for selection of county commissioners, and by action at the Extra Session of 1966 the General Assembly had made provision for the reapportionment of such county boards. Contemporaneous with the Moore County decision in this state were determinations, one state and one federal, in each of which legislative patterns for local bodies, identical with that for Moore County, were invalidated as inconsistent with Reynolds v. Sims on a showing of population disparity in the residence districts. Surprisingly, how-

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68 267 N.C. 665, 676, 149 S.E.2d 1, 8 (1966).
69 Determination of this question, anticipated in four appeals to the Supreme Court decided during the Term just ended, did not eventuate. In Moody v. Flowers and Supervisors of Suffolk County v. Bianchi, 35 U.S.L. Week 4459 (May 22, 1967), the decrees of the respective lower federal courts were vacated and remanded for jurisdictional reasons; in each of the other two, decision of the question was found unnecessary to disposition of the appeal. Dusch v. Davis, 35 U.S.L. Week 4461 (May 22, 1967), reversing Davis v. Dusch, 361 F.2d 495 (4th Cir. 1966); Sailors v. Kent County Bd. of Educ., 35 U.S.L. Week 4462 (May 22, 1967), affirming Sailors v. Board, 254 F. Supp. 17 (W.D. Mich. 1966).

U.S. Census of Population: 1960-North Carolina, Final Report P.C. (1)-35A, Table VII. The addition of Little River township to District 4, subsequent to 1943, does not materially affect the population distribution inasmuch as its 1960 population was 688.
67 Dist. 1 Carthage 4,788 Dist. 4 Greenwood 2,058
Dist. 2 Ben Salem 2,565 McNeills 8,895
Shef 4,418
6,983 Dist. 5 Sand 5,476
Dist. 3 Deep River 426 Mineral Spgs 5,419
Ritters 2,000
2,426
10,895
68 Sanders, Equal Representation and the Board of County Commiss-
ever, the Supreme Court of the United States has now found in such patterns no inconsistency with the equal protection clause, assuming arguendo the applicability of the *Reynolds* principle to local bodies of the elective type.\textsuperscript{72}

**Procedural Rights**

**Coerced Confessions (In General)**

For at least one hundred forty years, long before the insertion of the Fourteenth Amendment into the Constitution of the United States, it has been the well settled law in this State that when one is on trial for an alleged criminal offense, a confession or admission by him may not be admitted in evidence, over his objection, unless it was made voluntarily and understandably, not induced through use by the police of 'the slightest emotions of hope or fear.'\textsuperscript{73}

In the period of this survey, as in most periods, there were a number of "coerced confession" cases.\textsuperscript{74} Typically, a policeman would testify that the accused had confessed to the crime, the accused would object, and the trial judge would hold a hearing having first excused the jury. In each case in the survey period the trial judge found that the confession was voluntary, and permitted the policeman to continue his testimony. In each case the Supreme Court held that the trial judge finding was supported by evidence. Normally, in each case, there was ample evidence all apart from the confession indicating that the accused had in fact committed the crime. A few of the decisions are illustrative.

In *State v. Camp*,\textsuperscript{75} the defendant admittedly shot and killed one

\textsuperscript{72} Dusch v. Davis, 35 U.S.L. Week 4461 (May 22, 1967), cited note 66 *supra*. In *Sailors*, also cited note 66 *supra*, the Court again assumed arguendo the applicability of *Reynolds* but found the Board of Supervisors to be essentially an appointive one, not elective.

\textsuperscript{73} Justice I. Beverly Lake in *State v. Gray*, 268 N.C. 69, 77, 150 S.E.2d 1, 7-8 (1966).


\textsuperscript{75} 266 N.C. 626, 146 S.E.2d 643 (1966).
Pritchard in his front yard in an altercation over the ownership of a rifle. After the killing the defendant went to the home of a neighbor, and called the police. When the police arrived, the defendant took them to the body, and explained that the deceased had come to his home, claimed ownership of the rifle, and become abusive. The defendant asked him to leave, and the deceased had done so. The deceased then returned, made threats, and the defendant pointed the rifle at him. Whereupon the deceased reached for the glove compartment of his car, and defendant shot and killed him. The police also testified that the defendant had admitted that on an earlier occasion he had threatened to kill the deceased. The defendant, who pleaded self-defense, denied having made this last statement. The Supreme Court affirmed the conviction, pointing out that "there is nothing in the record to suggest that the statement was not made voluntarily, and the record shows affirmatively that the defendant sent for the officers after the killing and told them about it on the way to the scene of it."

A second illustrative case is State v. Stafford. There, Captain Goodwin of the Raleigh Police Department testified that the accused had made the following statement: that he had visited the Brawley Jewelry Company on several occasions, and on June 1, had concealed himself on the roof until closing hours. Then he gained access to the store by cutting a hole in the roof, and had filled a paper bag with watches from the display counters. He then had left Raleigh by bus, to Wilson, Rocky Mount, and Norfolk, Virginia, selling the watches along his route. The Captain further testified that he had warned the prisoner of all his rights, and stated that he had offered no promises, inducements, or threats.

The defendant, however, objected to the confession, and testified that he was threatened, that he was refused permission to talk to his sister or a lawyer, and that he was promised probation if he confessed.

The Supreme Court affirmed the conviction because there was ample evidence to support the trial judge findings that the defendant's "statement was made freely and voluntarily, without any promise, threat, undue influence, coercion or duress." The Court

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*Id.* at 629, 146 S.E.2d at 644 (1966).

**267** N.C. 201, 147 S.E.2d 925 (1966).
noticed that "defendant has a long record of violations" and that "it is not likely that one with his long experience with the courts would believe that a police officer, rather than a judge, would determine the question of probation."  

Although the Supreme Court almost always affirms the findings of the trial judge that the confession is made voluntarily after proper warnings, the Supreme Court does insist that the trial judge make these findings. Thus, in *State v. Conyers,* the defendant was found guilty of breaking and entering an occupied household at night with the intent to ravish and carnally know an occupant. The defendant was identified by a cap which was left in the house, and the police officers testified at the trial that the defendant had made an oral and written confession after being informed of his rights. The defendant denied the cap was his, denied having made an oral confession, and testified that he had signed the written confession upon certain inducements, without having read it. The trial judge found that "the statement and admissions . . . were freely and voluntarily made. . . ." The Supreme Court reversed and ordered a new trial on the theory that "The court did not make findings of fact. The statements in the court's ruling are conclusions."

Similarly, the Supreme Court insists that the trial judge try the "voluntariness" issues out of the presence of the jury. In *State v. Carter,* the defendants were charged with robbery by holding up a grocery store with a sawed-off shotgun. The store-keeper identified the defendants, and upon their arrest the shot-gun, and a length of cord used to bind the store-keeper, were found in their possession. Defense counsel objected to the introduction of a signed confession, and requested permission to question the voluntariness of the confession "in the absence of the jury." The Supreme Court reversed the conviction because the trial judge denied this request. It held that "the court should have sent the jury out and, in its absence, inquired into the circumstances under which the statements were given."

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78 Id. at 203, 147 S.E.2d at 926-27 (1966).
80 The occupants were not disturbed; in fact they did not even wake up.
83 Id. at 652, 151 S.E.2d at 605.
Coerced Confessions (Under Miranda)

The cases discussed above had this in common: the police testified that the defendant had been warned and had then confessed voluntarily; the defendant testified to the contrary, that he had confessed under pressure or promise of leniency. *Miranda v. Arizona,*\(^4\) was designed to end this process of trial by "oath swearing." It holds that no statements (either exculpatory or inculpatory) are to be admitted into evidence if taken from one "in custody" unless there has been a four-fold warning: (1) that the suspect has a right to remain silent; (2) that anything the suspect says may be used against him; (3) that he has a right to counsel; and (4) that if he cannot afford counsel, counsel will be appointed to represent him. If the suspect chooses not to say anything, all questioning must cease. If the suspect asks for counsel, all questioning must cease until counsel arrives. If the suspect makes a confession, and subsequently repudiates it, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."\(^5\)

The Supreme Court chose to make its *Miranda* ruling prospective only, i.e., "only to cases in which the trial began after the date of our decision."\(^6\) *State v. Gray*\(^7\) was the only case that reached the North Carolina Supreme Court wherein the trial began after June 13, 1966, the *Miranda* date. Gray and his cousin were charged with breaking and entering the house of T. A. Weaver and stealing $5.00 in money, an old clock, and several picture frames. The cousin received a suspended sentence after pleading guilty and testifying that he and the accused had committed the crime. The defendant, then a high school boy, pleaded not guilty, and after trial was sentenced to not less than four nor more than six years in the state prison. In addition to the testimony of the cousin, the owner of the house testified that the accused had returned the stolen articles to him with an apology and asked that the charges be dropped. There was also confession evidence.

The arresting officer testified that he had informed the accused

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\(^5\) Id. at 475.
\(^7\) 268 N.C. 69, 150, S.E.2d 1 (1966).
of his (1) rights to silence, and (2) to retained counsel, and warned him that (3) anything he said could be used against him. The officer continued his testimony by saying that the accused thereupon freely and voluntarily confessed to the crime. The accused denied making any confession. His testimony was that his cousin had given him the stolen articles, and that when he was informed that they were stolen, he returned them to their rightful owner. The brother of the accused testified that he was present when the interrogation took place, that he did not hear any warnings by the police officials, and that he did not hear any confession.

The Supreme Court held that whether or not a confession had been made was a factual issue for the jury; and whether or not it was voluntary was a factual issue for the trial judge. The Supreme Court further ruled that there was evidence here to support the decisions against the accused. Thus far, the Court applied the law as it stood prior to Miranda. But the fourth part of the four-fold Miranda warning admittedly was not given here, and the question before the Supreme Court was whether a confession is admissible if the arrested suspect is not told "that if he was an indigent person counsel would be appointed to represent him." The Court held that it was not erroneous here to fail to give the accused the fourth part of the four-fold Miranda warning because:

there is nothing in the record to show, and it has not been contended by the defendant, either in the trial court or before us, that this defendant was an indigent entitled to have counsel appointed for him at the time of his arrest and conversations with the officers. It cannot violate this defendant's constitutional right against self-incrimination for the officers in their interrogation to fail to advise him of rights which some other person might have but which he does not have in view of his own circumstances.

The facts of record are fragmentary. The arresting officer testified that at the time of the arrest he advised the mother, who was present, that her son was entitled to counsel and she replied that

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88 In Miranda, the Supreme Court discussed this point in footnote 43 as follows:
While a warning that the indigent may have counsel appointed for him need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score.

89 268 N.C. 69, 83, 150 S.E.2d 1, 11-12 (1966).
“she did not have any money to spend on that boy.” The Court also pointed out that bond was posted the night of the arrest, and that the accused was represented at trial by two retained counsel.

The dissenters on the Supreme Court of the United States in *Miranda* worried that the decision would have a grave and adverse impact on law enforcement because (1) confessions are essential for the apprehension of criminals, and (2) the four-fold warning requirement would dry up confessions. The thirteen North Carolina cases covered in this survey should alleviate this fear. In all but one of the thirteen cases there was ample evidence all apart from the confession to support the conviction. This evidence took the form of identification by the victim, testimony of bystanders who observed the crime, finger-print evidence, the possession of stolen property, and so on. Nor is there any indication in any of these cases that a warning of rights will prevent the defendant from confessing. In all the cases the supervisory courts believed the testimony of the police officials that they had warned the accused that he need not say anything, that anything he said could be used against him, and that he was entitled to counsel; and that thereafter, the accused had freely admitted their guilt. The trial judges' finding that this testimony by the police officials was supported by the evidence was upheld by the appellate Court.

All indications are that *Miranda* will not have an adverse impact on the apprehension of criminals. But the indications also are that it will not eliminate any pre-existing problems. In *State v. Gray*,

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90 Gray petitioned the Supreme Court of the United States to review his conviction and asserted error under *Miranda* in that the North Carolina court required him to prove indigency instead of requiring the state to prove financial ability. Gray also asserted error in that the North Carolina court engaged in "ex post fact inquiries into financial ability" which, he alleged, is not permissible under *Miranda* when "there is any doubt at all on that score." The United States Supreme Court denied the petition for the writ of certiorari. Gray v. North Carolina, 35 U.S.L. Week 3882 (U.S. Feb. 13, 1967).

91 State v. Lynch, 266 N.C. 584 S.E.2d 677 (1966) was the one case where the confession was the only evidence connecting the accused with the crime. There, a "colored boy" entered a bakery in Asheville as a customer, then putting a handkerchief over his mouth, he pointed a pistol at the cashier and took around forty-five dollars from the cash drawer and ran. The cashier could not identify the defendant as the one who held her up. Other witnesses to the event testified that the "boy" was "smaller and younger" than the defendant. The trial judge, after hearing, admitted an oral confession into testimony, and the jury found defendant guilty. He was sentenced to prison for "not less than nine nor more than ten years." The Supreme Court reversed for reasons unrelated to the confession.
the only post Miranda case, the arresting officer testified that the accused had been warned of his rights, and that the accused thereafter confessed. The accused, supported by the members of his family then present, testified to the contrary—that he had not been warned, and that he had not confessed. If the United States Supreme Court should decide to eliminate this "oath-swearing" type of decision process, it will have to consider extending the McNabb-Mallory rule, now applicable in the federal courts, to the states. It will have to rule that no confession obtained from an arrested suspect will be admissible unless the accused has been taken without delay to a magistrate and there informed by a judicial officer of his rights.

Right To Counsel

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Mr. Justice Black in Gideon v. Wainwright.

In Gideon v. Wainwright,92 the United States Supreme Court held that the fourteenth amendment required that indigents charged with crime be supplied with counsel appointed by the state.

Although Gideon concerned a felony conviction, the Supreme Court did not say whether its ruling was restricted to felony cases, and has refused since Gideon to explain whether or not the rule applied to misdemeanor situations.93 The North Carolina Supreme Court was faced with this problem twice during the period of this survey, and similarly refused to lay down any hard and fast rule.

State v. Bennett94 involved a conviction for breach of the peace in violation of the Charlotte City Code and a fine of $25.00. The Supreme Court denied appellant's contention that it was error on the part of the Recorders Court to refuse to assign him counsel. The Court said:

The Statute with reference to the appointment of counsel for indigent defendants charged with misdemeanors leaves the matter to the sound discretion of the presiding judge. Some misde-
meanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors. The facts of an individual case would determine the action of the court and it is not intended that anything in this opinion shall restrict or require the appointment of counsel in any given case.}

_State v. Sherron_ was the other misdemeanor case. Sherron was at a drive-in restaurant with friends and had an altercation. He got out of the car and threw a soft drink bottle at the occupants, hitting the car window. He was charged with the misdemeanors of malicious injury to personal property and assault upon a female; he was sentenced to prison for ninety days. He alleged it was error for the trial judge to fail to appoint counsel to represent him. The Supreme Court affirmed the conviction citing the _Bennett_ decision. The Court seemed influenced by "defendant's unquestioned guilt," the "very considerate sentenced imposed," and by the fact that appellant "would have nothing to gain if awarded a new trial."

Another question in the "right to counsel" area is whether this right exists at the pre-trial stages. In _Escobedo v. Illinois_, the Supreme Court held that an accused suspect has a constitutional right to consult with his retained counsel in the police station. In _Massiah v. United States_, the United States Supreme Court held that it was a denial of the sixth amendment right to counsel to interrogate an accused, free on bail while awaiting trial, in the absence of his counsel. In _Hamilton v. Alabama_ and _White v. Maryland_, the Supreme Court held that the right to counsel exists at the preliminary hearing. In _Hamilton_, the accused had pleaded not guilty at the preliminary hearing, and the Alabama court affirmed the conviction because there was no showing that the petitioner had been "disadvantaged in any way by the absence of counsel." A unanimous United States Supreme Court reversed because:

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95 Id. at 756, 147 S.E.2d at 238.
97 The Sherron case was appealed from the court in Durham. A student survey of misdemeanor cases in the City of Durham, made under the direction of Professor Penegar in a Criminal Law Seminar, shows that the presence or absence of counsel makes a good deal of difference there in terms of the number of cases dismissed prior to trial, in terms of the percentage of acquittals, and especially in terms of sentence imposed.
100 368 U.S. 52 (1961).
“When one pleads guilty to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted... The degree of prejudice can never be known.”\(^{102}\) In *White*, the petitioner had pleaded guilty at the preliminary hearing without the advice of counsel, and the Maryland court affirmed the conviction because the preliminary hearing was not a “critical stage in a criminal proceeding.” The United States Supreme Court reversed, holding that (1) there was prejudice here because the plea of guilty was commented on at the subsequent trial, and (2) that in any event, “we do not stop to determine whether prejudice resulted: only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.”\(^{103}\)

This is the North Carolina decision in *State v. Cason*.\(^{104}\) The defendant was permitted to waive preliminary hearing without the benefit of counsel. The North Carolina court affirmed the conviction and distinguished *White v. Maryland* and similar cases because here, “no plea was entered.”\(^{105}\)

**Judicial Conduct and Comment**

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.\(^{106}\)

There were several cases in the period of this survey wherein it was alleged that the trial judge had departed from the “cold neutrality” required by law, and consequently denied the defendant a fair trial.

In *State v. Belk*,\(^{107}\) the complaining witness told the police that he had been given a ride by three strangers in a white buick and robbed. The police stopped a white buick and arrested the three occupants, after spying in the back seat found the possessions stolen from the complaining witness. At the trial, in his summation to the jury, the trial judge referred to the defendants as “three black cats in

\(^{103}\) 373 U.S. 59, 60 (1963).
\(^{105}\) Id. at 316, 148 S.E.2d at 138.
\(^{107}\) 268 N.C. 320, 150 S.E.2d 481 (1966).
a white buick.” The North Carolina Supreme Court reversed the conviction, holding that this expression “injected a prejudicial opinion of the court into the instructions given by the court. This entitles the defendant to a new trial.”

In *State v. Davis,* there was a colloquy between the judge and defense attorney which culminated when the judge said: “you sit down, you just hush.” The Court held that this was not a “felicitous choice of words,” but affirmed the conviction because “there is nothing in the record to indicate . . . that there is any probability the challenged words of the trial judge had any effect upon the jury prejudial to the defendant.”

In *State v. Sullivan,* the defendant was a citizen of Maryland and argued that he had been denied an impartial and fair judge during his trial, as evidenced by the judge’s comment at time of sentence:

> North Carolina has been made a picking place for criminals from Maryland. They are riding down here regularly from Maryland, robbing people who are trying to make an honest living. I find this true in about every court I hold.

The North Carolina Supreme Court denied that this statement indicated a bias and concluded that “the fact that the court imposed only a five year sentence when a total of forty years imprisonment was permissible, refute his [the defendant’s] claim that he was not treated fairly.”

**Indictment and Trial By Jury**

In all controversies at law . . . the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

There were several “trial by jury” cases during the period covered by this survey, both civil and criminal.

The civil case was *In re Wallace.* There, a Mary Wallace

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108 *Id.* at 325, 150 S.E.2d at 484.
109 *Id.* at 325, 150 S.E.2d at 485.
111 *Id.* at 635, 146 S.E.2d at 647.
113 *Id.* at 572, 151 S.E.2d at 42.
114 *Id.* at 572, 151 S.E.2d at 42.
115 N.C. Const., art. 1, § 19.
died, and her administrator put the home (with all its belongings) up for sale. Nonnie Hadlock purchased the house (with all the belongings) and discovered within the house the sum of $1,283.95 in cash. The administrator seized the money by legal process and turned it over to the probate court. In the subsequent litigation, the assistant clerk of the superior court adjudicated that the money found was not part of the personal property which was sold with the house. The North Carolina Supreme Court reversed, because the issue of whether or not the money was included within the personal property was an issue of fact, and an "issue of fact must be tried by a jury."

*State v. Mason*\(^{117}\) was the criminal case restating the essentiality of a trial by jury. Mason was charged with the misdemeanor of wilfully failing to support his illegitimate child. This crime has two elements: fatherhood and wilful refusal to support. Here, the defendant denied fatherhood and the trial judge, with the consent of defendant's attorney, charged the jury that it could find defendant guilty if it found he was the father. The trial judge did not charge concerning wilful refusal to support. The North Carolina Supreme Court reversed because defendant had a right to a jury determination on both elements of the crime and, further, because he had not waived this right since "an attorney has no right in the absence of express authority to waive or surrender by agreement or otherwise the substantial rights of his client."\(^{118}\)

*State v. Knight*\(^{119}\) concerned not the right to jury trial, but its composition. When the jury was convened that tried this case, the clerk excused a total of 63 persons because they were either engaged as nurses, attorneys, railroad conductors, printers, doctors, railroad engineers, linotype operators, volunteer firemen, ministers, National Guardsmen, train dispatchers, or city firemen. This was in accordance with state law. The North Carolina Supreme Court affirmed the conviction and the exclusion of these groups for three reasons: *first*, because there was no showing that the defendant was a member of an excluded class and therefore prejudiced by the exclusions; *second*, because there was no showing that members of the excluded class "would bring to the deliberations of the jury a point of view

\(^{117}\) 268 N.C. 423, 150 S.E.2d 753 (1966).

\(^{118}\) *Id.* at 426, 150 S.E.2d at 755.

\(^{119}\) 269 N.C. 100, 152 S.E.2d 179 (1967).
not otherwise represented upon it’;\textsuperscript{120} and third, because “there is a reasonable ground for the Legislature to believe that the public interest and general welfare will be better served by the grant of the exemption than by subjecting the members of the exempted class to the duty imposed upon other members of the community.”\textsuperscript{121}

\textit{State v. Childs}\textsuperscript{122} also concerned the exclusion of certain persons from jury duty, i.e., those opposed for reasons of conscience to the death penalty. In a rape case, where death was one of the possible verdicts, the trial judge granted the state’s peremptory challenge for cause for this reason. Appellant argued that this was error because “jurors who believe in capital punishment are more prone to convict than those who do not so believe; and that to exclude jurors who do not believe in capital punishment denied him a fair and impartial jury from a cross-section of the community.”\textsuperscript{123} The Supreme Court, quoting from decisions and annotations elsewhere, denied these arguments.\textsuperscript{124}

\textit{McClure v. State}\textsuperscript{125} relates to the essentiality of a grand jury indictment. McClure was indicted for violation of G.S. § 14-26 (carnal knowledge of female virgins between twelve and sixteen years of age). This is punishable in the discretion of the court, but imprisonment cannot exceed ten years. At the advice of counsel, McClure pled guilty to violation of G.S. § 14-22 (assault with intent to commit rape) and was sentenced to imprisonment for a term not less than twelve nor more than fifteen years. In post conviction proceedings, the North Carolina Supreme Court vacated the judgment because the essential elements of the two crimes are not identical and the defendant had never been charged with the crime for which he was sentenced. The Court held: “There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction trial and conviction are a nullity.”\textsuperscript{126}

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\textsuperscript{120} Id. at 105, 152 S.E.2d at 182.
\textsuperscript{121} Id. at 106, 152 S.E.2d at 183.
\textsuperscript{122} 269 N.C. 307, 152 S.E.2d 453 (1967).
\textsuperscript{123} Id. at 318, 152 S.E.2d at 461.
\textsuperscript{124} The case is noted in 45 N.C.L. Rev. 1070 (1967).
\textsuperscript{125} 267 N.C. 212, 148 S.E.2d 15 (1966).
\textsuperscript{126} Id. at 215, 148 S.E.2d at 18.
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Due Process and Double Jeopardy

No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property without due process of law.\textsuperscript{127}

One element of due process is the requirement that a criminal statute must be definite as to the persons within the scope of the statute and the acts which are penalized. If the statute is so vague and uncertain “that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional.”\textsuperscript{128}

\textit{State v. Furio,}\textsuperscript{129} is one of these “void for vagueness” situations. The city of High Point made it unlawful for any person to construct or maintain along any street or highway a sign, billboard, motion picture screen, etc., upon which is displayed “any nude, or semi-nude pictures or any pictures or words which are vulgar, indecent or offensive to the public morals.”\textsuperscript{130}

Furio operated a drive-in movie, and the screen was visible from the highway. He was charged with violation of the High Point ordinance in that he exhibited movies which projected “nude and semi-nude pictures of men and women.” The Court reversed the conviction because the ordinance presents too many problems of construction “to the court seeking to apply it and to the person, firm or corporation seeking to determine what he or it may do without violating its provisions.” The Court gave illustration by asking questions including the following: “Does the prohibition against the display of semi-nude pictures apply to pictures not generally regarded as ‘vulgar, indecent or offensive’ such as a billboard advertisement of bathing suits or a moving picture of a swimming meet? Does the ordinance forbid the posting upon a billboard of a New Year’s greeting bearing the customary symbol of the new year?”\textsuperscript{131}

Another essential of due process is that the defendant not be prejudiced by a joint trial. This is illustrated in \textit{State v. Lynch,}\textsuperscript{132} where two men were put on trial for the crime of robbery. Lynch denied guilt, and the evidence against him consisted of a confession.

\textsuperscript{127} U.S. Const. amend. V.
\textsuperscript{129} 267 N.C. 353, 148 S.E.2d 275 (1966).
\textsuperscript{129} Id. at 355, 148 S.E.2d at 276.
\textsuperscript{131} Id. at 359, 148 S.E.2d at 279.
\textsuperscript{132} 266 N.C. 584, 146 S.E.2d 677 (1966).
which he had repudiated. The co-defendant confessed, and in his confession implicated Lynch as the leader of the two. When the confession of the co-defendant was introduced into evidence, counsel for Lynch objected. It was admitted into evidence, the judge charging the jury that this confession was not to be considered as evidence against Lynch. The North Carolina Supreme Court found no fault in this: "While the jury may find it difficult to put out of their minds the portions of such confessions that implicated the co-defendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it."133

Subsequently in the trial, a police officer testified that Lynch had confessed, and he was asked by the state if he had read to Lynch the confession of the co-defendant. Defense counsel objected to the mention of the co-defendant confession in connection with Lynch, but the trial judge over-ruled this objection, and the police officer continued his testimony. The North Carolina Supreme Court held this to be error: "Lynch should be awarded a new trial at which his guilt or innocence will be determined by evidence against him and not by evidence incompetent as to him but devastating in its impact upon his case."134

There was also a double jeopardy case of more than usual interest. In State v. Case,135 the defendant was indicted in three separate bills, each charging him with forging and altering a specific check. He entered a plea of guilty, and was sentenced to a term of eighteen to twenty-four months in the state's prison. He then filed a petition in propria persona, alleging that he first saw his court appointed attorney at the time his case was called for trial. This petition was denied. He then filed another petition, this time attacking the validity of the indictment on the theory that the paragraphs had not been numbered. The trial judge appointed his former counsel to represent him; after the hearing, the trial judge ordered a re-trial because defendant had not had the timely assistance of counsel at the preliminary hearing before the magistrate. This had not been averred in the defendant's petition, and he immediately appealed to the Supreme Court from the order for a new-trial. The Supreme Court denied the appeal, and defendant was put to trial a second

133 Id. at 588, 146 S.E.2d at 680.
134 Id. at 588, 146 S.E.2d at 681.
time. His defense of "double jeopardy" was overruled, he was found guilty, and this time he was sentenced to prison for not less than three nor more than five years.

The North Carolina Supreme Court held that the second trial and second sentence were unconstitutional: "Had defendant secured a new trial upon his first petition, he would have voluntarily placed himself again in jeopardy and thereby would have waived the constitutional guaranty against double jeopardy." But here, continued the Court, "defendant had a new trial forced upon him." In the second petition, he sought only his release and alleged no grounds for a new trial. "If not entitled to the relief sought, he wanted no other, for he had no intention of risking a longer sentence in a new trial," the Court said. "Under the circumstances," the Court held, "Judge Martin had no authority to vacate the 1965 sentence and to order a new trial, and his order purporting to do so is void."[186]

Right to Notice and Hearing

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.[187]

_Housing Authority v. Thorpe_[188] raises the question whether the government, acting as a landlord, is subject to the constitutional limitations which govern its activities in other areas of conduct.

In November, 1964, Mrs. Thorpe became a tenant in a low-rent public housing project owned and managed by the Housing Authority of Durham. The lease provided for tenancy from month to month, and gave both parties the option to terminate by written notice at least fifteen days before the end of any monthly term. On August 10, 1965, Mrs. Thorpe was elected president of the Parents Club, a group of tenants in the project. The next day she received written notice from the Authority to leave at the end of the month. The notice did not give any reasons for the eviction, and the Housing Authority refused to meet with Mrs. Thorpe to give an explanation. She refused to vacate, and the Authority brought summary ejection action. Mrs. Thorpe had two defenses: first, that she was entitled to notice and a reason for the termination of the lease; and

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[186] _Id._ at 334, 150 S.E.2d at 512.
second, that the eviction was because of her exercise of first amendment rights and therefore unconstitutional. The trial court ruled against her and appeal was taken.

The North Carolina Supreme Court affirmed the eviction:

- The defendant having gone into possession as tenant of the plaintiff, and having held over without the right to do so after the termination of her tenancy, the plaintiff was entitled to bring summary ejectment proceedings. ... It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease.
- Having continued to occupy the property ... the defendant, by reason of her continuing trespass, is liable to the plaintiff for damages due to her wrongful retention of its property and for the costs of the action.\textsuperscript{139}

The United States Supreme Court agreed to review the case, but vacated the decision and remanded for further proceedings when the Department of Housing and Urban Development issued a circular, reciting in part:

- Since this is a federally assisted program ... it is essential that no tenant be given notice to vacate without being told by the Local Authority ... the reasons for the evictions as he may wish.\textsuperscript{140}

A second "notice and hearing" situation arose in the context of a "contempt" proceeding. In\textit{In re Williams},\textsuperscript{141} The Reverend Williams was subpoenaed by both the state and the defense as a witness in a criminal case (rape) wherein both the defendant and the complaining witnesses were members of his congregation and had discussed the situation with him. When he was called to the witness stand, he refused to take the stand, and the jury was thereupon excused while the trial judge pursued the matter. The Reverend Williams explained, "Well, they came to me as their pastor. They confided in me as their pastor, and I think I would be less than their pastor to take the stand in defense of one of these persons."\textsuperscript{142} After a short colloquy, the trial judge held Williams in contempt, and sentenced him to 10 days in jail.

\textsuperscript{139} Id. at 433, 148 S.E.2d at 291-92.
\textsuperscript{140} Thorpe v. Housing, 35 U.S.L.W. Week 4366 (U.S. April 17, 1967).
\textsuperscript{141} 269 N.C. 68, 152 S.E.2d 317 (1967).
\textsuperscript{142} Id. at 70, 152 S.E.2d at 320.
The following day Williams filed a motion to be released, in part because he had not been afforded notice, and an opportunity to defend himself with the aid of counsel. The motion was denied, and the denial affirmed on appeal because:

Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel. As to the alleged duty of the court to appoint counsel for him, we note that he is presently represented by three able attorneys, two of whom appeared for him in the superior court on the day after sentence. There is no basis for the contention that to carry out the sentence would deprive him of his liberty without due process of law on the ground that he was denied a hearing or denied representation by counsel of his choice.

A petition for a writ of certiorari is now pending in the Supreme Court of the United States.

Right to Speedy Trial

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." On January 3, 1964, Professor Klopfer of Duke University participated in a sit-in demonstration at a segregated restaurant on the outskirts of Chapel Hill. He was promptly indicted and tried for "trespass." The jury was unable to agree on a verdict, and the case was continued. In the 1965 term of court, the solicitor informed Klopfer that he would ask for a \textit{nolle prosequi} with leave. If granted, this would give the solicitor authority to call the case for trial at any time in the foreseeable future. Klopfer filed opposition,

\footnote{In \textit{Holt v. Virginia}, 381 U.S. 131, 136 (1965) a Virginia judge summarily found a lawyer guilty of contempt because of a motion made by that lawyer in court. The Supreme Court reversed because: "It is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense—a right to his day in court—and to be represented by counsel.'" \textit{In re Oliver}, 333 U.S. 257 (1947), concerned a contempt conviction imposed by a Michigan judge upon a witness for "evasiveness." The Supreme Court reversed because: "failure to afford the petitioner a reasonable opportunity to defend himself . . . was a denial of due process. . . . A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." \textit{Id.} at 273.}

\footnote{In \textit{re Williams}, 269 N.C. 68, 76, 152 S.E.2d 317, 323-24 (1967).}

\footnote{U.S. Const. amend. VI.}
and asked for an immediate trial. By that time the Supreme Court had held in *Hamm v. Rock Hill*[^148] that all pending “trespass cases” had abated by reason of the Civil Rights Act of 1964. The trial judge granted the “nolle prosequi with leave,” and appeal was taken to the North Carolina Supreme Court, where the decision was affirmed.[^147] The North Carolina Supreme Court held that:

Without question, a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State’s prosecutor, in his discretion and with the court’s approval, elects to take a *nolle prosequi*.[^148]

The Supreme Court of the United States reviewed the case and reversed. After pointing out that the North Carolina conclusion “has been explicitly rejected by every other state court which has considered the question,” the Supreme Court held:

We, too, believe that the position taken by the court below was erroneous. . . . By indefinitely prolonging this oppression, as well as the ‘anxiety and concern accompanying public accusation,’ the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.[^149]

At least one thing stands out in this brief survey of criminal procedure cases; that the North Carolina Supreme Court does not hesitate to set aside a guilty conviction—no matter how abundant the evidence of guilt—where there has been a denial of constitutional rights.

This is true when the trial court fails to make complete findings concerning the voluntariness of a confession,[^150] or when the trial judge hears evidence on this score in the presence of a jury.[^151] This is true when the trial judge departs from the “cold neutrality” of his position, and makes adverse comments about the defendant which cannot help but influence the jury.[^152] This is true when the

[^146]: *Id.* at 350, 145 S.E.2d at 910.
state convicts without trial of all elements of the crime; when the state convicts on a charge which has not been made; when the state convicts under a statute which is hopelessly vague; and when the state tries a man a second time over his objection.

The lawyer might deplore the use of so-called "technicalities" to reverse the conviction of persons whose guilt seem clear; but lawyers can only appreciate and applaud these decisions. It is not only the individual who is on trial; it is the very system of justice that sits on the dock.

**Property Rights**

During the period under review the Supreme Court of North Carolina found no constitutional issue of taking by eminent domain save with respect to measure of value. Taking under the police power did arise in three cases. Contrasting results in two of these three teach once again the limits of legislative power to alter the law under American constitutional theory. In *Johnson v. Blackwelder*, a conflict between the widow and collateral relatives of a deceased, the latter asserted property rights in the estate by virtue of the statutes of descent and distribution as they read at the time decedent had the legal competency to make a will but did not because allegedly satisfied with the method of distribution provided by them. After mental incompetency overtook the intestate, the Assembly enacted the Intestate Succession Act, which became effective two years before his death. The kind of reliance generated by these facts is not productive of any constitutional protection; the intestate "was charged with knowledge that these statutes were subject to change by the General Assembly."

On the other hand, action taken in pursuance of state grants may create the type of reliance protected by the constitutional prohibition against impairment of the obligation of contract. Illustrative of this is *Oglesby v. Adams*, where the lessee of oyster beds under 1933 legislation empowering the Board of Conservation and Devel-

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159 Id. at 211, 148 S.E.2d at 32.
opment to lease river bottoms for twenty years, at one dollar per acre for the second decade of the leases, was successful in his challenge of an attempt by the Board to raise the rental fivefold in compliance with a statute of 1965. The Court treated as contractual the relation between state and lessee, thus bringing the contract clause limitations into operation and removing the case from the general rule applied in Blackwelder. "The distinction," said the Court in contrasting an earlier enunciation of the general rule,181 "is that here the plaintiff is relying not upon a statute but upon a contract duly and legally executed by the State, and the State is not at liberty to violate the rights conferred upon the plaintiff by a solemn agreement."182 Interpretation of the contract clause, whether of state or federal constitution,183 as applicable to any articulation of state legislative policy is an anachronism from an age that thought of nearly every interrelationship as founded in contract. Yet the decision of Marshall’s in Fletcher v. Peck104 withstands the test of time and circumstance, to continue to provide private interest with protection against change in statute law governing land grants, tax exemptions, corporate charters, and public utility franchises absent express reservation of legislative power to alter or amend.

For the period here reviewed, Clark’s Greenville, Inc. v. West165 is the Court’s major decision under the police power. Plaintiff’s emphasis was upon the motives prompting enactment of the Greenville Sunday closing ordinance. The motivation, it was contended, was to destroy plaintiff’s competitive advantage over merchants desiring to remain closed on Sunday. Accordingly, in plaintiff’s view, the preamble of the ordinance, stressing the desire of the City Fathers to promote the public health, safety, morals and general welfare, was a calculated misrepresentation. The Court gave plaintiff’s argument short shrift:

The question presented . . . is whether the court may inquire into the motives which prompted a municipal legislative body to enact an ordinance valid on its face. The answer is NO. . . . Any other rule would permit any displeased or disgruntled citizen to question the validity of any legislative enactment merely by alleg-
ing bad faith and conspiracy on the part of the body which passed it. Orderly government could not survive such license.\textsuperscript{168}

The opinion illustrates the inevitability of result under syllogistic reasoning, once the major premise is set. Three times it is asserted that the city council acted within its authority; if this be true, bad motive cannot, of course, reverse the result. But in asserting the validity of the ordinance, the Court begs the very question presented to it for resolution. That question is whether a statute or ordinance purposely enacted to prefer one merchant or one product over another is consistent with due process conceptions. The answer depends upon basic constitutional predicates of decision. In economic matters, such as involved in the case under discussion, the Supreme Court of the United States will not look behind the veneer of legislative profession to determine the true purpose motivating the legislative enactment. "We cannot undertake a search for motive in testing constitutionality."\textsuperscript{167} Yet, consistently with the double standard employed by it,\textsuperscript{168} the nation's High Court will pierce the veil of legislative profession where personal and political rights are involved\textsuperscript{169} and individual Justices, at least, will do so in other non-economic contexts.\textsuperscript{170} Almost all state courts reject the double standard, and a number will look beyond profession to purpose where economic interests are in litigation.\textsuperscript{171}

Under current federal constitutional doctrine it is immaterial that the United States Supreme Court refuses to go behind the

\textsuperscript{168} 268 N.C. 527, 530-531, 151 S.E.2d 5, 7-9 (1966).
\textsuperscript{169} Pollock v. Williams, 322 U.S. 4 (1944); Lane v. Wilson, 307 U.S. 28 (1939).
legislative profession in cases of economic orientation because there is in any event so little limitation upon permissible legislative objectives. *Powell v. Pennsylvania*\(^{172}\) early set the tone of Court tolerance of product favoritism, followed by similar toleration of legislative favoritism in the competition between older and newer methods of distribution.\(^{173}\) In the second *Carolene Products* case\(^{174}\) the Court denied that in Congressional proscription of interstate commerce in filled milk there is prohibition "merely because it competes with another such article which it resembles," but the *Carolene Products* litigation nevertheless indicated great legislative leeway. With many state courts, on the other hand, judicial inquiry into purpose is most material, inasmuch as due process is conceived as forbidding legislative disadvantage of one business or businessman for the competitive gain of another absent substantial evidence of relationship between the restrictive legislation and the public health, safety, or welfare.\(^{175}\) In the last 20 years the Supreme Court of North Carolina has first sustained and then invalidated the licensing of photographers,\(^{176}\) held licensing of dry cleaners and tile contractors unconstitutional,\(^{177}\) and upheld licensing of realtors.\(^{178}\)

In the case of *Clark's Greenville* earlier decisions of the Court had foreclosed attack on the municipal Sunday closing ordinance\(^{179}\) unless plaintiff, by inducing judicial attention to the allegedly true purpose of the local law, could overcome its presumed relatedness to the state police power and thus bare it as an unjustified attempt of City Council to play favorites between competing types of mer-

\(^{172}\) 127 U.S. 678 (1888).
\(^{176}\) 348 U.S. 483 (1955); State Board v. Jackson, 283 U.S. 527 (1931).
\(^{174}\) 323 U.S. 18 (1944).
\(^{176}\) 245 N.C. 516, 96 S.E.2d 851 (1957); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940).
\(^{179}\) Similar ordinances had been sustained, in a series of cases culminating in Charles Stores v. Tucker, 263 N.C. 710, 140 S.E.2d 370 (1965), on the basis of their professed concern for the public interest in a requirement of Sunday observance.
chandisers. Judicial inquiry into legislative motive has its undeniable hazards, suggesting the wisdom of caution. Yet there is great appeal in the view of the supreme court of Washington expressed 60 years ago: "We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view?"

**Separation of Powers**

Two decisions during the period under review concerned the applicability of the state's Declaratory Judgment Act. In the first the Court, finding that "no genuine justiciable controversy now exists between the parties hereto," remanded with directions that the action be dismissed.

Our Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions. Neither was this act intended to require the Court to give advisory opinions when no genuine controversy presently exists between the parties. Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relation only when there is an actual existing controversy between the parties.

In a case decided a few weeks later, the Court found present an existing controversy between the parties where the trial court had nonsuited the plaintiff. Accordingly, the cause was here remanded "for a trial de novo and for an adjudication of the respective rights of the parties."

This familiar judicial behavior would scarcely deserve comment, required as it supposedly is by the doctrine of separation of powers, did it not provide contrasting background for *Advisory Opinion In Re Work Release Statute*, which appears as an unpaginated Appendix to Volume 268 of the Reports. The North Carolina Constitution nowhere directs the state's highest court to render technically

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181 State *ex rel.* Rickey v. Smith, 42 Wash. 237, 248, 84 Pac. 851 (1906), cited note 171 supra.
183 *Id.* at 391-92, 148 S.E.2d at 236.
advisory opinions to governor or legislative assembly, as do the constitutions of a handful of states. In the absence of constitutional sanction, the advisory opinion is an anomaly in the face of the state constitution’s express declaration in article I, sec. 8, that “The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other.”

Little but misleading information would be available on the North Carolina advisory opinion were it not for the research of Professor Preston Edsall, the results of which appeared in the pages of this Review nearly twenty years ago. Publication of the Court's advisory opinions was for years as haphazard as the practice itself was spasmodic; Professor Edsall in the course of his study turned up several “lost” opinions, which were then published by the court reporter. But the current advisory opinion indicates an accepted, if constitutionally questionable, practice in this state which is now nearly one hundred years old.

In the pages of another law review, the writer offers a possible solution for the paradox of a court freely giving advisory opinions yet choking on analogous use of the declaratory judgment. That analysis emphasizes the fundamentalness of the distinction between ordinary judicial review—the historic judicial practice of deciding non-constitutional litigation through statutory or case interpretation followed by application of the controlling legal norm to the facts of the particular litigation, and constitutional judicial review—the power of the judiciary to enforce the written constitu-

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185 Even if point is made of the fact the constitutional provision reads "ought to be" rather than "shall be," arguably leaving room for legislative deviation, the advisory opinion is no less anomalous for the reason that it has never enjoyed even statutory authorization in North Carolina, again unlike some other jurisdictions.

186 Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 397 (1949). Professor Frankfurter, author of Advisory Opinions: 1 Encyc. Soc. Sci. 475 (1934), erred in stating that the North Carolina practice “has become atrophied” and misjudged the consequences of Opinion of the Justices, 64 N.C. 785 (1870), in asserting that power to render advisory opinions had there been “explicitly denied.” Professor Edsall’s analysis is thorough and excellent, aside from which Note, 7 N.C.L. Rev. 449 (1929), seems to be the only accurate, although short; investigation of developments following upon the 1870 opinion.

187 Counting from the 1870 opinion, cited note 186 supra.

188 Put to one side as pure rationalization is the explanation that the Justices and not the Court render the advisory opinion. This is the practice even in those states whose constitutions authorize advisory opinions.

tion. This distinction does not reconcile the North Carolina cases on advisory opinion and declaratory judgment; if there is a rationale to them, it lies in the concept that the advisory opinion is available for resolution of serious governmental problems that cannot later be so structured as to bring the issues within the framework of "existing controversy." But the distinction offered does provide basis for acceptable resolution of the North Carolina paradox through its insistence upon clear differentiation between two distinctly different types of judicial review. If the judicial review sought is of the ordinary type, requirement of the presence of an "existing controversy" constitutes an adequate articulation of the fact that the court, as one of the co-ordinate divisions of state government, should withhold its intervention until the legislative and executive branches have fulfilled their proper roles in the governmental process. On the other hand, if the judicial review sought is of the constitutionality of governmental action, either proposed or taken, then there is in order a different criterion for judicial intervention consistent with the entirely distinct posture in which the court places itself, vis-a-vis the other branches of government, in the exercise of constitutional judicial review.

Justice Lake's dissent in Rabon v. Hospital, wherein a bare majority of the Court overruled the former common-law rule of charitable immunity for hospitals, puts in classic context the appropriate role of the judiciary in relation to the law-making function of government. It was remarked a year ago, in reviewing constitutional decisions of that earlier period, that "American courts have not, as a general principle, found inconsistency between the constitutional principle of separation of powers and their historic function of fashioning common law." Avoidance of inconsistency has been achieved by judicial indulgence in the fiction that courts declare, rather than make, the law. But as Justice Lake's dissent discloses, that indulgence presents problems when a court concludes that it is time to overrule an earlier common-law decision. This can be done properly, he reasons, only through "its determination that its former decision was an erroneous statement of the law when the decision

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269 N.C. 1, 152 S.E.2d 485 (1967).
191 Williams v. Hospital, 237 N.C. 387, 75 S.E.2d 303 (1953), adhering to "settled law."
was rendered and, therefore, the law never has been as stated in the former opinion and the correction is retroactive.” However, “to change the existing law for the future because a different rule would be a wiser policy for the State of North Carolina to follow in the future is, in my opinion, a violation by this court of the Constitution of North Carolina and a usurpation of a power which has not been granted to us by the people.”

By this reasoning, according to the Justice, the Court, in failing to make the overruling decision fully retroactive, has exercised “the essence of the legislative process.” Otherwise stated, the majority preference for effectiveness of the new rule from the date of the overruling is declared to constitute a violation of the state constitutional requirement of separation of powers. This new wrinkle would jeopardize increasing resort to prospective overruling by American state courts only recently freed from the threat that such resolution of the difficult problem of timing might run afoul of Federal due process. In North Carolina it might produce complete judicial impotency to alter the common law; recent North Carolina cases cast doubt upon the due process validity of retrospective overruling, at least where property rights are involved. The majority's rejection of the declaratory theory of law requires a new rationalization to square judicial formation of policy with the doctrine of fractionated powers, but it is fortunate for law administration that Justice Lake's views did not appeal to other members of the Court.

Statutory interpretation is even more fertile than common-law ruling as a source of litigious conflict over the respective domains of legislature and judiciary. In theory the Court is to find the legislative meaning, not to rewrite the enactment to its own satisfaction. Legal history is full of debate on the merits and demerits of “judicial legislation.” During the period reviewed the Supreme Court of this

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269 N.C. 1, 29, 152 S.E.2d 485, 502 (1967).


Chief Justice Parker, also dissenting in opinion, approaches the problem largely on a policy level. The closest he comes to constitutional considerations are his statements that “the General Assembly is the ultimate tribunal to determine public policy,” and that “this prospective judicial action is outright legislation by the court.” 269 N.C. 1, 24-25, 1152 S.E.2d 485, 504 (1967).
state was almost inevitably presented with issues turning on statutory interpretation. Of these cases, by far the most prominent was *D & W, Inc. v. Charlotte,* \(^{197}\) the celebrated "brown bag case." The Court’s assertion that "It is the prerogative and function of the legislative department of the government to make the law"\(^{198}\) does not, of course, of itself absolve the judiciary of governmental trespass. However, there is nothing in the circumstances of this case to justify questioning the Court’s restrictive interpretation of the Turlington and ABC Acts as improper encroachment upon the province of the General Assembly. The current travail in that deliberative body stems from the complexity of the liquor problem, not from any effort of the judiciary to "establish the public policy of this State with reference to alcoholic beverages."\(^ {199}\)

**CONTRACTS**

*Walter D. Navin, Jr.*

**The Contract Concept At Work**

What is a contract? In one sense the question is unanswerable because contracts do not exist the way a tree or a stone exists; it is a construct of the lawyer’s brain, and is used to classify activity of human beings concerning very nearly everything humans consider important. A contract is not an "is" but a lawyer’s concept defining a relationship between persons. As lawyers, we find the concept useful because once we classify the particular relationship, then we know how to deal with it, in terms of resolving the conflict every lawsuit represents. We know how, because we have been trained in the use of the concept and have reached approximate agreement as to what it contains and what it does not. Put shortly, a good answer to the question, what is a contract, is the further inquiry: For what purpose do you wish to know? A consent judgment, for example, is really a "contract" because by treating it as a contract the rules by

\(^{197}\) 268 N.C. 577, 151 S.E.2d 241 (1966).

\(^{198}\) Id. at 591, 151 S.E.2d at 250-251.

\(^{199}\) The words quoted from *D. & W., Inc. v. Charlotte,* *ibid.*, are given a new, but consistent, context.

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which a “contract” is construed may be applied to the construction of a consent judgment. This is some of the learning of Insurance Co. v. Bottling Co.¹ A common reason for deciding whether a set of facts falls within our created concept of contracts is whether or not the “contract” statute of limitations applies. The Court faced this in City of Reidsville v. Burton.² Lawyers with clients who refuse to accept their good legal advice will no doubt feel a twinge of sympathy for an engineer working for the city of Reidsville in the late '50s. In exchange for the city's taking into its borders a real estate development, the city required the real estate developer to construct a bridge leading into the development across a drainage ditch, according to specifications furnished by the engineer. The developer built the bridge but it did not meet the specifications and the city engineer refused to accept it, fearing, apparently, its early collapse. The city council, however, accepted the bridge in exchange for the developer's promise to rebuild if the bridge collapsed within the following twelve years. In less than four years the bridge did collapse. When the city demanded its replacement from the developer, and he refused, the city rebuilt it and billed the developer its cost. But the city did not bring suit until more than three years after the date of their demand. Is the city in this set of facts exercising a governmental function in which case no statute of limitations may be pleaded against the municipality, or is the city merely enforcing a private right—a contract—in which case the statute does apply? The Court decided it was the latter. A similar sort of judicial process occurred in Parsons v. Gunter³ where the Court held a particular set of facts to fall within the contract concept rather than the constructive trust concept and thus the contract statute of limitations barred the plaintiff.

The state 'owns' the bottom lands under the waters of the state and by legislative enactment gave to the Board of Conservation and Development the power to lease such lands for oyster beds. The statutory enactment prescribed the term, the renewal and the rent. Does a man asserting claims under such an agreement that is authorized by the legislative statute assert a right based on a statute or a contract right? It makes a difference because after one Oglesby

² 269 N.C. 206, 152 S.E.2d 147 (1967).
³ 266 N.C. 731, 147 S.E.2d 162 (1966).
entered into such a lease at 10 dollars a year for 20 years, the legislature amended the statute to raise the rent to 50 dollars a year. No one has a vested right in a statute, but on the other hand, the state cannot impair the obligation of contract. The North Carolina Supreme Court called the fact situation existing a contract, and held the legislature could not constitutionally change the rental in *Oglesby v. Adams.* The application of the contract clauses of our State and Federal Constitutions is discussed in the *Constitutional Law Survey,* above.

**Contract or Tort**

Two cases decided during the period surveyed, *Veach v. Bacon American Corp.* and *Hollenbeck v. Ramset Fasteners, Inc.*, are examples of fact situations courts have had difficulty classifying as tort or contract; both involve personal injuries resulting from defective manufactured equipment. Whether or not such "breach of warranty" cases properly belong within the contract concept, the tort, or perhaps a new concept—products liability—has been perceptively explored in this Review, once during the 1965 Survey by Professors Dobbs and Byrd and again by Professor Clifford in his article dealing with the sales portion of the Uniform Commercial Code Symposium. In the *Veach* case, which more directly raises the problem of classification, certain oral statements by the selling agent were urged as express warranties that had been breached, but the written document contained that common clause expressly disclaiming any oral agreements by agents. The Court gave effect to the clause. The argument that such express disclaimers are unconscionable is made more difficult in North Carolina by the failure of the legislature to adopt section 2-302 of the Uniform Commercial Code. A bank's liability for a payout over an unauthorized indorsement has also been treated as both tort or contract insofar as the true owner of the negotiable instrument is concerned. In *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.* the Court reversed prior

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5 266 N.C. 542, 146 S.E.2d 793 (1966).
9 *Uniform Commercial Code* § 2-302.
10 266 N.C. 648, 147 S.E.2d 37 (1966).
law that had held such liability was promissory in nature and joined the mainstream of judicial authority by classifying such liability as arising from a conversion of the true owner's property. This is the position the Uniform Commercial Code takes and one wonders why the Code did not rate a citation in the opinion.

**IMPLIED PROMISES**

Ever since *Slade's Case*, which held that assumpsit would lie to enforce a promise implied by law and not one based on actual facts, lawyers have struggled to separate contract from quasi-contract. The quasi-contract recovery is viewed more conveniently today as a part of the concept of Restitution, but judges and lawyers still speak of it as contract and discuss enforcement of such promises. During the period surveyed several disputes were resolved under rubrics arising from such a classification. *Beacon Homes, Inc. v. Holt* involves a fact situation that has always given the judicial process a great deal of trouble because both parties are essentially innocent. *Beacon Homes, Inc.* contracted with the defendant's mother to build a home on a lot the mother thought she owned but in reality was owned by her daughter. The daughter had no knowledge of the construction and thus could not be held liable on the contract under any theory of estoppel. Does she have to pay for the home constructed on her land? The trial judge did not give a clear answer to that very question when it was posed to him by the jury trying the lawsuit between the construction company and the landowner. The jury then returned a verdict for the defendant, apparently on the theory that the damage done to the defendant's lot equalled the value of the permanent improvements. The Supreme Court reversed and granted a new trial, offering a careful set of issues for the next jury which clearly imply that if the owner prevents the builder from removing the home from her lot, the builder will be entitled to the amount the home increased the fair market value of the owner's lot. If the owner is willing, the only choice the builder has is to remove the structure. For a case involving repairs to a boat not owned

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11 N.C. GEN. STAT. § 25-3-419 (1965).
12 The problem is fully delineated in a student note in 44 N.C.L. REV. 1073 (1966).
13 4 COKER, 92b (1602).
14 RESTATEMENT, RESTITUTION 4 (1937).
15 266 N.C. 467, 146 S.E.2d 434 (1966).
by the repairer nor the one for whom the repairs were done, see Sawyer v. Wright.17

When the State Highway Commission orders a railroad to widen its crossings under appropriate statutes, has the Commission been so unjustly enriched by the new crossing that the law will imply a promise to pay? The Court said "no."18 Services performed in discharge of a legal obligation confer no unjust benefit. Another bar to the action was the state's immunity to a suit of this kind; there was no "taking" and no tort.

Once again the Supreme Court had to decide the classic case of the daughter-in-law claiming from the estate of her husband's mother the value of personal services rendered the mother by the daughter-in-law. Sometimes the courts have implied such a promise to pay, particularly where the relationship is not based on close family ties.19 In Brown v. Hatcher20 our Supreme Court found no express promise to pay nor did it imply one. While the in-law relationship does not give rise to the presumption the services were rendered gratuitously, the Court applied the "one family relation" doctrine, holding the services were a gift despite the lack of a blood relationship. On the facts the services were clearly given freely and the mother's expressions of appreciation for the kindness could not, without more, amount to an express promise. Even between those not closely related there must be some evidence justifying the inference of a promise to pay.

**Contract for a Sale on Credit—Usury**

A contract for the loan of money at a rate of interest greater than the law allows is usurious and certain penalties attach to it.21 Michigan Nat'l Bank v. Hanner22 involved an action to recover on a deficiency remaining after the foreclosure of a note and conditional sale contract. The defendant alleged that the original cost of the chattel—an airplane—was 59,250 dollars; that he had paid a 5,000 dollar down payment; and that the dealer had agreed to finance the sale. The defendant signed in blank a conditional sale

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contract and promissory note. The dealer filled in the blanks, making the sale price 69,500 dollars and adding to that a sales financing charge of 19,365 dollars; he then sold it to his financing agency. Allowing credit for the down payment, the indebtedness totaled nearly 84,000 dollars. The defendant's answer that the transaction was a loan and therefore usurious was stricken by the trial judge and this result upheld on appeal. A bona fide credit sale on an installment basis can be no basis for usury. The dealer had discounted the note and security document to Appliance Buyers Credit Corporation, which in turn had sold them to the Bank bringing the suit. The bank is apparently a holder in due course of the note; the argument defendant made that because the note was attached to the conditional sale contract the holder had notice of the defense has not often found judicial favor. The opinion in the instant case, however, did not turn on the holder-in-due-course question possibly because at least as to the usurious interest, the defense may be utilized even against the innocent purchaser. If Appliance Buyers Credit Corp. had loaned defendant the money but had in form made the transaction appear to be a sale of the airplane, the defense would have been available, as it was in Ripple v. Mortgage and Acceptance Corp. Interestingly, in the Ripple case a conditional sale contract was the form of the transaction, as it was in the instant fact situation. In other words, had the buyer obtained the financing directly from the lender there would have been usury but since the dealer, in effect, secured the loan for the buyer there is no usury. The contract here was not for the loan of money, but for the sale of an airplane on credit and thus the usury rule does not apply. In either situation the lender's money is to be repaid by the buyer-borrower, the lender receives compensation for his loan, and the dealer gets his sale price as a lump sum. The opportunities for the unscrupulous are obvious. Other state courts have pierced the useless symbolism of classifying such a transaction as a sale on credit. Still other states have regulated this factual pattern carefully both as to the amount charged and as to such "minor" matters as the practice of buyers signing blank

21 193 N.C. 422, 137 S.E. 156 (1927).
26 The leading case is Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).
promissory notes and conditional sales contracts. \(^{27}\) This is not to say that one financing consumer goods should not have a just and fair return for such endeavors. They should and it probably ought to be more than 6\% simple interest. Purposes of justice will be better served, however, by recognizing the realities of the consumer credit situation. It's a fair guess that until the State Supreme Court does so, the legislature will be under no pressure to act. \(^{28}\)

**Contractual Capacity**

Once again the Supreme Court wrestled with the problem of whether a person drinking intoxicating liquors in excessive quantities has the capacity to contract. Regular readers of these survey articles will recall Professor Dameron's careful treatment of *Moore v. New York Life Ins. Co.*, \(^{29}\) in last year's Insurance Law survey. There the alleged incompetent changed the beneficiary of his life insurance policy and also signed a cash surrender form at the same time. The personal representative of the decedent incompetent ratified the change of beneficiary and disaffirmed the cash surrender cancellation. Lawyers for the insurance company had argued, reasonably but not accurately as it turned out, that if man were incompetent for the one purpose he must have been incompetent for the other.

In *Chesson v. Pilot Life Ins. Co.* \(^{30}\) the Supreme Court faced a similar factual latticework. The decedent had been confined, off and on during 1963, to two different hospitals for chronic alcoholism. In March of 1964, Mr. Chesson, the insured, again entered the hospital. He was discharged on May 9, and on May 14, took the insurance policy in question from a dresser drawer in his home and presented it to the insurance company's home office. The policy, taken out by Mr. Chesson several years earlier, was in the face amount of 5000.00 dollars and contained a double indemnity clause. Mr. Chesson had twice before borrowed against the policy. On the May 14th

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\(^{27}\) See, *e.g.*, The Ohio Retail Installment Sales Act, Chpt. 1317, Page's Ohio Revised Code (1962 Replacement).

\(^{28}\) The present North Carolina Consumer Finance Act does not reach this problem at all. It is limited to direct loans of money (not retail installment sales of goods) not in excess of 600 dollars. See N.C. GEN. STAT. \(\$\) 53-164 to -191 (1965).


visit, the remaining cash surrender value was only 25.40 dollars. After some discussion of the consequences, the representative of the insurance company gave Mr. Chesson a check for that amount and he surrendered the policy. Mr. Chesson died on June 8, 1964, and Mrs. Chesson as beneficiary of the policy and administratrix of his estate brought action to rescind the cancellation of the policy. On seriously conflicting evidence—psychiatrists who had treated Mr. Chesson prior to his May 9 release testified that in their opinion he understood what he was doing—the jury decided Mr. Chesson was incompetent. On the basis of the testimony of the widow and others concerning the decedent’s behavior this finding is at least understandable. But since Mr. Chesson had never been adjudged insane his contracts are only voidable, not void. This means, generally, that the one asserting the incompetency must establish that fact to the satisfaction of the jury and that was done here. The law also requires the one dealing with such an incompetent to have had notice of his state of mind, but the burden is on the one dealing with the alleged mentally ill person to show that he did not have notice.  

From the evidence in Chesson it was perhaps arguable a person may have had notice of Mr. Chesson’s need for the money but there seems to be no fact revealed to indicate Mr. Chesson lacked ability to contract when he appeared in the office of the insurance company. The jury decided otherwise and the Supreme Court did not reverse. This offers a classic example of two fundamental policies in conflict. We must have certainty in our commercial transactions, yet we must protect the incompetent from the consequences of his irrational acts. If the legal paradox is difficult to resolve, ascertainment, analysis and proof of facts for a lawyer trying such a case must be far worse.

The Restatement (Second), Contracts, § 18c (Tent. Draft No. 1, 1964) sums up a rule of law for this area nicely:

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition. (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be inequitable. In such a case a court may grant relief on such equitable terms as the situation requires.
The psychiatrists defined Mr. Chesson's illness as a depression, depressive reaction. Suppose instead of a depressive reaction, he is in the mania phase of his illness (if it indeed is an illness and not a perjorative label for unwelcome human behavior) and he buys property at slightly inflated prices in order to carry out certain money-making schemes. Can his representative later set aside the property transaction? In *Faber v. Sweet Style Mfg. Corp.*, the highest New York State court said that he could. In the *Moore* case in particular the nature of the testimony as to the alleged incompetent's condition was challenged; for example, Mr. Moore's minister was asked for his opinion as to the rationality of the insured. The minister had some difficulty replying because the evidence indicated that the insured had been perfectly able to drive a car. Can a man drive a car and yet not be able to enter into a contractual relationship? Medico-legal questions are also raised by the second issue in *Chesson*. Mr. Chesson, standing in a hallway, suddenly jumped upward and backward, hitting his head against a cement floor. His death was later ascribed to a cerebral hemorrhage. The issue then became: under the circumstances was the cerebral hemorrhage an accident within the meaning of a double indemnity clause? On this issue a jury verdict for the plaintiff was reversed. The training of young lawyers today seems to demand at least a nodding acquaintance with a wide range of materials not traditionally classified as legal.

**Contracts in Restraint of Trade**

Two cases during the period surveyed illustrate the balance the law must make between freedom to contract and the necessity of open competition viewed as an economic good. The paradox is created by promises not to enter a given field of endeavor. Our basic economic tenent that open competition is a desirable policy is undercut in the case of an express promise purchased as a result of an otherwise perfectly acceptable exchange which limits the competi-

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28 N.C. at 101, 150 S.E.2d at 42 (1966). Professors take chiding occasionally from some practicing lawyers and some judges to the effect that we ought to teach "the law" and quit worrying about social science, medicine, economics and the like. But is the problem posed by *Chesson* medical or legal? What is "incompetency?" Why is a depressive unable to contract? Even the psychiatrist for the plaintiff testified that Mr. Chesson was not and never had been feeble-minded.


The rule frequently enunciated is that reasonable restraints will not be stricken and that reasonableness must be measured in terms of the geographic and time limitations imposed. Reasonableness is often tested in economic terms, although not verbalized as such. In *U-Haul Co. v. Jones*, a service station operator became agent for U-Haul in the business of renting automobile trailers. The terms of the agreement included a promise by the agent to account weekly, notice of termination provisions, a liquidated damages clause and a promise ("The dealer warrants, covenants and agrees . . .") by the agent that upon termination he would not undertake to rent trailers for any other competing firm within the county for a period of "the then existing telephone directory listing, plus a period of one year. . . ." The agent breached the agreement by not transmitting receipts promptly, U-Haul terminated, and the agent immediately began to rent a competing brand trailer. U-Haul then instituted action to obtain a temporary injunction against such activity and also to recover the liquidated damages and the unpaid receipts. The case presented no novel problem for the Supreme Court but the method of measuring the length of time of the restraint intrigues the reader. This could be described as the case in which the North Carolina Supreme Court took judicial notice of the fact that you can let your fingers do your walking through the yellow pages. In order to hold the restraint reasonable they took judicial notice of the fact that telephone directories are annually revised and then issued, and that an uninformed person, desiring to rent a trailer would probably turn to the yellow pages index of the telephone directory to ascertain where one could be obtained. Since the time limitation could not exceed two years and the geographical limitation was a single county the restraint was acceptable. The injunctive relief was appropriate although a possible remedy at law—the liquidated damages—was also available to the plaintiff. Is the fundamental basis for the decision an implicit knowledge that there are scores of trailer rental agents in the area so that the harm to competition caused by the elimination from the market of this one agent is *de minimus*?

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269 N.C. 284, 152 S.E.2d 65 (1967).


Id. at 287, 152 S.E.2d at 67-68.

In *Engineering Associates, Inc. v. Pankow* a covenant not to join a competing firm for a period of five years after termination of an employee's present position was said to be unreasonable especially as to the geographical factor since there was no space limitation. The statements are dicta since the employee had never agreed to the proviso and received nothing of value for it.

**INTERPRETATION OF CONTRACTS**

That process labelled "interpretation" by which a Court must read meaning into a set of words to settle lawsuits continued during the survey period. An outstanding example of the judicial process of implication—creating a promise where no express promise existed—is *Kayann Properties, Inc. v. Cox.*

Mrs. Cox owned outright a piece of property given to her by Mr. Cox prior to their marriage; in anticipation of a possible divorce, she agreed to transfer to him a half interest as tenant in common in exchange for the right to live in the home on the property the rest of her life. Certain other benefits not mentioned in the deed were contained in a separation agreement. Mr. Cox was to pay off the mortgage on the property and in the separation agreement the obligation of Mr. Cox to make monthly payments to Mrs. Cox as well as to pay off the mortgage was made an express lien on his half of the property. The transaction went through, and Mr. Cox then conveyed his half by quarters to two purchasers, one of whom wished to build a motel on the property but needed the entire tract for its purposes. The other transferee was Mr. Cox's lawyer who earlier had unsuccessfully attempted a quiet title action against Mrs. Cox. The motel builder brought an action for partition by sale. The whole purpose of the transaction was to provide Mrs. Cox, ill of a disabling disease, with a suitable income and a place to live for the rest of her life. Since a partition by sale might eliminate or injure her interests, the Court properly held that Mr. Cox had by implication made a promise never to partition and this was binding on his successor. While the successor claimed no notice of the terms of the separation agreement, the implied promise was "revealed" in the terms of the deed of separation which gave Mrs. Cox her life estate and which was in the chain of title.

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In *Taylor v. Gibbs* a "sure rent" tobacco lease contained a provision reducing the rent if the tobacco acreage allotment were reduced more than five percent during the year. That year the "government" instituted poundage controls which had the same effect of reducing the lesser's income. The lessee withheld a portion of his rent and the lessor sued, winning a judgment on the pleadings in the trial court. On appeal the Supreme Court said the reduction by poundage control was totally unanticipated at the time of the making of the lease contract and held that the agreement, clear and unambiguous in its terms, must be given effect. This is a hard case, for by using the words they did the parties seemed to have in mind a reduction in rent if a government action reduced the income of the lessee. But if written documents adopted by the parties are to have any significance at all, there must be a limit to what a judge can do by way of interpretation and that limit is reached when the words as viewed in their ordinary sense, have a generally agreed meaning as these did here.

In *Consolidated Vending Co., Inc. v. Turner* the maker of a negotiable promissory note was denied the opportunity of proving by parol evidence that his promise to pay was conditional on receipt by the holder of "promotion money" from other sources which was to have been credited on the note. The plaintiff had the food and drink concessions at a number of "speedways" and the defendants operated the "speedways." The promotion money turned out to be money paid to a concessionaire by suppliers for the exclusive privilege of supplying the food and drink requirements.

A provision in a lease permitting the lessor to terminate, re-enter and repossess the property if a receiver were appointed for the lessee was held to extend to a sub-lessee where the lessee-sub-lessee had had a receiver appointed for it. The Court in *Carson v. Imperial '400' Nat'l, Inc.* said that it could not under the guise of construction rewrite the contract: the lessee was named specifically, and it was the lessee who was in receivership.

The phrase appearing in the uninsured motorists' indorsement to the ordinary automobile liability policy, covering injuries caused by accidents arising "out of the ownership, maintenance or use" of

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an uninsured automobile was interpreted as covering an uninsured automobile up on blocks being repaired. The car slipped off the blocks injuring the plaintiff who was a member of the family covered by a family policy issued to his wife which bore the uninsured motorists' indorsement. In reaching this result in *Williams v. Nationwide Mut. Ins. Co.*, the Court applied the ordinary rules of contract interpretation and decided that maintenance meant repair in its common, non-technical meaning so that the facts came within the coverage.

**Statute of Frauds**

The magic of those few words in the Statute of Frauds "signed by the party to be charged" has been illustrated again in *Burkhead v. Farlow*. The written option involved the purchase of a tract of land and was signed by the seller; the buyer accepted orally saying, in effect, "My acceptance of this title depends on the title examination of this property." Justice Sharp in a perceptive opinion pointed out that the oral acceptance was all that law requires. The option giver was bound; the option acceptor was not. To the argument that the acceptance was conditional and thus no acceptance but a rejection and counteroffer, Justice Sharp drew the well known distinction between such acceptances as require the original offeror to do something he otherwise would not be required to do, and those acceptances which merely verbalize what the law would read into the contract anyway. Here the acceptance fell within the latter concept. Any contract to convey land implies an undertaking on the part of the vendor to convey good and marketable title and the vendee had a right to have his lawyer check his title; there was no requirement that any particular person approve. The case also holds that since the option did not require payment of the price until after the delivery of the deed, the plaintiff did not have to tender payment because the defendant had refused to execute the deed. Shades of *Pordage v. Cole* and the rules of Serjeant Williams! On the option aspect of the case, it should be compared with *Carr v. The Good Shepherd Home, Inc.* where the oral acceptance was one

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45 N.C. GEN. STAT. § 22-2 (1953).
46 266 N.C. 595, 146 S.E.2d 802 (1966).
47 Id. at 596, 146 S.E.2d at 803.
which did propose an agreement other than the one appearing in the written option. In *Ferguson v. Phillips*\(^5\) a tender of payment seven hours late was no tender; time was of the essence in that option. And in *Young v. Sweet*\(^6\) an option to renew a lease the new rental "subject to adjustment at the beginning of the option period" was held unenforceable, the price term being too indefinite. On the matter of tender, *Evans v. Transportation Ins. Co.*\(^7\) can be said to stand for the proposition that a legally sufficient tender, although refused, does not have the effect of extinguishing the debt or obligation represented thereby.

**DAMAGES**

Several cases decided during the period surveyed had to consider the problem of contract damages. Perhaps the most important is *Freeman v. Hardee's Food Systems, Inc.*\(^8\) which expressly sets the stage for a square holding in North Carolina that an employee wrongfully discharged from a term contract can claim as an element of damages the future losses he might suffer when the action is brought before the end of the term. A student note reviews the problem on an earlier page.\(^9\) One important key to the *Freeman* situation lies in a brief cross reference citation by Judge Bobbitt. "In this connection," he writes, "it seems appropriate to call attention to the rule stated in *Thomas v. Catawba College* . . .\(^10\) relating to the measure of damages."\(^11\) That rule requires an employee in such circumstances to mitigate his damages if he can by finding other suitable work. The measure of damages thus is the amount of compensation promised less the amount the employee earns or by reasonable effort could earn during the contract period.

In *City of Kinston v. Suddreth*\(^12\) a provision in a contract permitting the city to retain a deposit as liquidated damages was held to limit recovery for breach to that figure although the injured party did show loss in excess thereof. The clause was contained in a con-

\(^{51}268\) N.C. 353, 150 S.E.2d 518 (1966).
\(^{52}266\) N.C. 623, 146 S.E.2d 669 (1966).
\(^{53}269\) N.C. 271, 152 S.E.2d 82 (1967).
\(^{54}267\) N.C. 56, 147 S.E.2d 590 (1966).
\(^{55}\text{Note, 45 N.C.L. Rev. 223 (1966).}\)
\(^{56}248\) N.C. 609, 104 S.E.2d 660 (1958).
\(^{58}266\) N.C. 618, 146 S.E.2d 660 (1966).
tract for the purchase of property owned by the city and read as follows:

That if the said party of the first part (the buyer at auction sale who breached) shall fail to so purchase and to comply with such bid and to comply with the terms of this contract, that then the $4000.00 so deposited with the City shall be forfeited to the City as liquidated damages, and the said party of the first part shall have no further rights therein. . . .

Does that say that if Kinston suffers damage in excess of 4000 dollars it cannot recover the excess from the contract breaker? The Court said that it did, and the weight of authority seems in accord. If there is a possibility that damages on breach will exceed the amount of the deposit, contract drafters should beware the use of the phrase "as liquidated damages." Without that language the plaintiff's position is much improved.

Another damages case involved a contractor's warranty to repair, replace, or adjust his materials and workmanship in a home he had built at no cost to the purchaser-owner. Here the owner's measure of damages was the cost of repair or replacement and not the difference in value between what the home properly completed would have been worth and what it actually was worth in its defective state. *Leggette v. Pittman.* The contractor argued that the owner should recover the difference in the two values, not the cost of repair, but the headnote attributes the argument to the owner.

In *Jenkins v. Winecoff* the jurisdiction of the superior court turned on whether a claim for recovery of a portion of a down payment made to a real estate broker was contractual when brought by the seller. The Supreme Court held that the cause of action did sound in contract and, as the amount was 200 dollars, the superior court had no jurisdiction. G.S. § 7-121 and Article IV, Section 27 of the North Carolina Constitution give the justices of the peace exclusive jurisdiction over such claims.

It is worth remembering that as between the parties the fact that a negotiable instrument has been given has no particular significance.

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68 Id. at 619, 146 S.E.2d at 661.
69 5 CORBIN, CONTRACTS 1074 (1964).
60 See Royer v. Carter, 37 Cal. 2d 544, 233 P.2d 539 (1951) (Vendor given damages in excess of down payment retained where no reference made to liquidated damages; seller had "option" to retain.)
insofar as cutting off defenses is concerned. The court pointed this out in Montague v. Womble\(^3\) and allowed the defense of no consideration to be asserted. In Beaver v. Ledbetter\(^4\) a clause in a deed stating that the grantee assumes and agrees to pay a mortgage against the property involved was held not to be evidence that the grantee did in fact undertake such personal liability. It does not raise any presumptions and evidence that the grantee expressly or impliedly assented thereto or ratified it, is required.

The very common provision in construction contracts giving to the architect the power to decide disputes arising among the contractors on the job and to withhold from one contractor's payment damages for work the architect decides is faulty or injurious to another contractor was judicially approved in Welborn Plumbing & Heating Co. Inc. v. Board of Educ.\(^5\) The dispute was settled according to the agreement of the parties by the architect, and the court does not concern itself with whether the contract was a good or a bad one, a wise or a foolish one, from the standpoint of the defaulting contractor.

**CRIMINAL LAW AND PROCEDURE**

*Kenneth L. Penegar*

**Sanctioning Law**

Although the North Carolina Supreme Court has recently proclaimed "there is no such thing as a 'science of penology,'"\(^1\) and while the Court is very reluctant to give very much elasticity to the concept of a cruel and unusual punishment,\(^2\) it finds the occasion more and more frequently to review and not infrequently reverse the judgment of trial courts involving the illogic if not the undesir-

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\(^1\) *State v. Taborn, 268 N.C. 445, 447, 150 S.E.2d 779, 781 (1966).*

\(^2\) "We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." *State v. Caldwell, 269 N.C. 521, 527, 153 S.E.2d 34, 38 (1967); State v. Davis, 267 N.C. 429, 148 S.E.2d 250 (1966); and State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966)."
ability of certain sentences. More often than not the logic applied is that of statutes. Less frequently it is the fortuity of the number of separate judgments entered below. Other times it is a rule of its own making that the Court applies in appraising the sentence appealed from.

Illustrative of the first of these three categories are three cases in which ten year terms of imprisonment were awarded for simple larceny of chattels or money under the value of two hundred dollars. Since G.S. § 14-72 makes such larceny only a misdemeanor, the Court held each of these sentences excessive. The circumstances surrounding a particular instance of larceny, such as breaking and entering, may of course give rise to a separate charge and sentence, as in State v. Ford, in which situation the sentencing judge apparently has two choices. He may enter one judgment on both counts and sentence as severely as the greater offense warrants. Or, he may enter two judgments, preserving the outer limits of sentences accordingly. In the Ford case the trial judge erroneously entered a five to seven year sentence on the larceny count as well as on the breaking and entering charge. In State v. Smith, the sentencing judge made the other choice, entering but one judgment for both offenses—breaking and entering and larceny—and awarded an indeterminate sentence of seven to nine years, a permissible sentence for the burglary count. This judgment was upheld by the Court, while that in Ford was not, even though in Ford the sentences were to run concurrently.

In view of the fact that in Ford the sentences were to run concurrently, it well may be wondered whether the decision marks any departure from the long standing Hirabayashi rule to the effect that if one court is proper, error with respect to another need not be considered. Of course if the sentences are to run consecutively, and

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4 266 N.C. 743, 147 S.E.2d 198 (1966).
5 266 N.C. 747, 147 S.E.2d 165 (1966).
6 A similar decision is State v. Hart, 266 N.C. 671, 146 S.E.2d 816 (1966), wherein the Defendant pleaded guilty to six counts of passing worthless checks, each a misdemeanor. Six months imprisonment on each was awarded for a total of thirty-six months. The Court held that where the charges are “consolidated for trial and judgment,” the court could not impose a sentence greater than for any one crime charged. In other words two years would be the maximum for any one or all these charges.
7 See Hirabayashi v. United States, 320 U.S. 81 (1943), discussed in
there is error with respect to the judgment in one of two charges, then of course our Court will set aside the erroneous judgment and remand for new sentencing on that count.8

Furthermore, the particular sanctioning outcome could be the function of yet another fortuity not clearly related to the goals of applying our criminal law sanctions. Under G.S. § 14-72 for larceny to be a felony the state must allege and prove the value of the property stolen to be in excess of two hundred dollars.9 But G.S. § 14-72 does not apply to certain other kinds of larcenies such as from the person or by breaking and entering, in which case the value of the property stolen is not important. It is a felonious larceny in that event. But a remaining question—now the focus of some confusion in the North Carolina Court—is whether the indictment has to allege that the larceny was by breaking and entering in order to sustain a verdict and judgment of felonious larceny or whether it will suffice if the evidence indicates these circumstances. The Fowler, Ford, Smith and Davis cases mentioned above would suggest that such allegation is essential. In two other recent cases the suggestion is the opposite.10 But two members of the Court now are of the view that in order to make out felonious larceny, whether by breaking and entering or by stealing property of greater than two hundred dollars in value, the jury must be specifically instructed to find these circumstances.11

It may be possible to summarize this brief consideration of some of the problems relating to sentences that hinge on technicalities of statutory construction in the larceny area and on perceptions of regularity in charging, proof, and judgments. Whether or not the sentence of a person who has committed some kind of theft offense may or may not be directly related to the social seriousness of the total offense seems to depend in part upon whether the solicitor draws the indictments with these constructions and perceptions in mind, whether the judge submits precise instructions to the jury


9This does not mean, however, in the view of a majority of our Court that the jury must be specifically instructed to so find. State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966).


with these factors in mind, and, finally, whether the judge enters single or multiple judgments. In any case the policies that should guide the respective decision-makers in choosing among these alternatives seem lacking or of such subjectivity as to not be capable of easy articulation.

Another troublesome matter for the courts in fixing proper sentence has been the concept now embodied in what may be called the Blackmon rule. Under this rule language appearing in particular statutes which is insufficiently precise to limit the sentencing judge's discretion, such as "fined or imprisoned in the discretion of the court," will be limited by the provisions of G.S. § 14-2, which provides for a maximum term of ten years for any person convicted of a felony "for which no specific punishment is prescribed by statute." Thus, in a conviction under G.S. § 14-177, the "crime against nature" statute as amended by the 1965 General Assembly, a sentence of eighteen to twenty years is excessive. Excessive also is a sentence of eighteen to twenty years for involuntary manslaughter under G.S. § 14-18, as amended in 1933.

Three other cases raise a similar problem concerning the limits imposed upon the sentencing judge upon remand of the case when the Supreme Court has found error in one or more of the judgments previously entered. In State v. Smith and in State v. Rhinehart as well as in State v. Thompson, mentioned above, the Court held that the petitioner was entitled to credit for time spent in custody on the erroneous sentence to be applied to any new lawful sentence imposed. No one should quarrel with the soundness of this rule even though it probably encourages the sentencing judge to give the maximum sentence allowable.

A harder question in the same general area of the sentencing judge's discretion is presented in State v. Pearce, where the error in the appellant's first trial was not related to the sentence but to the admission of a confession. At the first trial the appellant was given a twelve to fifteen year sentence for assault with intent to commit rape. At the new trial the judge awarded a straight eight

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year term of imprisonment. Appellant, however, had served six and one-half years under the first sentence. Taking the eight years together with the six and a half already served, it appeared to appellant that his sentence was being arbitrarily increased over the minimum of the first sentence. The Court in *Pearce* ruled: "If a sentence is set aside on a defendant's application, the former judgment does not necessarily fix the maximum punishment which may be imposed after a second conviction." Thus the Court reaffirmed its position taken in *State v. Slade* and in *State v. Weaver* to the effect that the earlier sentence did not impose any ceiling unless the time served plus the new sentence resulted in a sentence in excess of the statutory maximum. Between the time of the decision in those cases and the present one, however, the issue of the constitutionality of this procedure was presented in a habeas corpus proceeding to a federal district court. In the resulting decision in that case, *Patton v. North Carolina*, Judge Craven ruled that a harsher sentence upon retrial must rest upon a discernible reason if due process is not to be violated, citing the inevitable intimidation not to proceed with appellate or collateral review inherent in the practice of increasing sentences. The North Carolina Court in *Pearce* chose not to review the issue more fully than it had done in *Weaver*.

Even more difficult than the issues raised in the above decisions is the unspoken problem of determining what factors, what policies,
and what expectations, based on what assumptions should dictate the choice of, for instance, fifteen years for the assault with intent to rape conviction in the *Pearce* case or a two year sentence for the larceny of fifteen cents worth of tomato paste as in the case of *State v. Wiggs.* A careful enunciation of statutory guidelines to assist in the selection of an appropriate sentence, whether it is to be active or supervised conditional liberty, and if it is to be incarceration, then how long, etc., is singularly lacking in most criminal codes of the country. As the President’s Commission on Law Enforcement and Administration of Justice recently stated:

The penal codes of most jurisdictions are the products of piecemeal construction, as successive legislatures have fixed punishments for new crimes and adjusted penalties for existing offenses through separate sentencing provisions for each offense.

As a consequence of this piecemeal construction there is little in the way of unifying theme, theory, or thought running through the sentencing provisions in these codes which the sentencing judge must consider in fashioning a particular “prescription” for the “ills” of particular cases. Consider what help it would be merely to have some legislative expression of various degrees of seriousness of such broad groupings as felony and misdemeanor. Are there felonies—and personalities—which from society’s point of view deserve the possible application of an extended term of years, something, perhaps, beyond five years actually spent in prison? Is forgery, for example, on the same plane in such a view as a discrete instance of sodomy between consenting adults? Is the theft of $250 without violence on the same plane as the robbery of the same amount of property? In each of the four cases put the court could impose a ten year sentence.

An enlightened sentencing code . . . should provide for a more selective use of imprisonment. It should ensure that long prison terms are available for habitual, dangerous, and professional criminals who present a substantial threat to the public safety and that it is possible for the less serious offender to be released to community supervision without being subjected to the potentially

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25 *269 N.C. 507, 153 S.E.2d 84 (1967).* Although the measure of the sentence was not reviewed by the Court, a convenient basis for reversal on this count was found in the absence of any proof of ownership of this grocery store item in the person alleged in the warrant.

destructive effects of lengthy imprisonment. Moreover, it should provide the courts and correctional authorities with sufficient flexibility to fix lengths of imprisonment which are appropriate on the facts of each case.27

Considerable flexibility already exists in much of the rather informal structure that we do have. Consider, for example, the court's power to place a defendant on probation under certain conditions, to suspend sentence for a time, or, in North Carolina anyway, to "continue prayer for judgment" long enough to see how the defendant disposes himself. The purpose of all three expedients is thought to be much the same—to allow the defendant opportunity to conform under supervision; but the invocation of the sentence is usually for specific cause, that is violation of a specified condition. This right to specificity in advance is not available, however, to one for whom prayer for judgment has been continued, as illustrated in the case of State v. Thompson.28 There the appellant had been given an active sentence under several counts of forgery; but judgment had been continued for several other related counts. Five years later the state's solicitor gave notice of his intention to pray for immediate judgment on the other counts, apparently because of reports of infractions of disciplinary rules in the prison. A further eight to ten year sentence was imposed at the ensuing hearing, to begin at the expiration of the five year term. It was from this judgment that the appeal in question was prosecuted. Although the point at issue in the appeal relates to whether the appellant was entitled to a bill of particulars as to the infractions,29 the case is instructive for the light it sheds on informal developments toward elaborating the sentencing

27 Ibid. The Commission cites with apparent approval, for example, the categories of felonies and sentencing criteria developed in the Model Penal Code and the Model Sentencing Act. Both models provide "an ordinary term, which is generally shorter than authorized under present statutes, and an extended term, which the court may impose when certain factors are present. . . . Developing proper standards to guide the courts in determining the length of prison sentences is only in the elementary stages. . . . [But] they are the most definite criteria . . . which have been formulated on the basis of limited ability to predict behavior. These standards will be revised should the behavioral sciences develop improved ways of identifying dangerous offenders." Id. at 17.


29 If the sentence had been suspended, the Court conceded, he would have been so entitled. Quaere why should the result turn on such a technical distinction if the man's liberty is vitally at stake? As it was, the appellant could not call witnesses or otherwise prepare his "defense" at the hearing in which he was awarded the eight to ten year sentence.
process. It is difficult to determine, however, from the report of the case whether the sentence appealed from was the product of a desire to punish or control behavior in prison or the product of a desire to find out more about the offender with respect to the crimes he actually committed. Certainly the latter desire has a place in the peno-correctional process, but the sharing of the competence to make decisions about appropriate sentences with authorities other than the court customarily rests on the expectation that in the intervening time classification studies, personality appraisals, background reports of work-habits, etc., will be forthcoming which will be useful to the judge who finally imposes sentence. In the instant case apparently only the bare facts of the alleged infractions, which were uncontradicted save by the testimony of the appellant himself, were presented to the court, suggesting that the courts have been enlisted in some sort of subtle disciplinary role in tandem with the prison staff.\(^8\)

If an appellate court is to make any intelligent appraisal of a sentence or judgment, it is apparent that an adequate record of the proceedings below must be made. In this respect the record in the *Thompson* case just discussed seems adequate at least in revealing what the trial court did consider before entering judgment. All too often, however, in cases where a guilty plea is entered and the court proceeds at once to pronounce sentence, no record at all is kept even to indicate circumstances surrounding the commission of the crime itself which might reflect severity or mitigation. And, not infrequently, it will be important in passing on an attack of the guilty plea itself to know what happened below. This is illustrated by *State v. Jones*,\(^9\) where on appeal it was suggested that appellant entered the guilty plea to charges of forgery with the expectation that other charges would be dropped. But the Court felt it impossible to consider matters not of record. It is not unlikely that a record will have to be made eventually to consider the merits of appellant's claim, in a collateral attack via a post-conviction hearing or habeas corpus in the federal courts. The Court was apparently not unmindful of this prolongation of the review process when it lightly

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\(^{8}\) Loss of good time and unfavorable reports to the parole board have been the more traditional modes of control in prison, plus of course loss of privileges and, for the most serious of incidents, isolation. There was nothing here to suggest that the prison rule infractions amounted to new crimes for which charges and trial would be appropriate.

\(^{9}\) 268 N.C. 160, 150 S.E.2d 52 (1966).
admonished: "In view of recent rulings, it would seem to be advisable that the presiding Judge see that a record is made of the evidence adduced before him so that upon appeal the appellate court may have the information that was available to the lower court."\(^2\)

**SUBSTANTIVE MATTERS**

**Crime and Defenses**

Homicide committed through the mere negligent operation of an automobile is not a crime in most common law jurisdictions or in North Carolina, although a few jurisdictions have enacted vehicular homicide statutes to cover those cases where the actor's conduct does not rise to the level of recklessness or wanton misconduct sufficient to convict for manslaughter under the general rule.\(^3\) Although some thoughtful observers have expressed difficulty in understanding and applying the concepts of recklessness and wanton misconduct as a kind of super negligence which will suffice for the mens rea essential to a common law crime,\(^3\) the general rule just stated is so well and long established that it is surprising to find a prosecution was begun in the case of *State v. Reddish*.\(^5\) In that case the defendant was overtaking the deceased on a divided highway of the interstate variety. Deceased's car was apparently slowing in preparation for a right turn off the highway. Defendant's car was doing no more than sixty miles per hour when his car struck the left rear of the deceased's car. The only permissible inference seems to be either that defendant was traveling too closely behind the other car or failed to notice the other car's turn. It might present a case for recovery of damages in a civil action, but it clearly called for a dismissal in a criminal forum under existing law. The Supreme Court held that the motion to dismiss was improperly denied. "Civil negligence," the Court stated, "is not enough to establish criminal responsibility."\(^6\) Perhaps equally surprising was the jury's verdict of

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\(^5\) The American Law Institute's Model Penal Code, Tent. Draft No. 4 (1955), comments to sec. 2.02 at page 128: "The apex of ambiguity is 'wilful, wanton negligence,' which suggests a triple contraction—'negligence' implying inadvertence; 'wilful,' intention; and 'wanton,' recklessness." (quoting from Jerome Hall, General Principles of Criminal Law 227-228 (1947).
\(^6\) 269 N.C. 246, 152 S.E.2d 89 (1967).
guilty of manslaughter as charged, although one is not completely out of sympathy with what must be taken as an authoritative effort (here on the part of the prosecutor) to "do something" about the mounting death toll on the state's and nation's highways. As suggested above, however, the traditional concepts and categories may not be sufficient to deal with the task. Arguably, the civil law remedy may provide an adequate deterrent to infractions of rules of the road, but the index of rising traffic mishaps resulting in millions of dollars in damages to property and loss of life to thousands of Americans annually does not seem to bear this out. It is certainly open to question whether a motorist who speeds slightly on an open, high-speed freeway, or follows a bit too closely is mindful then of his obligation to pay damages if he injures the other fellow; and of course there is the existence of liability insurance to further complicate the picture. Beyond this, however, the kind of homicide represented by the Reddish case is more than just a criminal law problem; it represents a challenge to the total safety and transportation policy of a commonwealth.

While the plea of not guilty (coupled with the motion to dismiss) was enough to raise the issue of insufficiency of the evidence to make out all the elements of the offense of manslaughter in the Reddish case, at least as far as the Supreme Court is concerned, sometimes trial courts will confuse such general denials with affirmative defenses. In State v. Fowler,\(^{27}\) for example, defendant was charged with first degree murder and he put on evidence purporting to show that the killing was accidental. In his instructions to the jury the trial judge said in effect that if the defendant would rebut the presumption of malice arising from an intentional killing and thus reduce the crime to manslaughter or "excuse it altogether on the ground of self-defense, unavoidable accident . . . or other defense," then he must "establish to the satisfaction of the jury" such excuse. Quoting extensively from Justice Sharp's opinion in State v. Phillips,\(^{28}\) the Court held this was error in that it confused an affirmative defense, in which the defendant carries a burden, with a simple denial of an intentional killing.\(^{29}\) One difficulty with this

\(^{27}\) 268 N.C. 430, 150 S.E.2d 731 (1966).
\(^{28}\) 264 N.C. 508, 142 S.E.2d 337 (1965).
\(^{29}\) The decision is also instructive for the point that in affirmative defenses the defendant must only "satisfy" the jury as to the existence of the excuse or justification or provocation and not prove "by the greater weight of the
seemingly simple distinction between affirmative defenses and general denials is that in telling a jury that the defendant must prove something or "satisfy" the jury as to the existence of something the Judge may imply that the state has established its case, subject only to be undone by something the defense may make out to be adequate evidence. In other words, it may be preferable to avoid language about shifting burdens in criminal trials, for the ultimate burden of proof on the existence of every element of the offense charged rests on the state in our system.\(^4\)

Further complications in the area of self-defense are revealed when the context shifts from a homicide case to one involving assault and battery. In *State v. Fletcher*,\(^41\) where defendant was prosecuted for an aggravated assault under G.S. § 14-32, evidence was presented suggesting that defendant was himself resisting an assault by his adversary. The trial court instructed, in part, that in order to benefit by the principle of self-defense, defendant "must show that he was free from blame." The Court on appeal concluded:

"In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim."\(^42\)

The distinction between this kind of case and one involving homicide, the Court explained, is that upon a showing of homicide with a deadly weapon the presumption of malice, sufficient to make out common law murder (second degree under conventional statutes), arises. But for this presumption the rule would be the same for both kinds of offenses, viz., the court would not in its instructions use language about shifting burdens of proof. But in either case, evidence" or "beyond a reasonable doubt." The Court here cited *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875 (1943); and *State v. Matthews*, 263 N.C. 95, 138 S.E.2d 819 (1964).


\(^41\) 268 N.C. 140, 150 S.E.2d 54 (1966).

\(^42\) *State v. Fletcher*, 268 N.C. 140, 142, 150 S.E.2d 54, 56 (1966). The case is also interesting in that it suggests, via the uncontested portions of the instruction, that North Carolina clearly follows the so called retreat rule, to the effect that before deadly force may be used even in resisting an unlawful assault the actor must withdraw to a place of safety, if such place existed.
if evidence is allowed which suggests the existence of necessity, self-defense, or provocation, or other matter in excuse or partial reduction of the charge, it would seem simpler and less confusing to the jury if they were told that the state's case must demonstrate beyond doubt the existence of every element of the crime charged. Then the court could go on to explain the significance of defense evidence suggesting that defendant did not act with malice aforethought. The emphasis then is on the elements of the crime and not on a subjective evaluation of the reasonableness of the defendant's conduct, although that is not without importance in determining the central question of the presence of all the elements of the offense.48

The crimes of kidnapping and rape are frequently committed simultaneously, at least in the technical sense. But not every prosecution of the capital crime of forcible rape, even though it involves taking the woman by force and transporting her some distance, also presents the charge of kidnaping. Technically, too, both these crimes involve some kind of assault; yet that offense is rarely separately charged and to do so would present questions of double jeopardy. If multiple defendants are involved, the state has yet another po-

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48 Even in homicide cases the Court will not assiduously hold to its affirmative defense doctrine, if the state's evidence suggests an excuse for a deliberate killing—as by defense of habitation. State v. Miller, 267 N.C. 409, 148 S.E.2d 279 (1966), is illustrative. In this case a drunk was trying to break into the defendant's house by tearing away the screen door. The victim had been turned out of the house on a previous occasion. The defendant said "I told you not to tear my screen out," and fired one mortal shot with his pistol. Our Court thoughtfully added: "A householder will not . . . be excused if he employs excessive force in repelling the attack, whether it be upon his person or upon his habitation." 267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966). The trial court had instructed on self-defense, not on the "substantive right" to defend one's habitation. This amounted to reversible error. The most relevant point here is that defendant had not put on any evidence; nor does he have to in order to benefit by the principles raised by the other evidence; nor need he even request special instructions. If, as the Court said in State v. Fletcher, supra, "the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim," why then is not the state's burden to prove an unlawful homicide? Should not the strength and quality of the state's evidence be pitted against that of the defendant regardless of what the charge is, regardless of what the mitigating or excusing circumstances are alleged to be? The alternative, maintained in dictum in the Fletcher case, is to pit the defendant against some abstract standard even before the jury has passed on the presumed probity of the state's evidence. After all, "reasonable resistance to entry of habitation" or "self-defense" or "provocation" are or may be as effective to negative the presence of the operative mens rea as "the plea of accident," yet in our Court's view the latter in effect rests on a higher plane than the others.
tential charge to make, aiding and abetting others in the act of forcible rape. The prosecution thought of all these possibilities in *State v. Overman*, where convictions for rape by three brothers with aiding and abetting one another in the commission of rape were upheld. Upon a recommendation for life imprisonment, judgment was entered accordingly. At the trial defendant’s pleas of former jeopardy were entered based on the theory that a former trial for kidnapping the same girl was a bar. These pleas were rejected. The earlier trial resulted in convictions of assault. Thus, the state has another opportunity to charge defendants with a more serious offense. Motions for separate trials also were denied. Whether or not the requirements of former jeopardy were made out, the most remarkable feature of the case is that successive trials were used. Justice Lake points out that due process has not so far been interpreted to forbid the states to use multiple trials involving more than

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44. 269 N.C. 453, 153 S.E.2d 44 (1967).
45. Compare State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966), where both offenses were charged but tried together against one defendant.
46. In this respect Justice Lake’s disposition of the argument is one of the more interesting features of the case. He concedes that the argument that assault (of which defendants had been formerly convicted growing out of evidence identical to that in the rape trial) is essential to rape is an “ingenious” one but without merit, for “a simple assault is probably not, and an assault on a female is certainly not, an essential element of the crime of kidnapping, since the victim of a kidnapping need not be a female and may be enticed away by fraud rather than . . . by violence or threat. . . .” State v. Overman, 269 N.C. 453, 465, 153 S.E.2d 44, 55 (1967). Somehow this is not satisfying. First, this case did involve a forcible abduction, albeit after getting into the car of the victim’s escort by a ruse. Second, why did the Court fudge with the expression “probably not” an essential element of kidnapping? Third, the argument was addressed to the later prosecution of rape, which does involve an assault, and not the crime of kidnapping, of which the defendants had been impliedly acquitted. See State v. Case, 268 N.C. 330, 150 S.E.2d 509 (1966), for an unusual instance of where double jeopardy does clearly attach, namely where successful petitioner in a habeas corpus declined but was forced to go through a new trial. And see State v. Vaughan, 268 N.C. 105, 150 S.E.2d 31 (1966); after a judgment as of nonsuit the plea of former jeopardy will lie. But the order of a mistrial because of illness of prosecuting attorney in a non-capital case will not support the plea. State v. Battle, 267 N.C. 513, 148 S.E.2d 599 (1966). Nor will the declaration of a mistrial because of the illness of a juror. State v. Pfeifer, 266 N.C. 790, 147 S.E.2d 190 (1966).
47. The failure to grant separate trials, too, seems regrettable as a general matter where some defendants seem more criminally involved in a series of events than others, as was the case here. See in this respect also State v. Battle, 267 N.C. 513, 148 S.E.2d 599 (1966), where the Court declined to reverse the trial judge’s denial of a motion for separate trials for persons accused of conspiracy, the motion being in the trial court’s “sound discretion.”
one offense or several counts of the same offense. But this principle does require that fundamental fairness be preserved in such a procedure. It is difficult to give concreteness to such a term where the cases have not gone so far as to find fundamental unfairness in almost identical circumstances. Yet the procedure does suggest that the state wished to minimize the risks of an adverse or “luke warm” jury in one trial by saving one principal charge for another. Frankly it is difficult to see, from the report of the case at least, why the state should have suffered from any lack of confidence in this case. Identification of the culprits was no problem; and in addition to the evidence of the female victim as to the circumstances surrounding the abduction there was the testimony of the girl’s escort. Admittedly the jury in the rape case did take quite a few hours to reach its verdict, but the Court’s speculation that this could have stemmed from deliberations about recommendations as to the sentence seems a plausible explanation. Under the circumstances it may be wondered what legitimate policy determined the decision to employ separate trials. If there was none, then the unfairness resulting in putting the defendants before successive juries with all the anguish that entails seems fairly obvious and unnecessary.

A case which sheds some light on the contours of the crime of assault with a deadly weapon deserves passing mention in this section. In State v. Wiggs, defendant was charged, among other crimes, with assault with a deadly weapon, “to wit, a gallon glass jar by threatening to hit [the officer] with the said jar. . . .” The Court held that such a description failed to allege that the instrument used was a deadly weapon, for the ordinary nature of the object did not by itself import its deadly or dangerous character. The Court said that unless the object used is commonly accepted as a dangerous weapon, then the indictment must sufficiently relate the circumstances making the ordinary object deadly.

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49 269 N.C. 507, 153 S.E.2d 84 (1967).
50 The principal reliance here was on State v. Porter, 101 N.C. 713, 7 S.E. 902 (1888); and State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); but the Court conceded some difficulty in distinguishing “borderline cases,” such as State v. Phillips, 104 N.C. 786, 10 S.E. 463 (1889), holding that a club, without further elaboration, could be taken to mean a deadly weapon. The distinction at least seems to have semantics on its side, for the word “club” itself suggests utility in fighting, whereas a glass jar, except perhaps as a missile, lacks something of that special utility. See Oxford
in any event, was made out, and the verdict would be so treated; accordingly the Court remanded the case for appropriate sentencing in this respect.

Two cases involving substantive crimes that are not themselves part of the body of prescriptions directly protective of public order but that support these prescriptions indirectly by reinforcing the integrity of the trial process are worthy of inclusion in this survey if for no other reason than their relative rarity. One is *State v. King*\(^{51}\) in which defendant was alleged to have procured another to commit perjury. Specifically, defendant was alleged to have suborned one Rainey Harris to testify at an earlier trial for illegal possession of three gallons of whiskey that the whiskey belonged to him, Harris, which testimony, it is now asserted, was known to be untrue by defendant King. The issue presented was whether Harris' testimony plus that of several officers who repeated what Harris told them as to King's asking him to testify falsely would suffice for a conviction of subornation of prejury. In holding that defendant's motion for judgment as of nonsuit should have been granted, the Court reiterated its rules that proof of such a crime must be made out by two witnesses who testify as to the former oath's falsity or one such witness plus "corroborating circumstances" of the false oath. In other words, all the state produced here was one witness to testify as to which oath was false and several who repeated this witness' testimony but nothing else independent of such statements to corroborate the single witness' account.\(^{52}\)

The other case is *In re Williams*,\(^{53}\) which presents the troublesome matter of when a trial judge should punish for contempt of court. The facts in *Williams* involved "the contumacious and unlawful refusal, in the presence of the court, by one duly subpoenaed, to be sworn as a witness," which the court said "is direct contempt and may be punished summarily."\(^{54}\) The issue was whether

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*Universal Dictionary* 328 (3d ed. rev. 1955), where the first usage given of the term "club" is as follows: "A heavy staff for use as a weapon, thin at one end for the hand, and thicker at the other. . . ."


\(^{52}\) The decision is basically in accord with *State v. Sailor*, 240 N.C. 113, 81 S.E.2d 191 (1954), and seems to support the sound policy of discouraging bilateral swearing contests among the often disgruntled participants of trials.


\(^{54}\) Thus spoke the Court, citing G.S. § 5-5. *In re Williams*, 269 N.C. 68, 75, 152 S.E.2d 317, 323 (1966).
there is fundamental conflict between this principle and the one protecting a clergyman's good faith refusal to answer questions relating to his association and conversations with a communicant. G.S. § 8-53.1 recognizes a qualified privilege in this respect. Reverend Williams, however, seems not to have reached the point of declining particular questions on the strength of his communicant's objection. Rather he claimed a privilege not to have to take the witness' oath and say anything about his associations with the defendant in a pending trial. This kind of professional arrogance, however well intended, seems out of place among the balanced policies of effective administration of criminal justice and the free exercise of religion. Accordingly the resulting decision upholding the ten day contempt sentence would appear well grounded. This is not to say, however, that any sterner measures should be employed to force compliance where matters of conscience are concerned. It might be of considerable public service if organized groups of such professionals would undertake to establish appropriate guidelines for the proper conduct of members in the context of civic enterprises like criminal trials. This would not end the need for a considered judgment by judicial authorities but it might assist in appraising the claim of conscience-related-to-a-professional-endeavor invoked by individual members of the cloth.

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Criminal Procedure*

Jurisdiction and Venue

"In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity," the Court said in McClure v. State. In that case the petitioner was illegally imprisoned after he pleaded guilty to a charge of assault with intent to commit rape and the indictment charged

56 Concededly this would be no easy matter when one considers the fact that many branches of the country's principal faith do not recognize organized, not to say centralized, responsibility or authority in doctrinal matters. But surely some consensus about the nature and scope of the professional relationships vis-a-vis believers could be empirically described. For a different view of the whole matter see Professor Daniel Pollit's "Constitutional Law" elsewhere in this Survey. And see generally Reese, Confidential Communications to the Clergy, 24 Ohio St. L.J. 55 (1963).

* This section is conceptually extended into other parts of the Survey, principally the section on Constitutional Law, where confessions and right to counsel are treated.

only that he had carnal knowledge of a virtuous girl under the age of sixteen. Lack of jurisdiction may arise, too, where over-lapping state and local law coverage is confused. Two examples are present in the recent decisions of the Court. In one, State v. Wiggs, the defendant was charged, among other things, with disorderly conduct "by cursing and swearing in a loud and boisterous manner in a public place." During the trial the prosecution introduced a section of the Raleigh City Code proscribing such conduct. Since defendant was not charged with a violation of a municipal ordinance, his motion for judgment as of nonsuit should have been granted. G.S. § 160-172 requires the specific pleading of particular local laws if they are to govern the charge alleged. In State v. Furio, while the city ordinance was specifically pleaded in the warrants charging the display of obscene pictures on an outdoor movie screen, the offense was not unequivocally alleged to have been committed in the city of High Point. A municipality has no inherent power to prohibit acts beyond its corporate limits; hence the warrant, in the Court's view failed to charge an offense.

In criminal cases which generate local notoriety the defense can move for a change of venue. Sometimes the trial judge without making findings with respect to the adverse publicity and prospects for a fair trial in the county where the trial is laid will order a special venire to be drawn from another county. In effect the trial judge is conceding the assertion of a high degree of adverse publicity but chooses a remedy different from that requested. As illustrated by the decision in State v. Childs, our Court feels this is a reasonable substitute and will decline to hold that an abuse of discretion has occurred. On the face of it there may seem little to choose between in these alternatives; but there may be occasion for extra-judicial influences to permeate the minds even of these non-residents depending upon the intensity of feeling in the county of trial and the duration of the trial. Concededly, however, the special venire is probably better from the defense point of view than an outright

269 N.C. 507, 153 S.E.2d 84 (1967).


Quaere if a city, assuming the validity of the ordinance in other respects, should not have some kind of contiguous zone jurisdiction to cope with problems just beyond its boundaries which intrude within them as by the powered transmission of offensive matter. The Court went on to decide in any event that the ordinance in question was void for vagueness.

denial of the motion. Where the judge elects to rule on the motion to remove, he of course should do so only after carefully examining the affidavits and other exhibits (such as local news clippings) proffered by the defense. Likewise any counter evidence of the state must be considered. It is at best an unenviable position the judge is in when he has, as did the judge in State v. Porth, a number of affidavits from one side asserting the opinion that the defendant could not get a fair trial and a like number of affidavits from the other side asserting he could receive a fair trial. It is a highly speculative matter approached in such a way. At worst it seems an impossible choice to make, although the judge has criteria of relevant detail and vividness of cited instances of bias to assist him. In Porth the judge found that the defendant could receive a fair and impartial trial in Forsyth County and accordingly denied the motion. The Supreme Court had no difficulty in upholding this ruling, emphasizing that the judge had considered all the evidence, had held an adequate hearing, and had made the necessary finding. The additional consideration, that the defense had failed to exhaust its peremptory challenges on the voir dire, does not seem terribly relevant. After all, as the Supreme Court pointed out in Irvin v. Dowd, whether a prospective juror can say he is not biased is not dispositive, for bias is an attitude not always consciously held nor easily admitted. The focus in such an inquiry should perhaps be more on the quantity, quality, and repetitiveness of the adverse publicity in the community rather than on the subjectivities of potential participants drawn from the community alleged to have been saturated by the news media.

Jury Composition and Unfair Tribunal

It is by now familiar constitutional doctrine and practice that grand or petit juries from which members of the defendant's race have been systematically excluded cannot discharge their functions validly in a constitutional sense. Juries from which certain classes have been excluded present harder questions. Where statute allows

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61 269 N.C. 329, 153 S.E.2d 10 (1967).
certain professions or categories of persons, such as mothers of children under twelve and physicians or ministers, voluntarily to exempt themselves, the question of a proper composition is yet more complex. And this is the problem raised in State v. Knight, where in a prosecution for a capital offense the defense complained of this permissive withdrawal of hundreds of doctors, dentists, druggists, pilots, ministers, postal clerks and nurses. The challenge raises, in terms of the developed concepts anyway, two questions. One, since the service of such persons is permitted officially, how does the doctrine of systematic exclusion apply? Secondly, what point of view would be brought to the deliberations of the jury by members of such groups if they were not allowed to withdraw or even if they were excluded for some reason not amounting to discrimination against the class? Of course not every particular jury itself can or must reflect the myriad class and personality identifications possible in social groupings, but the "American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." One factor lacking in the defendant's arguments in support of his challenges in Knight was the empirical proof of how many of the various groups permitted to beg off jury duty had actually done so in how many cases over how many years. In other words, it might have been possible to show a practice of wholesale withdrawal from jury duty by such groups, whether or not they were affirmatively excluded by official action. The public policy is one of making it easy not to serve, it might have been argued. And a pattern of jury composition over the years which leaves out virtually all the medical profession, by itself, could hardly be said to present a cross-section of the community from which the jury lists must be drawn. Beyond this, however, there is the difficult question of showing what "view point" the excluded or withdrawn group would add to the jury mix. Professional membership does not necessarily mean unanimity on social issues of im-

65 269 N.C. 100, 152 S.E.2d 179 (1967).
66 Most of the categories listed in G.S. §§ 9-19; 90-45; 90-150; and 127-84 are presumably thought to involve callings essential to the rendering of critical services to society. Quaere if all pilots, all nurses, or very many postal clerks are needed all the time to keep society functioning? Why couldn't the judge decide in individual cases whether a particular professional's services were likely to be required on the days in question? The statutes are probably in need of updating.
importance. But juries which are made up primarily of those persons who either do not have a statutory category to invoke or the economic prestige to get excused otherwise may tend to be made up of the poorly educated and persons whose cultural or class identifications may be if not more pronounced than others perhaps at least less subject to self-scrutiny and accommodation with larger community norms. This, it seems, is the fundamental problem presented in the resourceful arguments of the defense in State v. Knight.

A related problem was presented in the previously mentioned case of State v. Childs. Is a fair jury one that excludes any person who says he does not believe in capital punishment? In this case the trial judge granted several of the state's challenges for cause which were based on the venireman's expression of lack of sympathy for the death penalty. These rulings were upheld on appeal, the Court citing cases and authorities from several jurisdictions in accord. Of course the defense may use its peremptory challenges for some jurors, but after these are exhausted the defendant in capital cases will then face a jury which in sum is the only kind that could impose the death penalty in view of the unanimity rule. Whether or not such a jury is more inclined to punishment generally and therefore presents a more formidable array to the defense than a different composition is a question which should receive some empirical research in order better to appraise the policy issues at stake.

Not only must the triers of fact in our system of trials be drawn from a representative cross-section of the community in order that the defendant may receive a fair trial, but the jury must also be free from coercive, not to say persuasive influences where they emanate from other participants in the process. For example, the judge should not convey directly or otherwise his perspectives or beliefs as to guilt or innocence of the accused or as to the quality or validity of his defense. This policy is embodied in G.S. § 1-180 which forbids an expression by the judge of an opinion. This statute was applied in State v. Douglas, where the trial judge had in effect ridiculed the defense by characterizing it in terms which over-stated the

68 See Berelson and Steiner, Human Behavior: An Inventory of Scientific Findings, 482-490 (1964).
defense. Here, the accused had pleaded not guilty to larceny from a store and offered no evidence. In instructing the jury the court said:

The Defendant says and contends in the first place that he wasn't even there, he didn't take any suit of clothes, that [the store owner] never lost a suit of clothes. He doesn't even sell suits of clothes.\[^{74}\]

The Court had no difficulty concluding:

When the judge charged that defendant contended Lipinsky 'doesn't even sell suits of clothes', the jurors, recognizing the absurdity of such a contention, likely understood that the judge considered the rest of defendant's contentions to be on a par with that one.\[^{72}\]

Likewise the jury may be coerced or have its independence compromised by insistent judicial pressure to have a verdict reached, as by telling a deadlocked jury: "Jurors, if they cannot render a verdict, are entirely useless.\[^{73}\] Seemingly, remarks of the judge during trial which put defense counsel in a bad light could have a prejudicial effect in the minds of the jury, although the court must of course control the conduct of counsel in its presence. In *State v. Davis*\[^{74}\] the trial judge during the examination of the defendant as a witness by his attorney told the lawyer: "Let him do the talking. You just hush up; he can talk."\[^{75}\] This was held not to be prejudicial to the defendant's case before the jury, although the Court characterized the trial judge's choice of words as not "felicitous."\[^{76}\]

**Guilty Pleas**

There are few more vexing problems in the area of criminal procedure today than those centering around the appraisal, often long after the event, of the entry and acceptance of a plea of guilty. The social importance of the guilty plea in the contemporary context can


\[^{72}\] Id. at 271, 150 S.E.2d at 416. And see State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966), for a yet more blatant judicial indiscretion, viz., a description of defendants in terms of being "three black cats in a white Buick."

\[^{73}\] 266 N.C. 633, 634, 146 S.E.2d 646, 647 (1966).

\[^{74}\] 266 N.C. 633, 146 S.E.2d 646 (1966).

\[^{75}\] And see State v. Sullivan, 268 N.C. 571, 151 S.E.2d 41 (1966), where the Court declined to limit a judge's informal remarks (in this case about how criminals from Maryland were making a "picking place" out of North Carolina) at sentencing.
hardly be minimized when it is considered that somewhere in the range of from eighty to ninety percent of criminal convictions in the United States are based upon it.\textsuperscript{77} Nor can the technical implications of the plea, from the point of view of the accused, be taken lightly.\textsuperscript{78} Accordingly it would be a poor system that did not provide persons so convicted of some appraisal of the question whether his plea of guilty was intelligently and voluntarily entered. Provided the record is adequate this question may be examined on direct appeal.\textsuperscript{79} To avoid subsequent swearing contests in habeas corpus or other collateral proceedings, the trial judge should conduct a searching inquiry fully recorded and sufficient to satisfy himself that the accused has not been induced to enter the plea for reasons of expected leniency or because of over-reaching on the part of prosecutors, police, or even his own counsel.\textsuperscript{80} In such an inquiry, however, the judge may discover that a plea has been "copped" or other "arrangement" has been established between prosecution and defense which will present something of a dilemma for the judge in finding that the plea was voluntarily made, and not the product of a promise of leniency. If the "arrangement" is honored, under existing precedents, then there should be no difficulty in having the conviction upheld on direct or collateral review.\textsuperscript{81}

\textit{Search and Seizure}

A search warrant which does not specify the contraband or stolen goods to be searched for in a particular place, though it may be proper in other respects, is void as authorizing a general or exploratory search, violative of Article I, Sec. 15 of the North Carolina...
Constitution (and of the Fourth Amendment to the U.S. Constitution). Evidence so seized must be excluded if offered at trial in line with the exclusionary rule made applicable to the states through the due process clause of the Fourteenth Amendment. Furthermore, a search warrant may be insufficient in other respects, such as the way in which it was procured or issued. In State v. Upchurch, it was held that the warrant was improperly issued when the assistant clerk testified that she just "witnessed" the officers' signatures when requested to do so and did not, in other words, examine the affiant under oath as required by G.S. § 15-27.

When evidence has been seized in violation of statutory or constitutional rights and is to be excluded at trial, a procedural question arises as to when the propriety of the search and/or seizure is to be tested. Of course the inquiry should be out of the hearing of the jury; but does the defense have to wait until the evidence is proffered before the inquiry is made? In State v. Myers, the defendant made a motion to suppress after arraignment and before the plea, which motion was denied as being premature. On appeal the Court said it would be proper to make the inquiry on the motion at the outset of the trial but declined to rule that this was mandatory. Although Federal Rule 12 does not in terms require the conduct of such a preliminary inquiry, the practice in the federal courts seems to be of ruling on the motion at the earliest opportunity. This practice seems wise since interruptions of the trial are minimized and the defense is to a certain extent relieved of any possible prejudice by references however slight before the jury to evidence that must be separately tested.

Where officers conduct a search without a warrant, the issue whether the individual consented to the search, absent a prior arrest, will arise. Several cases from the Court during the period being surveyed presented such a question. In State v. Belk, the defen-
dants in a car were reasonably suspected of having committed robbery, and they were stopped by a policeman and permission to search the car was requested. The driver of the car, one of the three defendants, said "he would get the key and let [the officers] look in the trunk." Nothing was found there, but the officers had spotted a brown bag under the driver's feet inside the car. The bag was seized; it contained property of the robbery victim. The Court held that the consent was a general one, to search the whole car. In another case the Court found unconvincing the argument that the accused's permission to search his house without a warrant for stolen goods was vitiated by the intimidation inherent in seven officers surrounding his house and approaching both doors in the night time. To be distinguished from the problem of consent to a search in the absence of a warrant and by one competent to give consent is the situation where a valid warrant has been issued, but the one whose house was searched is absent at the time. The fact that admittance to the premises is given by another member of the household is no ground for objection to admission of the evidence seized. The warrant, properly issued and drawn, bestows the needed authority regardless of the presence or absence of the owner or occupant or that person's consent.

A final reference should be made to the passing of a not so venerable rule of constitutional search and seizure—the so-called "mere evidence" rule. The North Carolina Court may have been presaging this demise when it said recently in State v. Bullard: "It must be remembered that the object of search warrants is to obtain evidence. . . ." Today this is more nearly correct after the recent Supreme Court decision in Hayden v. Maryland; but it was formerly the rule, albeit often more honored in the breach, that only contraband, fruits of crime, or "instrumentalities" of crimes could

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89 State v. Williams, 267 N.C. 424, 148 S.E.2d 209 (1966). And see State v. Williams, 269 N.C. 376, 152 S.E.2d 478 (1967), where there was apparently no timely motion to suppress.
be seized even under an otherwise valid search warrant. The most interesting feature of the case, at least from a professional viewpoint, is not that it was overturned, for it had been difficult to give a concrete rationale in policy for it, but how the public reacted to the Court's decision. Some newspapers have taken this decision as an indication of a retrenchment on the part of the Court in favor of greater powers of police at the expense of individual rights. Of course, the Court deserves support in its efforts to help the nation realize its spoken ideals by seeing its decisions in the full social context out of which they arise, and out of the hard practicalities, too, of trying to serve overriding goals of both public order and individual human dignity. But it would probably be a mistake to generalize from a decision like that in Hayden to an assertion that the Court is in retreat from its role of leadership in protecting and advancing basic human rights under our Constitution.

EVIDENCE

Henry Brandis, Jr.*

RIGHTS TO CROSS-EXAMINATION

In a criminal case a prosecution witness, after giving significant testimony, was withdrawn by the solicitor on the understanding that he would later be recalled. In fact, the witness was never recalled, and, therefore, was never cross-examined. The Court held, in effect, that failure of defendant's counsel to request recall, when the witness remained in the courtroom, was a waiver of the right to cross-examine.

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But the Court's opinion in Hayden distinguished written documents as not necessarily covered, pointing to possible compulsory self-incrimination problems. This point emphasizes that a man's papers, to which he is more likely to contribute something of his essential personality, should be more highly protected than say an article of clothing.

See, e.g., Durham Morning Herald, June 1, 1967, editorial page.

In a civil case objection was sustained to a hypothetical question because it contained assumptions not then supported by the evidence, but, in the absence of the jury, the expert's answer was recorded. After supporting testimony had been supplied, counsel requested that the expert's answer be read to the jury. The request was denied. The Court held that the denial was proper since, the witness having meanwhile left the courtroom, cross-examination would not have been possible.

Both decisions were per curiam and both seem correct. There must be an opportunity for cross-examination, but, when that is provided, the right may be waived—and the waiver may be by conduct as well as by express declaration.

Taking Evidence to Jury Room

In State v. Spears a police officer had talked with three defendants together and they signed a statement which the prosecution introduced in evidence. The jury, after beginning its deliberation, requested that it be allowed to take this statement to the jury room. Counsel for one defendant objected; counsel for another said he had put on no evidence and thought granting the request might be prejudicial; and counsel for the third indicated no objection. The judge refused the request. All three defendants were convicted, but only the third appealed, assigning this ruling as error. The Court, without discussion, sustained the trial judge on the authority of a prior case.

This reflects North Carolina's general rule that juries may not take evidence to the jury room. The cited case recognizes that, by consent, the jury may do so, though neither that case nor any North Carolina case found by this writer presented the precise question involved in Spears. Here, assuming that the solicitor consented, the objections made by other defendants were sufficient to justify, and probably to require, the judge's ruling. However, even had

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3 State v. Caldwell, 181 N.C. 519, 106 S.E. 139 (1921).
4 2 McIntosh, NORTH CAROLINA AND PROCEDURE § 1545 (2d ed. 1956).
5 The opinion is silent as to the solicitor's attitude, but, since he introduced the evidence, it seems doubtful that he objected.
6 In this respect, however, the case presents one more example of the problems of fairness presented when several defendants are tried together. Compare the discussion of "Confession of a Codefendant," infra, page , dealing with the notion that the jury may be told, with reference to evidence
there been no codefendants, the consent rule probably means only that the consenting party may not assign the matter as error. It does not necessarily follow that, even if all parties consent, the judge must allow the jury to take the evidence.

**REFRESHING RECOLLECTION**

*Harvel's, Inc. v. Eggleston* involved a dispute over the extent to which defendant had authorized plaintiff to furnish a house for defendant's daughter at defendant's expense. The daughter, a witness for plaintiff, testified without objection that defendant authorized her to buy a pool table after he had given Lucy (allegedly his intended bride) a Corvette (more titillatingly identified as a "Stingray"). Objection was made and overruled to questions asked defendant on cross-examination suggesting that Lucy expressed her desire for a Corvette when she saw one in front of plaintiff's store while accompanying defendant on one of his visits there. The Court said:

Defendant had denied many of the conversations which Mr. Harvel [plaintiff's key witness] testified he had had with him, and he was indefinite as to the number of times he went to plaintiff's store. The questions with reference to the Corvette were an attempt by plaintiff's counsel to refresh defendant's recollection as to one of the visits he had made to plaintiff's store. The court was careful to instruct the jury that this evidence related "only to the circumstances under which the defendant is alleged to have contacted and dealt with Mr. Harvel with relation to the matters set forth in the complaint." The evidence was competent for that purpose.

It is perhaps plausibly arguable that the purchase of the Corvette was relevant to the issues because of its tendency to prove a motive for defendant's generosity to his daughter and that the

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*See Angier v. Howard, 94 N.C. 27 (1886).*

*Cf.* the matter of comparison of handwriting samples by the jury, which N.C. GEN. STAT. § 8-40 (1963) seems to authorize. The Court has indicated that the judge is not required to permit this *in the jury room.* Gooding v. Pope, 194 N.C. 403, 140 S.E.2d 21 (1927). See also *In re Will of Gatling*, 234 N.C. 561, 68 S.E.2d 301 (1951).

*268 N.C. 388, 150 S.E.2d 786 (1966).*

*268 N.C. 388, 394, 150 S.E.2d 786, 791 (1966).*
daughter's testimony as to this should have been admitted even had objection been made. Conceivably, then, the cross-examination of defendant regarding Lucy's desire to own a Corvette could be regarded as corroborating the daughter's testimony, though it would hardly have been necessary for that purpose, since actual purchase of the Corvette seems not to have been disputed. However, as the above quotation indicates, this was not the basis of the Court's ruling. Indeed, if the questions were relevant to the issues, reliance upon refreshing recollection hardly seems necessary.

This writer accepts the proposition that, even on direct examination, things usable to refresh the recollection of a witness should not be confined to writings prepared by or under the supervision of the witness. However, a writing used to refresh recollection is not made admissible in evidence simply because so used, though it may qualify for admission as a prior inconsistent statement or, under North Carolina's broad practice, as corroborative. Here there is no prior statement of the witness involved. Rather we have questions seemingly treated by the Court as irrelevant to the issues, which may be prejudicial. Conceding the right of a cross-examiner to incorporate in his questions matters which may aid a witness (however unwillingly) to recall the occasion of a relevant conversation, it is perhaps still permissible to doubt that all such questions should be allowed in the presence of the jury. At the least, the trial judge should be careful to prevent abuse, lest, whenever a party witness denies, or says he doesn't recall, a conversation, the next

12 Cf. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966). In a personal injury action it was held that, though for impeachment purposes plaintiff could properly be cross-examined regarding her relations with the car driver, defendant could not introduce evidence showing illicit relations between them. Plaintiff had used evidence showing that she was forced into the car by the driver. Defendant's attorney argued that his evidence tended to prove that she was not a captive. The Court said there was no allegation or issue that plaintiff was anything but a passenger.

13 STANSBURY, NORTH CAROLINA EVIDENCE § 32 (2d ed. 1963) (hereafter cited as STANSBURY.)

14 Ibid.

15 STANSBURY §§ 46, 51. Even calling counsel may ask an evasive witness about prior contradictory statements to "refresh the memory." STANSBURY § 40. (The quotation marks are in the text cited.)

16 In view of the daughter's testimony, given without objection, it seems doubtful that the questions involved sufficient prejudice to justify reversal, even had they been held incompetent. Again, however, this was not the ground of decision. Since that is true, appraisal of the decision as a precedent must be attempted on the assumption that the "refreshing" process might introduce matters not reflected in prior testimony.
question ostensibly attempts to identify the conversation by reference to something at once irrelevant and prejudicial. Otherwise there is no safeguard as to "refreshing" questions of this nature comparable to inadmissibility of a writing (other than a statement of the witness) used to refresh recollection.

It may also be doubted whether the quoted instruction in any way deals with refreshing recollection. To this writer, the instruction means that the jury may consider the evidence in appraising the credibility of the plaintiff's version of the basic facts. To the extent that its use as circumstantial corroboration is permitted, the evidence, in at least a loose sense, is made relevant to the issues. Since the Court seems to approve the instruction, despite its failure to jibe with the Court's reasoning, a further uncertainty is introduced. What did the instruction mean to the Court?

IMPEACHMENT OF WITNESSES

In State v. Wilson defendant was convicted of incestuous relations with his daughter, aged fourteen. The daughter's testimony, if believed, justified the conviction. The Court held that it was error to exclude testimony from a defense witness to the effect that the daughter had expressed a desire to get her father out of the way because he was too strict with her. The Court said that this tended to show bias and a motive to get rid of defendant, and that the defense had a right thus to challenge the credibility of the prosecuting witness.

This, of course, makes good sense. The prejudice arising from exclusion was certainly not overcome by the fact that defendant, as his own witness, was allowed to testify to similar statements by the daughter. If it be assumed that on cross-examination the daughter

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17 Even relevant evidence should be excluded when its probative force is relatively weak and there is great likelihood that it will appeal to the passions and prejudices of the jury. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966).

18 See also, decided during the period covered by this Survey, State v. Walker, 269 N.C. 135, 152 S.E.2d 133 (1967), holding that, while a witness may refresh his recollection from a memorandum prepared by him, only his oral testimony is substantive evidence, and that, when the memorandum is in conflict with such testimony, it may not be read to the jury as corroborative. As is usually the case, the question there arose on direct rather than cross-examination. In general, cross-examination allows more leeway for exploratory questions than is permissible on direct—but, still again, this is not the ground upon which the Court's decision in Eggleston is rested.

19 269 N.C. 297, 152 S.E.2d 223 (1967).
was asked about the statements, the use of such testimony is sanctioned by prior North Carolina authority, even though the daughter denied making them. The opinion does not indicate whether there was such cross-examination; and if no such foundation was laid, prior cases would require exclusion.

It would not be too unhappy an outcome if Wilson resulted in dropping or modifying the foundation requirement. The rule is based upon fairness to the impeached witness, and our Court has pointed out that, if the witness is still in the courtroom, he may be recalled for the purpose of laying the foundation omitted on the original cross-examination. It might equally be said that the witness may be recalled by his sponsoring counsel to explain or deny if he can. Fairness does not necessarily require that he be given such an opportunity in advance of the impeaching testimony. (Further, recall of the witness for foundation cross-examination would ordinarily be in the discretion of the judge, whereas recall for rebuttal would ordinarily be a matter of right.) This writer would bar the impeaching testimony only where no foundation had been laid on cross-examination and the witness is neither in court nor readily available.

When the impeaching matter is “collateral” and does not tend to show bias or prejudice, cross-examination is the only method by which it may be shown, and the cross-examiner is bound by the answers of the witness. This rule was reiterated in Pearce v. Barham, where plaintiff, as a witness, was cross-examined regarding

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20 Stansbury § 48.
21 In re Craver, 169 N.C. 561, 86 S.E. 587 (1915); State v. Dickerson, 98 N.C. 708, 3 S.E. 687 (1887) (a case where the testimony was of very similar import to that in the principal case); Edwards v. Sullivan, 30 N.C. 302 (1848). In State v. Wilson the only case cited by the Court for its position is State v. Armstrong, 232 N.C. 727, 62 S.E.2d 50 (1950). In that case the impeaching testimony was as to the mental capacity of the witness and, as to that, no foundation problem arises.
22 There is respectable authority elsewhere to the effect that no foundation need be laid as to a prior statement showing bias. See, for example, Kidd v. People, 97 Colo. 480, 51 P.2d 1020 (1935). Though the opinion in that case concedes that it is applying a minority rule, it is also followed in some other jurisdictions. See Wigmore, Evidence § 953 (3rd ed. 1940), where the wisdom of the majority rule is questioned and where it is emphasized that no foundation is required for evidence of conduct showing bias, as distinguished from utterances of the witness.
illicit relations with defendant's intestate. It was held to be error thereafter to permit other witnesses to contradict her answers. But when the cross-examination brings answers from the witness which tend to impeach him, he is entitled to explain them. This rule was clearly and correctly applied in State v. Calloway, where defendant admitted that he had been convicted in nine prior cases of purse snatching (one of the offenses for which he was being tried), but was not allowed to testify that each time he obtained a new trial with the result that he was acquitted or the prosecution was abandoned.

In Cline v. Atwood plaintiff offered in evidence the pre-trial adverse examination of defendant Scott. The Court said:

When this ... was introduced in evidence, the plaintiff made him his witness and represented that he was worthy of belief. ... A party does not make his adversary his witness by taking his adverse examination, unless he offers the adverse examination, or part of it, in evidence at the trial. ... Furthermore, when a plaintiff makes a party in the litigation his own witness, he is not allowed to impeach him by attacking his credibility, but retains the right to contradict him by the testimony of other witnesses whose testimony may be inconsistent with his.

Actually, if the adversary testifies at the trial in his own behalf, the party introducing the adverse examination may thereupon impeach the deponent in the same manner as he could impeach any other witness. And if the 1967 General Assembly enacts the proposed new rules of civil procedure recommended by the General Statutes Commission, a party calling his adversary as a witness or, indeed, any unwilling or hostile witness, may impeach him in the same manner as if he had been called by the adversary. The proposals also include a provision that the deposition of an adverse party may be used at the trial "for any purpose, whether or not deponent testifies at the trial or hearing."

This does not specifically spell out the impeachment rules when, for example, plaintiff's attorney introduces defendant's deposition as

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a part of plaintiff's case. However, since, under the present practice, this is the equivalent of plaintiff calling defendant as plaintiff’s witness, it seems necessarily to follow that plaintiff’s attorney could impeach defendant regardless of whether or not defendant subsequently takes the stand in his own behalf (though any form of impeachment requiring a foundation to be laid would seem to be barred unless such foundation was laid when the deposition was taken or defendant is a witness at the trial).

Another North Carolina rule will be modified if the proposals are adopted. The present rule is exemplified by Moore v. Moore, holding that the party calling a witness (not his adversary) may not contradict or impeach him by proving his prior inconsistent statements. Under the proposals, if the witness’ pre-trial deposition has been taken, the calling party may introduce the deposition “as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.”

Evidence, Once Excluded, Subsequently Read to Jury

In 1961, in State v. Payton, a rape case, a prosecuting witness (a girl aged nine) seemed unable to testify before the jury. The judge excused the jury, conducted the examination, recalled the jury and had the reporter read the testimony. The Court, in reversing, said: “Thus the story of the witness went to the jury as hearsay. The defendant was entitled to have the jury hear the story from the witness herself and to observe her demeanor at the time she told it. This was a fundamental right.”

In State v. Wilson, an incest case, the solicitor objected to questions propounded to a defense witness on direct examination. The objections were sustained, but questions and answers were recorded in the absence of the jury. Subsequently the judge decided

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31 N.C. GEN. STAT. § 1-568.25(b) (Supp. 1965) would be repealed. See 13 THE NORTH CAROLINA BAR No. 3, at 129 (1966).
33 13 THE NORTH CAROLINA BAR No. 3, at 56, Rule 26(d)(2)(ii) (1966). Under Rule 26(d)(2)(i) the calling party's adversary may also introduce the deposition as substantive evidence, as well as to contradict or impeach the deponent.
35 Id. at 420, 121 S.E.2d at 608.
36 269 N.C. 297, 152 S.E.2d 223 (1967).
the evidence was admissible and had the reporter read it to the jury. Defendant’s attorney objected to the judge’s refusal to allow the witness to give his answers before the jury. On appeal the Attorney General conceded that if the testimony was admissible, defendant was entitled to a new trial under State v. Payton. It is obvious that here, by contrast with Payton, defendant’s attorney is not urging hearsay or any other ground for exclusion, since he offered the evidence. The sole ground for reversal is depriving the jury of demeanor evidence. The Court obviously agreed with the Attorney General that this is enough. The two cases together mean that defendant is entitled to have the jury observe witnesses, whether they are for or against him.

The per curiam opinion in Wilson was filed on January 20, 1967. On February 3 the Court filed the opinion in State v. Porth. There defendant was convicted of murder. At the trial a prosecution medical expert, who had performed an autopsy, testified that in his opinion death resulted from brain concussion and shock. On cross-examination he was asked, in effect, whether the bruises, etc. he observed could have been produced by a fall down a flight of stairs. The jury was not permitted to hear his answer, which was “It would have been compatible.” Subsequently the trial judge, believing that this should have been admitted, repeated the question to the jury and permitted the reporter to read the answer.

The opinion disposes of the matter in a single sentence to the effect that the alleged error was cured by the judge’s instruction that the evidence was competent and by the fact that it was admitted and fully considered by the jury. No mention was made of demeanor evidence. It is true that the testimony in Wilson was more extensive and possibly more significant than the single answer at stake in Porth; and the testimony in Payton was still more extensive and was vital to the State’s case. It may be that the demeanor of this expert, taken in conjunction with the character of the evidence, was less important than the demeanor of the witnesses in the other cases. But if either of these is a potential ground of distinction (and, on principle, this is debatable), neither (nor any other ground) is specified in the Porth opinion. Indeed, there is no indication that the Court was aware that any distinction was in

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57 As to its admissibility, see note 19 supra and accompanying text.
58 269 N.C. 329, 153 S.E.2d 10 (1967).
order. Since the reasoning in the earlier opinions is patently sound, the *Porth* ruling, pending further enlightenment from the Court, is entitled to little weight as a precedent. 89

**AUTHENTICATION—WAIVER BY FAILURE TO OBJECT**

In *Mathis v. Siskin* 40 plaintiff, without objection, testified that he received a telephone call from defendant Schulman, who stated that he was cancelling the contract in litigation. On cross-examination plaintiff said that he did not know Schulman's voice well enough to identify it positively and that all he knew was that it was someone who called himself Schulman. Motion to strike the direct testimony as to the conversation was denied. The Court, finding no error, held, in effect, that defendant's attorney should have sought permission to examine plaintiff as to the caller's identity before plaintiff testified as to the content of the conversation; that the answers on cross-examination did not require striking the direct; and that such answers would go only to weight and credibility. 41 This accords with the general proposition that an objection must be made at the earliest opportunity; and, while the trial judge may, in his discretion, grant the motion to strike, he is not required to do so. 42

**OPINION EVIDENCE**

*Insurability.*—In a life insurance litigation 43 the critical issue was whether the insured, concededly insurable when he applied for the policy, remained so at the time of its delivery. The trial judge allowed an officer of the defendant company to testify that if the company had known insured had had a convulsion or epileptic attack it would not have delivered the policy; but the judge excluded the testimony of the same witness that if insured had such an attack that he would not have been insurable. The Court sustained this exclusion: (1) as involving an inadmissible opinion on the very question to be decided by the jury; and (2) because the testimony


41 It was also pointed out that, in the deposition of another defendant, admitted in evidence, there was some corroboration for the statements attributed to Schulman in the telephone conversation.

42 See STANSBURY § 27.

admitted had substantially the same meaning and hence the exclusion could not have been harmful error.44

Whether Vehicle Stopped or Barely Moving.—In Farrow v. Baugham,45 a wrongful death case, the Court affirmed an involuntary nonsuit. A plaintiff's witness (a police officer with four years experience), who did not see the crash but examined the scene shortly after it occurred, testified as to what he observed. He was not allowed to say that, based upon his observations, he "determined" that intestate's car was stopped or barely moving at the time of impact. The Court said that the jury was as well qualified as the witness to draw an inference as to speed from the physical facts described, quoting from an earlier case.46

The per curiam opinion states that, under the allegations of the complaint, defendant had the right of way unless intestate's car was already in the intersection when defendant's car approached. Assuredly, if the physical facts described would permit an inference that intestate's car was stopped or barely moving, this is relevant on the question of whether it first entered the intersection, though its persuasiveness might well depend upon where, within the intersection, the impact occurred. In this case the latter factor, from the standpoint of the Court, was speculative, because the officer witness had used a blackboard diagram and the record on appeal contained nothing to show what he meant when he referred to "here" or "there."47 Entry of the nonsuit by the trial judge indicates that he believed the physical evidence would not permit the inference that intestate's car was stopped or barely moving, or believed that the inference, if permitted, would not justify a finding of negligence. Failure of the record to make plain the nature of the physical evidence meant that neither hypothesis could successfully

45 266 N.C. 739, 147 S.E.2d 167 (1966).
47 Though not involved in the opinion in Farrow, a problem lurks here as to whether one who did not see the crash may, based upon his post-crash observations, identify the point of impact, or whether that, too, involves an inference which the jury must draw without the help of the opinion of the witness. See Dixon v. Edwards, 265 N.C. 470, 144 S.E.2d 408 (1965), briefly discussed in Brandis, Evidence, North Carolina Case Law, 44 N.C. L. Rev. 1005, 1009 (1966).
be challenged on appeal; and it is, therefore, difficult to quarrel with the result of the case.

However, the ruling out of the opinion is in no way made to depend upon the state of the rest of the record, and the case helps to perpetuate a highly questionable rule. In an earlier case a verdict for plaintiff was reversed because a highway patrolman, based upon his examination of the scene, the results of which he described, was permitted to opine that defendant's vehicle was going fifty to sixty miles per hour. It was not suggested that the scene he described would not permit the jury to draw such an inference. The Court has also held in a criminal prosecution for reckless driving that such testimony is without probative value.

In the case upon which Farrow relied, the critical question was whether defendant's intestate (one of two occupants) was driving the other car when plaintiff's intestate was killed in a collision. (There was sufficient evidence of negligence on the part of the driver and of proximate cause.) No eye witness was available. A sergeant of the Traffic Division of the Provost Marshal's section of the Marine Corps testified to his observations at the scene. Though he had investigated more than four hundred accidents and had other special qualifications, he was not allowed to testify, based upon a hypothetical question, that in his opinion defendant's intestate was thrown out the left door. The case was then nonsuited and the Court affirmed. In both courts the reasons for exclusion,
seemed to be a compound of: (1) the idea that the jury is as qualified as the witness to draw inferences from the physical facts; and (2) the idea that the physical facts, as a matter of law, left the locus of exit too speculative to permit either jury or witness to draw an inference.

This writer believes that a new look at the rule of exclusion is long overdue. In his opinion (obviously of no probative weight) it is wholly unrealistic to assert that an officer experienced in investigating motor vehicle crashes is no better qualified than the average juryman to draw inferences or form opinions as to speed or point of impact, even if it be assumed that the jury not only hears the witness described the scene, but also sees photographs or diagrams or both. Shutting the mouth of the witness makes sense only when the witness is, in fact, no more expert than the jury. 5

Cause and effect.—In Apel v. Queen City Coach Co. 53 there was an issue as to whether injuries received by plaintiff in a motor vehicle collision caused fecal incontinence. Experts for plaintiff testified on direct that they could or might have caused it, and on cross-examination one testified more positively that they did so. As to the latter, the Court said that defendant's attorney could not complain, because the testimony was induced by a prodding cross-examination. However, a more troublesome question was presented

53 When an expert witness is not allowed to express an opinion which, if believed, would show negligence, and the issue is then withdrawn from the jury, this is tantamount to saying that reasonable men cannot draw an inference which, in fact, has been drawn by an expert. Perhaps, considering all the evidence, this was a valid approach in Shaw v. Sylvester, 253 N.C. 176, 116 S.E.2d 351 (1960) where the question was the side of the car from which an occupant was catapulted. There is, however, some danger here that admissibility and sufficiency will be confused. (Compare State v. Becker, 241 N.C. 321, 85 S.E.2d 327 (1955), where a witness who said she first saw a car when it was about 15 feet away from her, testified that it was traveling 55 miles per hour. In the light of all the evidence, the Court held, in effect, that this was so improbable as to be without probative weight and that, disregarding this testimony, the State should have been nonsuited. It may be asked, nevertheless, whether the finding that no credence could be given the speed estimate gives complete credence to the distance estimate made by the same witness.) There might be extreme cases involving speed or point of impact where the expert is so clearly off base as to justify exclusion of his opinion, but in most cases this would hardly be true. Further, this involves a decision as to whether things observed or assumed furnish a predicate for an inference or an opinion—not a question as to the relative capacities of the witness and the jury. In the cases, exclusion is ordinarily rested upon the latter.

by defendant's contention that the direct testimony was inadmissible and that, even if admissible, was insufficient to permit the jury to consider the incontinence as an element of damages. In holding that the trial judge was required to admit this testimony and let it be considered by the jury, the Court said:

The Court has had, and still has, difficulty in applying the rules to the facts of particular cases. Ordinarily, the hypothetical questions should not be so framed as to permit the witness to answer the ultimate issue to be determined by the jury and thus invade its province. This case is a good illustration of the difficulty. The plaintiff's experts were permitted to answer the lengthy hypothetical question as to whether the plaintiff's particular difficulty could or might have resulted from the 1962 accident. The witnesses, with some qualifications and explanations, answered, "yes," that the accident could or might have triggered the harmful results. On the other hand, the defendants' medical expert, in answer to the same question, stated, "no," the harmful result might not and could not have come from the accident. The rule overbalances the advantage in favor of the defendants. 64

This decision is notable for three things: (1) It omits any discussion of whether the admissibility of medical opinion as to causation depends upon whether it reflects a reasonable scientific probability of cause and effect. 65 (2) It frankly admits, in general, that the Court has had difficulty in applying the "jury province" rules, and this, mayhap, indicates that consideration will be given to improving the rules. (3) It more specifically recognized the inherent

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64 267 N.C. 25, 30, 147 S.E.2d 566, 569-70 (1966). As the quotation indicates, a hypothetical question was involved. See STANSBURY § 136, pointing out that an expert testifying entirely from his own knowledge may testify positively as to cause and effect.

65 See Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964), commented on in 43 N.C.L. Rev. 979 (1965). There the Court, though allowing medical expert testimony that accident injuries "may have" produced amnesia, nevertheless indicated that such testimony must indicate a reasonable scientific probability. The vice of this is readily apparent in the light of the rule that causation testimony stronger than "could" or "might" is inadmissible. This can prevent the expert from stating a probability, scientific or otherwise. Therefore, under the Lockwood aberration, literally applied, the only opinion admissible under the "jury province" rule may be excludible for failure to state a probability. (In Apel, the decision was that the opinion evidence was sufficient, as well as admissible. Hence the distinction between sufficiency and admissibility was not squarely presented; but this writer still finds encouragement in the absence of discussion of probability in relation to admissibility, particularly since Lockwood is one of a number of cases listed in the Apel opinion as a preface for the statement that the Court has had difficulty in applying the rules.)
unfairness in allowing one expert to state a flat negative while confining the opposing expert to the merely possible positive—which should indicate that the Court, having explicitly identified a patent injustice, will proceed to rectify it.

The imbalance is worse than that caused by allowing "did not" while barring "did," because "could not" is even more negative than "did not." Theoretically, balance might be achieved by confining the expert for the negative to stating that A "possibly did not" cause B. The absurdity of this is apparent. It is strange that the Court has not perceived that the "could" or "might" formula on the positive side is equally absurd. The qualified expert who has a clear, positive opinion that A caused B should be allowed to say so. "Could" and "might" would then be available for their only proper use—reflecting that the witness, in his own mind, is less than positive about the causal relation. The lack of certainty, however, should ordinarily affect only sufficiency, and not admissibility.

It is devoutly to be hoped that Apel foreshadows scrapping of the "could" or "might" mumbo jumbo. In the interest of preventing the jury from abdicating in favor of the expert (though, of course, only the expert for the affirmative), this ritual prevents the jury from hearing opinion testimony in accurate form. It is indeed anomalous to qualify an expert, make him swear to tell the truth, and required him to express an opinion, but, at the same time, force him to cast that opinion in a form which fails to reflect what he actually believes to be true.

Another recent case\(^56\) highlights the niceties of the rules of the opinion game as played in this baliwick. In a criminal prosecution, the trial judge sustained an objection to a question as to whether conduct of the defendant (of which conduct there was evidence) could have caused the abortion to which the prosecuting witness testified. The judge then permitted a question as to the effect of such conduct (not specifically described as that of defendant) on a pregnant woman. The answer was, in effect, that it would ultimately be "very apt" to result in an abortion. The Court held that such generalized testimony is admissible.\(^57\) This raises an interesting possi-

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\(^{57}\) The Court cited as authority State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914) and State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956). In the former, as explained by the latter, an expert was allowed to testify that
bility. In an appropriate situation, might an expert, barred from opining that in the specific case A caused B, nevertheless be permitted to testify, as a generality, that A invariably causes B?  

Patient's Statement as Predicate for Medical Opinion.—In Todd v. Watts, a motor vehicle collision case, on the damage issue, plaintiff claimed that persistent headaches and backaches resulted from her injuries. An orthopedic surgeon, who treated plaintiff, was permitted to testify over objection: (1) to a diagnosis which included a reference to the accident with resultant injuries; (2) that, in his opinion, plaintiff would have some minimal permanent disability—i.e., continuing lumbo-sacral strain and persistent headaches—as a result of the accident; and (3) that an injury or blow received in the accident could have aggravated a congenital condition he found in plaintiff. The jury returned a verdict for plaintiff and the majority of the Court awarded a new trial, solely on the ground of error in admitting this testimony. Chief Justice Parker dissented.

As pointed out in the dissent, prior to reaching the critical testimony the witness testified to the history given him by plaintiff, including statements by her that she had been in the accident, that she had been thrown forward, that she had struck the windshield, that she wrenched and contused her knees and her low back, and that she was dazed for a few minutes. There was no objection to admission of all this, though the judge, at the request of defendant's attorney, confined its use to corroboration of plaintiff's testimony.

"Aloes in an excessive dose I should think would have an indirect tendency to produce an abortion."

The cases cited in notes 56 and 57 supra do not involve so sweeping an assertion. Compare State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1966), where the question called for an opinion as to the "probable or likely source of acid phosphatase . . . in the area of the mouth of the womb of a female." The answer was that it "indicates the presence of male seminal fluid." The Court approved admission of this testimony on the ground that the expert witness, having superior knowledge, could be helpful to the jury, citing, inter alia, STANSBURY §§ 134, 135. How nice it would be if this eminently sensible reasoning could be applied to all causal relation testimony, whether generalized or specific.

269 N.C. 417, 152 S.E.2d 448 (1967). Under North Carolina's rule allowing great leeway for "corroboration," this seems allowable. See STANSBURY § 50. Statements regarding present bodily condition of the declarant, as an exception to the hearsay rule, are admissible as substantive evidence, whether made to a physician or to a layman. STANSBURY § 161. Some courts have extended this to history statements made to a treating physician. See, for example, Meaney v. United States, 112 F.2d 538, 130 A.L.R. 973 (2d Cir. 1940). This, however, would not necessarily extend to statements as to the specific occur-
The majority opinion says that the witness was erroneously allowed to express an opinion grounded on matters beyond his personal knowledge, without having those matters properly assumed in a hypothetical question. The dissent relies on the decision in an earlier case to the effect that a treating physician's opinion is not rendered incompetent because based wholly or in part upon statements of the patient; and that even if the physician may not testify to the statements as substantive evidence, he may give them to show the basis of his opinion. In the view of the Chief Justice, the majority holding "defies the usual processes of medical thought."

It would be possible to distinguish the case on which the dissent relies. It was a Workmen's Compensation case in which plaintiff claimed disability resulting from a fall while at work. As described in the opinion, the medical witness did not opine as to what resulted from the fall. He testified that the patient gave him a history of a fractured rib and punctured lung at a particular time, and of various symptoms thereafter developing. On these he predicated a percentage estimate of disability. In Todd, as interpreted by the majority, the witness related the headaches and backaches directly to the collision, as distinguished from the initial injuries suffered. Hence, it is possible to say that in the earlier case the Court was dealing with the patient's declarations as to past symptoms and in Todd with the external cause of those symptoms. There is some language in the majority opinion susceptible of the interpretation that such a distinction was in mind, but the matter remains conjectural since there is no discussion or even citation of the earlier case.

Even if the majority had such a distinction in mind, it seems overly technical in the setting of Todd. Considering all the testimony of the witness, recited in both opinions, it seems highly improbable that the jury failed to comprehend that the opinion testimony as to cause implicitly assumed that plaintiff was involved in the collision (not in dispute), that she banged her head and knees

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\[63\] Two other earlier cases cited in the majority opinion are adequate to support the general propositions for which they are cited, but, in this writer's opinion, neither has significant relevance to the specific question involved in Todd.
and wrenched her back (probably not contradicted), and that she thereafter had headaches and backaches. (The congenital condition found by the witness was within his personal knowledge, and involved no assumptions.) There was factual basis for all of these in the testimony of plaintiff herself. If any error was involved, it hardly seems prejudicial enough, standing alone, to justify a new trial, at which the questions will explicitly state the assumptions clearly implicit in the testimony at the first trial.

Further, it is most unfortunate that the majority simply ignored the earlier case upon which the dissent relied. It is sound to allow a doctor to testify to an opinion predicated upon the history of symptoms related to him by the patient and, in the process, to recite the patient's statements as to such symptoms. Must we now assume that, for practical purposes, this case is overruled?

RELEVANCE

Financial Worth of Civil Defendant.—When defendant denied the contract (to furnish a residence at defendant's expense) upon which plaintiff sued, the Court found no error in allowing plaintiff's agent to testify that defendant told him that defendant had income of 32,500 dollars per month and exhibited a bankbook showing monthly deposits. Recognizing that, except upon an issue as to punitive damages, evidence of defendant's worth is ordinarily irrelevant but prejudicial, the Court believed that under the circumstances of

The case does not involve the well accepted rule, which the Court has recently been required to reiterate several times, that a hypothetical question may not assume facts not supported by the evidence. Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966); Petree v. Duke Power Co., 268 N.C. 419, 150 S.E.2d 749 (1966); Bryant v. Russell, 266 N.C. 629, 146 S.E.2d 813 (1966).

See the authorities cited in the Chief Justice's quotation from Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

In Bryant v. Russell, 266 N.C. 629, 146 S.E.2d 813 (1966) a witness was asked: "Now, Doctor, based on your examination of this patient can you give me your medical opinion as to the injuries she sustained?" A unanimous Court sustained exclusion, stating that the question called neither for a statement as to the patient's condition at the time of his examination nor for his opinion as to what might have caused it, but for an opinion as to the injuries the patient sustained in a collision occurring three months before the examination. Obviously there is a much stronger basis for excluding this than for ruling out the testimony in Todd. Cf. State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967), finding no reversible error when, though an expert gave an opinion based in part on information not acquired by personal examination, there was a mass of competent evidence to prove the fact involved.

this case the evidence was not offered to prove defendant's actual worth or income, but rather to show that, as part of the negotiations leading up to the contract, defendant intended to induce plaintiff to extend credit.68

Prior Crimes.—In a prosecution for murder of his wife (not by poisoning), defendant contended that she died from a fall, that he took the body and placed it elsewhere because he feared he would not be believed about the fall, since his wife had formerly been hospitalized by arsenic poisoning. Defendant's son, testifying for him, referred to coming home from Alaska to his sister's funeral. On cross-examination, over objection, the solicitor asked if the son did not know for a fact that his sister died from arsenic poisoning. He replied that he did not. The Court said:

Absent a showing that the death of witness Porth's sister was caused by arsenic poisoning which was intended, not for her, but for her mother, the inquiry into the cause of the sister's death would appear to be improper as introducing evidence of a separate and independent crime. The rule, and the exceptions with respect to such evidence are fully discussed in State v. McClain, 240 N.C. 171, 81 S.E.2d 364. The question may be debatable whether the evidence of the sister's death by poisoning is governed by the general rule and should be excluded, or by the exceptions, and should be admitted. But assuming the question was improper, nevertheless, the answer was exculpatory and rendered the inquiry harmless.69

Such an unqualified assertion that an exculpatory answer eliminates prejudice is not altogether realistic and might well open the way to trial by insinuation.70

Hearsay—Admissions of a Party Opponent

The Court held that it was proper to exclude evidence offered by defendant of what took place at a conference between defendant,
defendant's attorney, and plaintiff's husband, absent any showing that the husband was authorized to act as plaintiff's agent.\textsuperscript{71}

**Confe
sion of a Codefendant**

In two cases\textsuperscript{72} the Court reiterated the rule that a criminal defendant may not prevent introduction of the confession of a codefendant, even when it implicates him, though the trial judge must instruct the jury that it may be considered only on the guilt of the confessor. However, in one of them,\textsuperscript{73} the Court found ground for a new trial in the fact that an officer, testifying to the appealing defendant's oral confession, was allowed to say that he read to appealing defendant that part of the codefendant's written confession identifying the appealing defendant as a participant in the crime. The Court said that the prejudicial effect of this was accentuated by the fact that the written confession was before the jury.

It is none too clear whether the Court regarded as error the admission of the testimony or only failure to confine its use. It is probably the former, since the officer's testimony was directed solely against the appealing defendant. In either event, it is most difficult to see how the officer's testimony is any more prejudicial than the written confession itself, whatever instructions are given. And it is clear that the Court has qualms about the justice of allowing joint trial where the confession of defendant A, though inadmissible against defendant B, in fact implicates him. The last paragraph of the opinion states: "When all circumstances are considered, we are of the opinion and so decide that Lynch should be awarded a new trial at which his guilt or innocence will be determined by evidence against him and not by evidence incompetent as to him but devastating in its impact upon this case.\textsuperscript{74}

This recognition is all to the good. The Court pointed out that it was not called upon to decide whether a defendant may demand separate trial as of right when the prosecution, in case of a joint trial, will use a codefendant's confession of this type; but, in the

\textsuperscript{71}Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966). See also Mathis v. Siskin, 268 N.C. 119, 150 S.E.2d 24 (1966), to the effect that, while extra-judicial declarations of an agent may not be used to prove his authority, he may testify that he was authorized to act.
\textsuperscript{73}State v. Lynch, 266 N.C. 584, 146 S.E.2d 677 (1966).
\textsuperscript{74}266 N.C. 584, 588, 146 S.E.2d 677, 681 (1966).
light of the above quotation, there can hardly be doubt as to what the answer should be. Nevertheless, the North Carolina rule has been that, even in this situation, separate trial is not a right, but is within the discretion of the trial court judge. In one case, in which separate indictments were consolidated for trial over the protest of the defendants, the Court apparently recognized a right to separate trial, and this case has recently been cited in a joint indictment case in which the Court, while still recognizing the rule of discretion, also recognized that limiting the use of such confession evidence is not too satisfactory. At the very least, this seems to suggest that a judge should exercise his discretion in favor of separate trial.

The major plausible objection to separate trial is that it increases the time required of the court and witnesses and also increases the expense. It seems most doubtful that this outweighs the objective of fair trial. And surely, when the crime is the same, the matter should not depend upon whether indictments are joint or separate. If fair trial is the objective, this is irrelevant. Certainly the above quotation provides an adequate basis for recognizing a right to separate trial or, at the least, for a decision that a trial judge refusing separate trial has abused his discretion.

78 The federal courts have been struggling with the same problem. In 1966 FED. R. Civ. P. 14 was amended by adding: "In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." This does not deprive the judge of discretion, but it indicates the importance of the problem. In Barton v. United States, 263 F.2d 894 (5th Cir. 1959), failure to grant severance because of possible prejudice from the confession of a codefendant was held to be abuse of discretion. See also Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955). In some cases of joint trial the judge has edited the confession or has excluded it completely. See Note, Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 YALE L.J. 553, 564 (1965). Cf. People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265 (1965) for an illuminating opinion by Chief Justice Traynor.
INSURANCE

Donald F. Clifford, Jr.*

LIABILITY OF AGENT OR BROKER FOR FAILURE TO PROCURE WORKMAN'S COMPENSATION INSURANCE

Two cases during the past year involved the nature of the responsibility of an agent or broker who has undertaken to procure workman's compensation coverage and his liability for failure to do so. In *Wiles v. Mullinax*, the court described the agent's responsibility as twofold: (1) he must exercise reasonable care to procure insurance, and (2) if he is unable, in the exercise of reasonable care, to procure such insurance, he must give timely notice of his failure so that the customer may take the steps necessary to protect himself. Thus, even assuming that an agent has used reasonable diligence to procure coverage and is therefore not liable for his failure to procure it *per se*, still a cause of action is stated when it is alleged that the agent has failed to give timely notice to the customer of his inability to procure the requested coverage. Where either of these responsibilities is not fulfilled, the customer "at his election, may sue for breach of contract or for negligent default in the performance of a duty imposed by contract."  

The second case, *Crawford v. Gen'l Ins. & Realty Co.* seems at first blush to hold that the customer does not have a remedy, but a careful reading shows that it is consistent with *Mullinax* when its facts are clearly understood. In *Crawford*, the plaintiff was the administrator of a deceased employee of the employer who had sought the insurance. The court held that he had no standing to sue inasmuch as he had no right to compensation under the Workman's Compensation Act and therefore could not have had an interest in an insurance policy had one been issued. The only misunderstanding that might arise from the opinion is that the employer who had sought the insurance was an additional party plaintiff and the court held that a demurrer should be sustained as to him also. In this

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  2 Id. at 395, 148 S.E.2d at 232.
  3 266 N.C. 615, 146 S.E.2d 651 (1966).
respect, the case seems to be at odds with Mullinax. However, as the court noted, the employer's complaint did not ask for recovery in his own right; it asked merely that the administrator recover in accord with the prayer in his complaint. Moreover, the record showed that the employee's claim had not yet been allowed by the Industrial Commission and therefore the extent of the employer's liability—and hence the extent of his damages for the agent's failure to procure insurance—had not yet been ascertained. Thus, even if he had asked for damages in his own right, he would have been unable to show more than nominal damages in addition to the amount of premiums he had paid. In Mullinax, by way of contrast, an award had already been allowed by the Industrial Commission, and damages could therefore be ascertained.

Permission of Insured

Shearin v. Globe Indemnity Co. presents a troublesome question regarding the application of the permissive user provision of an omnibus clause in a garage liability clause. The facts showed that Speight, a prospective purchaser of an automobile, tried out a car on or about April 18, 1958 and told the dealer "he would like to have the car." He and the dealer agreed on a price of $495.00 cash. Speight made a deposit of $40.00, promised that "he would have his money in a few days," and, after inquiring "if it was all right for him to drive the car," drove the car away. The following Saturday, Speight paid the dealer $20.00 more and said he expected to get the rest "in a day or two." The following Saturday, Speight came in and paid $20.00 more to the dealer's brother and did not say anything. When the dealer learned of this, he told his brother "Well, George, we have got to get that thing straight; he has got to pay for the automobile or we have got to bring it in." Four or five days later, the dealer saw Speight at his home and told him that "it had to be straightened out" and that "you will have to bring the car around or you will have to pay for it." Speight assured the dealer he could straighten it out the following Saturday. On Saturday, Speight did not appear, and the dealer and his brother planned to get the car on Monday, May 12, although the record does not show that they so informed Speight. On May 12, Speight was involved in a wreck, as a result of which he died and plaintiff was injured.

*267 N.C. 505, 148 S.E.2d 560 (1966).*
Thereafter, plaintiff brought an action against the estate of Speight which was defended by the dealer's insurer under a non-waiver agreement. The instant case was brought against the dealer's insurer to recover on the garage liability policy of the dealer. Judgment of involuntary nonsuit was given after the close of plaintiff's evidence.

On appeal, the Court held that the evidence was sufficient to permit a jury to find that the car was owned by the dealer at the time of the accident but that, as a matter of law, "Speight had no permission to use the car after the Saturday on which he was obligated either to pay therefor or to surrender possession thereof to Auto Exchange, Inc." The latter question seems debatable at best, in which case the nonsuit should not have been granted.

The evidence would seem to indicate beyond any doubt that Speight had permission to drive the car at least until Saturday, May 10, and the dealer himself testified that he did not plan to pick up the car until Monday, May 12—an intent which, so far as the record shows, he never communicated to Speight. The dealer had not told Speight not to use the car. When he left the car with Speight, did he then really expect that Speight would not use it? If the dealer's conduct did not constitute actual permission, certainly it would seem enough to warrant submission of the question under the test of implied permission which would have to be read into the policy by virtue of G.S. § 20-279.21(b)(2), a factor which the Court apparently did not consider. The Court could have found a cogent argument for this result in the criticism given an earlier permissive user case which it cited in the opinion in the instant case.

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6 The court noted that it was required to consider the evidence "in light of the fact that 'prior to 1961 a purchaser of a motor vehicle acquired title notwithstanding the failure of his vendor to deliver vendor's certificate of title or vendee's failure to apply for a new certificate.'" Id. at 510, 148 S.E.2d at 563, quoting Credit Co. v. Norwood, 257 N.C. 87, 90, 125 S.E. 369, 371 (1962). It should also be noted that the question of whether title to the car had passed to Speight had to be answered under pre-Uniform Commercial Code law. The court referred generally to Wilson v. Finance Co., 239 N.C. 349, 79 S.E.2d 908 (1954). Since the pre-Code law is not applicable, this question will not be considered further. However, the scholar may wish to consult VoLD, SAiLES, 160-169 (2d ed. 1959) for an exposition of the doctrine.


Two recent cases reaffirmed the decision of a case decided a year ago that the prospective purchaser who is test driving a car owned by a car dealer is not within the automobile business exclusion of the purchaser's own liability policy. In each of these cases, there was also in existence a garage liability policy issued to the car dealer who owned the car. The question of coverage of the garage policies as to the car was apparently not contested, and the Court held, without citation, that such use was within the coverage of a garage liability policy. In a third case involving somewhat different facts, the Court did question whether a garage liability policy covered a prospective purchaser. There, coverage was for automobiles used "for the purposes of an automobile sales agency . . . and all operations necessary or incidental thereto." With respect to the involved fact situation discussed above, the Court stated simply: "Nor does it show that Speight's operation thereof on May 12, 1958, was necessary or incidental to the operation of the automobile sales agency of Auto Exchange, Inc." When one considers, as the Court did, that Auto Exchange, Inc. owned the car at the time of the accident, the conclusion does not seem consistent with the facts of the case and is arguably inconsistent with the two cases just discussed. It is submitted that the holding of the case rests on the question of permissive user and should not be relied on for the question of the use of the automobile as an operation incidental to the purpose of an automobile sales agency.

The fourth case in this series involved an accident which occurred when an employee of a service station was returning the owner's car to the owner after repairs had been made on it. Again, the contest was between the insurer which had issued a garage liability policy and the insurer which had issued an ordinary owner's liability policy. This time, however, the Court held that the use of

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11 See text accompanying note 4 supra.
12 See text accompanying note 4 supra.
the car was within the coverage of the garage policy and that it was also within the contemplation of the "automobile business" exclusionary clause of the owner's policy. The court cited with approval the following quotation from a Virginia case:

Obviously, if the operation of the car by Perdue was a use in the automobile business . . . within the meaning of the insuring clause . . . it was a use in such automobile business within the meaning of the exclusion clause of United's policy.14

The logic of that assertion, of course, would require a different result in the two cases previously discussed which held that a use could be within the meaning of "automobile business" in the coverage of a garage policy while without the meaning of "automobile business" in an owner's policy. The seeming discrepancy, however, is cleared up, at least by implication, by the Court in distinguishing an earlier prospective purchaser case15 on the grounds that the insured (for purposes of the owner's exclusionary clause) was not the one engaged in the automobile business and therefore the exclusion did not apply. In the instant case, by way of contrast, the insured was an employee of the service station and was therefore the one engaged in the automobile business and therefore within the exclusion of the owner's policy and within the coverage of the garage policy. It should also be noted that the Court rejected a federal court decision arising out of North Carolina which had held to the contrary on this question.16

CONFLICT BETWEEN "NO LIABILITY" CLAUSE AND "EXCESS INSURANCE" CLAUSE IN TWO POLICIES OTHERWISE COVERING THE INSURED EVENT

Two cases in the past year involved the interesting question of the effect of clauses in two otherwise applicable policies purporting to limit or avoid liability in the event of other insurance. Fortunately, both cases presented identical questions involving identical conflicting policies. Both cases involved a contest between a garage liability insurer and an ordinary owner liability insurer. The policy provisions of the former provided insurance for:

14 Id. at 328, 150 S.E.2d at 498.
any other person, but only if no other valid and collectible auto-
mobile liability insurance, either primary or excess is available
to such person. . . .

The owner's policy, by way of contrast, provided that

... the insurance with respect to a temporary substitute auto-
mobile or non-owned automobile shall be excess insurance over
any other valid and collectible insurance.

The trial court in Allstate Ins. Co. v. Shelby Mut. Ins. Co.\textsuperscript{17} held that both policies afforded primary coverage for the insured and prorated the recovery between them, while the trial court in Government Employees Ins. Co. v. Lumbermens Mut. Cas. Co.\textsuperscript{18} held that primary coverage was afforded only by the owner's liability policy. It also held that the "no liability" provision of the garage policy was in conflict with G.S. § 20-279.21, but that the approval of the Commissioner of Insurance eliminated the conflict and thus validated the endorsement and further that the "no liability" clause conflicted with the "excess insurance" clause. The Supreme Court held that the "excess insurance" policy afforded primary coverage, thus agreeing with the second trial court on this point, but held that the "no liability" clause was not in conflict with G.S. § 20-279.21 and that the "no liability" clause did not conflict with the "excess insurance" clause.

The Court's result comports with what has been said to be the greatest number of cases\textsuperscript{19} involving the question. In so holding, the Court rejected the reasoning of the decision in Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.,\textsuperscript{20} in which the Court held that one could not rationally choose between the "other insurance" provisions of two conflicting policies and that the two insurers must be required to prorate the loss—thus effectively cancelling out the "other insurance" provisions of both policies. The Court cited the following sentence from the Oregon Auto. Ins. Co. opinion: "It is plain that if the provisions of both policies were given full effect, neither insurer would be liable" and went on to say that "we, likewise, reject such a result in the present case." The basis for the decision, however, is not because the two clauses can-

\textsuperscript{17} 269 N.C. 341, 152 S.E.2d 436 (1967).
\textsuperscript{18} 269 N.C. 354, 152 S.E.2d 445 (1967).
\textsuperscript{19} Annot., 46 A.L.R.2d 1163 (1956).
\textsuperscript{20} 195 F.2d 958 (9th Cir. 1952).
not be rationally distinguished, but because they can. One might speculate that should a case come up in which the "other insurance" clause in two otherwise applicable policies cannot be rationally distinguished, the Court would cancel them both out and prorate the loss. Indeed, it is strongly arguable that such a result would be required under the provisions of the compulsory liability insurance law. However, that question was not posed in these cases, and the Court held that the "no liability" clause of the garage policy did not conflict with G.S. § 20-279.21 inasmuch as the injured parties on the facts of these cases would still have the benefit of liability insurance to the full extent contemplated by statute.

**Uninsured Motorist Clause**

Plaintiff mechanic was insured under a family automobile and comprehensive liability policy issued by the defendant insurance company to plaintiff's spouse. On the fateful day, plaintiff had gone to repair the car of one Singletary who had no insurance. While plaintiff was working underneath Singletary's car, which was raised on blocks, Singletary negligently caused the car to fall off the blocks thereby causing plaintiff serious injury. In this action\(^{21}\) by plaintiff against the company which had issued the policy to his wife, the court held that the injury was within the "ownership, maintenance or use" clause of the uninsured motorist indorsement. Noting that this question was one of first impression in this jurisdiction, the Court discussed cases from several other jurisdictions,\(^{22}\) quoted the dictionary definition of "maintenance,"\(^{23}\) and held: "Giving the word its common, daily, non technical meaning, the facts alleged come within the coverage of the policy."\(^{24}\)

One question apparently not considered by the Court is the effect that would be given to an "automobile business" exclusion clause such as the one discussed above on these facts. Although the Court in the instant case quoted liberally from the provisions of the

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\(^{23}\) "Webster's New International Unabridged Dictionary defines 'maintenance' as 'The labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep.'" 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1966).

\(^{24}\) Ibid.
policy in question, no mention was made of such a clause. On the basis of the Court's holding in *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*,\(^{25}\) and the Court's explanation of that holding in *Nationwide Mut. Ins. Co. v. McAbee*,\(^{28}\) one might argue that plaintiff's activity would have been within the purview of such an "automobile business" exclusion because the plaintiff insured was the one engaged in the automobile business. Perhaps the answer would be found in the policy underlying the compulsory law which is to be construed in favor of coverage for the injured public.

In *Rice v. Aetna Cas. & Sur. Co.*,\(^{27}\) the Court, in a per curiam opinion, reached a much more questionable result in construing an uninsured motorist indorsement. There, the plaintiff was insured by the defendant company whose policy contained a standard uninsured motorist indorsement. Plaintiff was injured in an accident caused by another motorist whose insurer became insolvent after the accident. Relying on *Hardin v. Insurance Company*,\(^{28}\) the Court held that the subsequent insolvency of the other motorist's insurer did not make his vehicle an uninsured automobile. The Court appears to have ignored the following dicta from a case decided after *Hardin* and before the instant case: "It is noted that G.S. § 20-279.21(b)(3) was amended by Chapter 156, Session Laws of 1965, so as to prelude the result reached by this Court in *Hardin*. . . ."\(^{29}\) The case is extensively noted at 45 N.C.L. REV. 551 (1967).

**ACCIDENTAL MEANS**

Two cases during the covered period reaffirmed the distinction drawn in numerous cases between death caused by "accident" and one caused by "accidental means." The policy in the first case provided for double indemnity if the insured "sustained bodily injury resulting in death within ninety days thereafter through external, violent and accidental means, death being the direct result thereof and independent of all other causes. . . ."\(^{30}\) The insured, who while under the influence of alcohol was awaiting the arrival of a relative

\(^{25}\) 266 N.C. 430, 146 S.E.2d 410 (1966).
\(^{26}\) 268 N.C. 326, 150 S.E.2d 496 (1966).
\(^{28}\) 261 N.C. 67, 134 S.E.2d 142 (1964).
who was to return him to the State hospital, "suddenly threw his arms and hands across his chest and jumped straight backwards, striking his head on the cement floor." He died thereafter, and the cause of his death was found to be a cerebral hemorrhage. The Court held that there was no evidence to show that the cause, as distinguished from the result, was accidental, and that regardless of whether the hemorrhage caused the fall (as plaintiff alleged) or the fall caused the hemorrhage, the causation of the fall was not shown to be accidental.

In the second case, the insured's accident policy provided coverage "against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this policy, and effected solely through accidental means." The insured, a fireman, was apparently overcome by heavy smoke while fighting a fire as a result of which he later died. While noting "strong equities for the plaintiff in this case" (the policy was a group policy furnishing coverage for firemen in the exercise of their duties), the Court held that "in the instant case the insured was voluntarily performing an intentional act and there is no evidence of any unusual mishap, slip or mischance occurring in the doing of the act. To the contrary, it appeared that the result was unusual and unexpected and unforeseen."

There is little that can be said about cases like these. Clauses of the variety construed here have been said to be "the subject of more American litigation than any other provision in insurance contracts," and Mr. Justice Cardozo once noted in a strong dissenting opinion that "the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." One can make a rational argument for either side in almost all of such cases. For example, one could argue with some cogency that the action of the insured in the first case here considered was not intentional in view of the fact that he was both under the influence of alcohol and mentally incompetent at the time.

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31 Id. at 104, 150 S.E.2d at 45.
33 Id. at 133, 150 S.E.2d at 20.
34 Ibid.
of the event. And, in the case of the fireman, one could argue quite rationally that the means of his death were accidental inasmuch as though he intended to breathe, it was an accident that he inhaled the smoke that caused his death. The real issue raised in the cases is whether the Court should remain in a “Serbonian bog.” The Court noted in one of these cases that there is a division of authority on the distinction it relied on, but showed no interest in departing from its established view. While it is perhaps still true that most courts support the distinction, it has been noted that “a majority of these cases were decided many years ago” and that the distinction “has been rejected by most of the recent cases, beginning with the dissent of Judge Cardozo in 1934.” Perhaps it is time for North Carolina to get out of the bog.

REAL PROPERTY

William B. Aycock*

Most of the cases in this section fall into two main categories: (1) Conveyancing; (2) Landlord and Tenant. Also included is a case establishing the right of the state to acquire title by adverse possession, and a case concerned with taxation of an estate held by the entirety. Another case dealing with a contingent class gift is the subject of a Note published in a previous issue of this Review and is not discussed in this Survey.

ADVERSE POSSESSION

In 1913 the Court held that the City of Raleigh acquired title to a strip of land by adverse possession. In 1964 the Court in

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**Note, 45 N.C.L. Rev. 264 (1966).

1 City of Raleigh v. Durfey, 163 N.C. 154, 79 S.E. 434 (1913).


3 "While there is a division of authority elsewhere (see 29A Am. Jur., Insurance § 116 and Comment Note, 166 A.L.R. 469), this Court has consistently drawn a distinction between the terms 'accidental death' and 'death by external accidental means.'” Langley v. Durham Life Ins. Co., 261 N.C. 459, 461, 135 S.E.2d 38, 40 (1964).

4 Vance 950.

5 Patterson 243.
dictum\(^2\) indicated that the State Highway Commission could acquire a right of way by prescription. In 1966 the Court, apparently for the first time, was faced with the question of the right of the state or its agencies to acquire title by adverse possession. In *Williams v. State Bd. of Educ.*\(^3\) the Court answered in the affirmative notwithstanding the fact that the statutes on adverse possession explicitly refer only to "person" or "persons." The Court concluded that the General Assembly intended that G.S. § 1-39 and G.S. § 1-40 should apply to any legal entity\(^4\) including the State of North Carolina and its agencies. Thus under G.S. § 1-38 the state or its agencies may acquire title by seven years adverse possession under color of title or under G.S.§ 1-40 in twenty years by adverse possession not under color of title.

In order to acquire title by adverse possession against the state longer periods are required. G.S. § 1-35 provides that in order to acquire title by adverse possession against the State of North Carolina there must be a period of twenty-one years under color of title and a period of thirty years not under color of title.

**Conveyancing**

**A. Right of First Refusal**

In *Duff-Norton Co. v. Hall*\(^5\) the Court was concerned with whether or not an "Option Agreement" violated the rule against perpetuities. Plaintiffs leased a twenty-six acre tract of land for a period of twenty years with an option to renew for four periods of five years. A few months later plaintiffs secured an "Option Agreement" from the sellers on a thirteen acre tract adjacent to the leased land. This "Option Agreement" gave the plaintiffs a "preemptive" right to buy the thirteen acre tract for the same price for which the owners would be willing to sell to any other person.\(^6\)

\(^3\) 266 N.C. 761, 147 S.E.2d 227 (1964).
\(^4\) The unorganized public is probably excluded inasmuch as there is no grantee capable of holding title. See 3 Am. Jur. 2d Adverse Possession § 139 (1962).
\(^6\) A first refusal or first opportunity to buy contract will fail unless it either fixes the price or provides a way in which the price can be determined. However, the offer of a third person is usually deemed to provide a sufficient standard. *Note*, 7 N.C.L. Rev. 474 (1929).
Subsequently, the thirteen acres of land were sold without giving the plaintiffs an opportunity to purchase.

In a suit for specific performance of the "Option Agreement" on the thirteen acre tract, the defendants invoked the rule against perpetuities on the ground that the "option" of the plaintiffs could extend for a period of forty years. The Court held that this "Option Agreement" did not violate the rule against perpetuities because it did not restrain free alienation. It gave the plaintiffs a preferred right to buy at the market price whenever the owners desired to sell. In substance, this "Option Agreement" was a right of first refusal and not an option. An option contract in which one offers to sell within a limited time and the optionee has a right to accept or reject such offer within such time is subject to the rule against perpetuities.

B. Statute of Frauds

In Montague v. Womble the parties had oral conversations concerning the purchase and sale of a house. The defendant gave plaintiffs a check for 5,000 dollars in anticipation of what would be a credit on the purchase price of the house. On the check was written "Down Payment on house." The check was returned for insufficient funds. Although plaintiffs sold the house to another party, they sued on the check. The jury returned a verdict of 5,000 dollars after a peremptory instruction from the court:

I also instruct you that all the evidence tends to show that the defendant gave to the plaintiffs a check for $5,000.00, which check has not been paid and that it was given to the plaintiffs by the defendant as down payment for a house and that the plaintiffs were ready and willing to convey the property had the defendant paid the remainder of the purchase price.

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9 Apparently the "Option Agreement" was to continue in effect during the period of the plaintiff's lease and renewals thereof.

8 The primary purpose of the rule against perpetuities "is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation." Mercer v. Mercer, 230 N.C. 101, 103, 52 S.E.2d 229, 230 (1949).

9 Christopher, Options to Purchase Real Property in North Carolina, 44 N.C.L. Rev. 63, 77 (1965). Options to purchase leased land by the lessee generally have been treated as socially desirable exceptions to the rule against perpetuities. 5 POWELL, REAL PROPERTY § 771 (1962).


11 Id. at 362, 148 S.E.2d at 256.
The Court held that the contract was void under the Statute of Frauds; therefore, there was no consideration for the check and for this reason the trial court should have sustained the defendant's plea in bar.

C. Real Estate Brokers

General Statutes of Frauds requiring contracts for the sale of real property to be in writing do not apply to agreements between owners of property and real estate brokers. Thus in the absence of specific statutory requirements that such contracts be in writing, oral agreements are valid. This is the law in North Carolina.\(^3\)

In *Jenkins v. Winecoff*\(^4\) a real estate broker collected 500 dollars "earnest money" from a purchaser who agreed to pay 4500 dollars for the property. The purchaser defaulted. The real estate broker retained 200 dollars and paid the vendor 300 dollars. The vendor sued the broker for 200 dollars, alleging that pursuant to the oral contract between them that the broker's compensation would be all he could get for the property in excess of 4300 dollars. The Court held that the superior court did not have jurisdiction in a suit on contract for 200 dollars and left unanswered the question of the rights of a vendor and broker in respect to "earnest money" paid by a purchaser who defaulted on the contract of sale. The Court, however, did refer to an annotation in the *American Law Reports*\(^5\) without comment. This annotation suggests that the weight of authority upholds the right of the vendor to the whole of the forfeited "earnest money" in the absence of a specific agreement as to its disposition.

D. Option to Purchase

In *Burkhead v. Farlow*\(^6\) the defendants signed the following document which had been prepared by the plaintiff:

"Option of Purchase"

We do hereby option to John A. Burkhead, a certain parcel or tract of land, lying & being in Back Creek Township, Randolph County and described as follows: App. 52 acres of land with

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\(^{12}\) Some states have such statutes. 12 Am. Jur. 2d Brokers 41 (1964).


\(^{15}\) Annot., 9 A.L.R.2d 495 (1950).

\(^{16}\) 266 N.C. 595, 146 S.E.2d 802 (1966).
500 ft. more or less fronting the Spero Rd. The purchase 15,000.00, payable upon delivery of deed and acceptance of Title. Option expires Oct. 15, 1961.

His—Lester M. Farlow
Her—Dorothy Farlow

The plaintiff orally accepted this written offer subject to a title check. Before the title check was completed, and prior to the expiration date specified in the "Option of Purchase," the defendants notified the plaintiff that they had decided not to sell.

Plaintiff sued for specific performance and suffered a nonsuit in the trial court. On appeal, the Court, in effect, considered two questions: (1) Does an oral acceptance of a written offer to sell bind the seller? (2) Is an acceptance conditional if it is made subject to a title check?

The Statute of Frauds in North Carolina, as in most jurisdictions, provides that contracts to convey land must be in writing and "signed by the party to be charged therewith." This provision, according to the weight of authority, including the view of the North Carolina Court, means that one who signs a written offer to sell is bound by an oral acceptance even though the purchaser is not bound. Thus the oral acceptance by the plaintiff was sufficient to bind the defendant unless the acceptance was conditional. The Court held that the title check contemplated by the plaintiff was the usual one any prudent purchaser would make to determine whether the vendor could convey the marketable title implied in every contract to convey real property; hence, it was not conditional. The Court noted that the outcome might be different in those situations in which the vendor is required to furnish title satisfactory to the purchaser or his attorney. Here a conditional acceptance may result because it is possible for a title to meet the legal standard of marketability and yet be unsatisfactory to a purchaser.

LANDLORD AND TENANT

Three cases involved summary ejectment proceedings instituted by the landlord against a tenant. In Morris v. Austraw the land-

19 Richardson v. Greensboro Warehouse & Storage Co., 223 N.C. 344, 26 S.E.2d 897, 149 A.L.R. 201 (1943). This case was discussed by the Court.
20 269 N.C. 218, 152 S.E.2d 155 (1967).
lord asserted a forfeiture of the lease because the tenant had violated a provision in the lease in that he had been convicted of a federal offense in connection with the operation of the tenant’s business on the leased premises. The landlord relied on the following provisions in the lease:

Paragraph 1 (a) Tenant shall not use or permit the use of any portion of said premises for any unlawful purpose or purposes.
Paragraph 16 (b) In case landlord should bring suit for the possession of the premises, for the recovery of any sum due hereunder, or because of the breach of any covenant herein, or for any other relief against Tenant, declaratory or otherwise, or should Tenant bring any action for any relief against Landlord, declaratory or otherwise, arising out of this lease, and Landlord should prevail in any such suit, Tenant shall pay Landlord a reasonable attorney’s fee which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

The courts do not look with favor on forfeitures. In the absence of a specific statute providing for a forfeiture, a breach of a condition in a lease will not result in a forfeiture unless the lease either provides for termination because of the breach, or a right of reentry is reserved. The Court concluded that the foregoing paragraph in the lease did not meet any of these requirements. Therefore, the judgment of the trial court was reversed and it was ordered that the proceeding be dismissed as in case of nonsuit.

In Carson v. Imperial ‘400’ Nat’l Inc. the forfeiture provisions in the lease were explicit. Paragraph 12 provided:

Lessor reserves the right to terminate this Lease, and to re-enter and repossess the whole of the property without further notice or demand:

(1) Upon any general assignment for the benefit of creditors of Imperial; or if a receiver shall be appointed for Imperial.

25 Id. at 230, 147 S.E.2d at 899.
A receiver had been appointed for Imperial, lessee. The defense, in the summary ejectment proceedings, was that Imperial had subleased the premises and that the parties intended for Paragraph twelve of the lease to apply only if the lessee had the immediate right of possession when the receiver was appointed. The Court rejected this defense:

If the appellants (lessee) position is sound, we would have the strange situation of the leasehold estate being valid for the next 34 years, invalid for the remaining 17 years of the term because of a present violation of the lessor's right to terminate the lease. Certainly the parties never contemplated such a strange situation when they executed the lease.26

The judgment of the trial court terminating the lease was affirmed.

In *Housing Authority v. Thorpe*27 the Court upheld the right of the lessor to terminate the lease by giving notice of termination to the lessee in accordance with provisions expressed in the lease. The lessee's request for a hearing on the reasons for the termination was not granted by the lessor. On this point the Court held that it is not material what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease. Whether or not the Court's traditional view of a lease termination, as expressed in this case, will prevail, when, as here, a public housing authority is lessor, will depend on the resolution of the constitutional issues which have been argued recently before the Supreme Court of the United States. These constitutional issues are discussed elsewhere in this Survey.28

Two additional cases involved the construction of a provision in a lease. In *Taylor v. Gibbs*29 the lessee agreed to pay 2100 dollars for certain tobacco allotments "providing the tobacco acreage is not reduced over 5 per cent." The acreage was not reduced. But due to acreage-poundage control regulations which neither party had anticipated, lessee could not sell all the tobacco produced. Lessee asserted a right to reduce the rent in that the acreage-poundage control is comparable to a reduction of the tobacco acreage. The Court rejected the contention of the lessee on the ground that the law cannot

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26 Id. at 233, 147 S.E.2d at 901.
28 Supra 883.
bind the lessor to an unforeseen and unexpected eventuality not within the contemplation of either party.

In Young v. Sweet, a renewal provision in a lease was held void for uncertainty because the rental for the renewal period was subject to adjustment at the beginning of the renewal period.

**Tenancy by the Entirety**

A tenancy by the entirety is created when real property is conveyed by deed or devised to two persons who are at the time husband and wife. Each spouse is considered as the owner of the entire estate because of the common law fiction of the unity of husband and wife. As between the husband and wife there is but one owner—that third person recognized by the law, the husband and wife.

In Duplin County v. Jones, the Court had before it the question of whether land owned as tenants by the entirety, listed for taxation by the husband in his name as owner, was subject to a lien for taxes assessed on personal property, listed by the husband in his own name, some of which was owned by him, and some by his wife, but none of the personal property was owned jointly. In concluding that the land owned by the entirety was not subject to a tax lien under these circumstances, the Court adhered to the common law rule that a tenancy by the entirety is not subject to the separate obligations of either the husband or wife.

The Court found it unnecessary to determine the liability of the husband's rights to rents and profits from such jointly held land to taxes owned by him on his separate property.

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23 General Air Conditioning Co. v. Douglas, 241 N.C. 170, 84 S.E.2d 828 (1964). (A laborer's and materialmen's lien upon land held as tenants by the entirety cannot arise in favor of one who constructs improvements thereon pursuant to a contract with the husband alone).
TORTS

Philip Thorpe*

IMMUNITIES

By far the most significant decision of the past year relating to immunities from liability in tort was Rabon v. Rowan Memorial Hospital. The decision apparently abolished charitable immunity as a defense available to hospitals in this state. In Rabon plaintiff was a paying patient at defendant hospital. He alleged injuries resulting from the negligent administration of drugs by an employee nurse. Plaintiff did not allege a lack of care by defendant in the selection of hiring of the nurse. After a hearing, the trial judge granted a demurrer to the complaint on the theory that plaintiff, as a paying patient, fell within the North Carolina charitable immunity rule. In an opinion by Justice Sharp, dissented from by Chief Justice Parker and Justices Lake and Pless, the Supreme Court overruled two earlier decisions, and held that plaintiff was entitled to a trial on the merits. This discussion had the effect of making the charitable immunity defense inapplicable to paying patients in hospitals. The decision was made prospectively only, so that the immunity defense applies to cases arising before Rabon.

The majority opinion, after an extensive review of the history

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1 269 N.C. 1, 152 S.E.2d 485 (1967).
2 For reasons which will become evident, the word "apparently" is utilized to signify some doubts about the Rabon decision, and not as a means of equivocating about the unequivocal—a usage beloved by all attorneys and law professors.
3 Had plaintiff made such allegations, the case would have fallen within the exception to the charitable immunity recognized in Hale v. Glenn, 167 N.C. 594, 83 S.E. 807 (1914); and in Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910).
4 Williams v. Randolph Hospital, 237 N.C. 387, 75 S.E.2d 303 (1953); noted 32 N.C.L. Rev. 129 (1953). Notes in 37 N.C.L. Rev. 209 (1959) and in 30 N.C.L. Rev. 67 (1951) also develop North Carolina law on the charitable immunity prior to Rabon.
5 Williams v. Randolph Hospital, supra note 4; Williams v. Hospital Association, 234 N.C. 536, 67 S.E.2d 662 (1951).
6 In Quick v. High Point Memorial Hospital, 269 N.C. 450, 152 S.E.2d 527 (1967) plaintiff was permitted to proceed to trial, because he was not within the scope of the charitable immunity, despite the fact the action arose prior to the Rabon decision.
of the charitable immunity, justifications advanced in its support, and criticisms of it, and after an equally extensive and careful review of the current state of authority, concluded that the charitable immunity should be abolished. The opinion then proceeded to cast doubt upon the extent of the Court's ruling by apparently limiting its decision to hospitals. Finally the majority opinion suggests that defendant was not a charity at all, thus completing the confusion as to the precise limits of its decision. Despite these last minute limitations by the majority, it seems safe to submit that Rabon represents a retreat from the prior immunity granted charities in this state. Because it overrules the Williams cases, the Court has undoubtedly abolished the immunity as to hospitals where a paying patient is injured. Since only the Williams cases were overruled expressly, it appears that the immunity has not yet been abolished as to other charities. What is unclear is the extent to which Rabon is limited: to paying patients only, or to all beneficiaries of the charity?

Although the above conclusions and comments make the Rabon decision appear illogical, there is much merit in the approach taken by the Court. In the first place, what with Medicare, privately obtained hospitalization insurance, employment obtained group hospitalization and state welfare aid, the incidence of truly gratuitous services by hospitals must be small. Secondly, liability insurance can be obtained at reasonable cost. Thirdly, prior application of the immunity to hospitals has been particularly unjust and illogical it-

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7 269 N.C. 1, 21, 152 S.E.2d 485, 498. The apparent limitation may well be the result of Justice Lake's dissent, in which he suggests that the immunity might well offer substantial protection to small charities. He argues that abolition of the immunity, if it is to be abolished, should be done by the General Assembly, after full hearings on the matter. This writer has received an informal report that rehearing of Rabon has been requested on this ground.

8 This aspect of the majority opinion was prompted by certain findings of fact, made by the trial judge, as to the financing of defendant's enterprise. Included were findings that every effort was made to collect from patients, to operate at a profit, and that in fact the enterprise was profitable.

9 See note 4 supra and accompanying text.

10 Although the great majority of North Carolina charitable immunity cases have involved hospitals, a few cases have involved other charities. Herndon v. Massey, 217 N.C. 610, 8 S.E.2d 914 (1940) (Y.W.C.A.). Turnage v. New Bern Consistory, 215 N.C. 798, 3 S.E.2d 8 (1939) (Masonic Lodge engaged in fund raising for charitable works).

11 As to so-called "third persons" the immunity did not present a bar to suit before Rabon. See, e.g., Quick v. High Point Memorial Hospital, 269 N.C. 450, 152 S.E.2d 527 (1967).
self. Fourthly, as to charities other than hospitals, compulsory automobile liability insurance offers protection to the public in probably the major area of accidental injuries resulting from their activities. Thus limiting abolition of the immunity to hospitals is justified, at least for the present. Finally, the Court's statement to the effect that defendant was not really a charity indicates a willingness to examine individual cases to determine whether reasons for continued immunization of the particular charity are apparent. Where they are not present, *Rabon* appears to promise a withdrawal of the immunity. Thus, despite the constitutional and jurisprudential misgivings of the dissenter's, the majority opinion's decision to move slowly and carefully seems merited. Certainly at the time the charitable immunity was developed, it was a sound position. There still may be charities which need protection from tort liability. A rule of total liability might be as unworkable as the total immunity rule. Thus, despite the confusion which remains, *Rabon v. Rowan Memorial Hospital* represents a highly sensible step by the Supreme Court in this area.

An article could be written about both types of misgivings raised by the dissents in *Rabon*. Particularly with respect to the doctrine of *stare decisis*, Justice Lake's dissent raises some interesting arguments. Although much of his position is untenable when viewed from modern theories of jurisprudence, his suggestion that certain judicially created legal rules should only be overruled by the legislature is a significant point. Certainly the judiciary is not as well equipped as the legislature to permit all relevant data and interested parties to be heard concerning the advisability of a change in policy. At least in part, the idea of judicial self-restraint rests upon this fact. Like many another advocate, however, Justice Lake chose to ignore this truly perplexing question; instead resting his argument upon a doubtful issue of constitutional power. It is clearly within the power of the judiciary to overrule judicially created rules, as history has indicated. What is not at all clear is the extent to which this power should be exercised.
TRIAL PRACTICE

Herbert R. Baer*

PROCESS

In Thomas v. Frosty Morn Meats, Inc., suit was brought in North Carolina against a North Carolina corporation on a judgment which had been obtained in New York. The certified copy of the New York judgment showed that service had been made in the New York action by serving the defendant in North Carolina. Defendant moved for a nonsuit in the action on the judgment on the ground that New York had no jurisdiction of the defendant, that no valid service of process had been made on it, and that the defendant had not appeared in the New York proceeding. The trial court granted the motion.

On appeal the Court reversed and sent the case back for a new hearing. The Court cited the International Shoe case and its progeny and stated that the fact the North Carolina corporate defendant was not served with process in New York did not of itself establish a want of jurisdiction in that state. Jurisdiction is to be presumed until the contrary is shown. The trial court was instructed to consider the law of New York as interpreted by New York decisions in passing upon the question of whether or not New York had jurisdiction. The burden of establishing lack of jurisdiction was on the defendant and the defendant, on rehearing below, is to be given an opportunity to show, if it can, that under the law of New York there was no legal service of process.

In Russell v. Bea Staple Mfg. Co. the original summons commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, local agent for Bea Staple Manufacturing Company, Incorporated, defendant(s) above named." It was so served. No appearance was entered and default judgment was taken against the corporate defendant, April 9,

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* Alumni Distinguished Professor of Law, University of North Carolina.
1 266 N.C. 523, 146 S.E.2d 397 (1966).
3 266 N.C. 531, 146 S.E.2d 459 (1966).
1965. On April 21, 1965, the defendant corporation entered a special appearance and moved that the judgment be set aside because of lack of service on it. The trial court denied the motion.

On appeal the Court held that the only service made was on Clayton Eddinger, individually, and that no valid service had been made on the corporate defendant. The judgment was declared a nullity and should have been vacated on the corporation's motion. The reference in the original summons to Eddinger as local agent for the corporation was merely "descriptio personae" and did not result in bringing in the corporate defendant.

In Webb v. Seaboard Air Line R.R. the Court restated the well established rule that a sheriff has 20 days from the date of a summons, or the date of an alias summons, or the date of the endorsement extending the time for service on the original summons, in which to make service and that service after said 20 day period is a nullity. In the same case the Court also declared that although the issuance of an alias summons which does not refer to the original process may operate as the institution of a new suit, it cannot toll the operation of the statute of limitations unless it shows its relation to the original summons.

**Subpoena Ducas Tecum**

The use of the subpoena *duces tecum* as compared to obtaining an order giving leave to inspect documents under G.S. § 8-89, or an order for the production of books and documents under G.S. § 8-90, is fully discussed in Vaughn v. Broadfoot. The Court declared that the relevancy and materiality of the documents described in the subpoena *duces tecum* as well as its adequacy from the standpoint of definiteness in describing the documents subpoenaed may properly be raised by a motion to quash, vacate, or modify the subpoena. The court also called attention to the fact that no affidavit is necessary for the issuance of a subpoena *duces tecum* and that G.S. § 8-89 and G.S. § 8-90 do not supercede the subpoena *duces tecum.*

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*268 N.C. 552, 151 S.E.2d 19 (1966).*

*267 N.C. 691, 149 S.E.2d 37 (1966).* See in this connection Rule 45(c) of the proposed North Carolina Rules of Civil Procedure wherein provision is made for the allowance of counsel fees and expenses if the subpoena is quashed or modified or for the advance of the reasonable cost of complying with the subpoena.
In *Doss v. Nowell* the action was brought in Mecklenburg County. The proper venue was either the county of the residence of the plaintiff or that of the defendant under G.S. § 1-82. Neither of the parties were resident in Mecklenburg. Defendant in due time moved to have the case transferred to Catawba County which he said was his residence. Upon taking proof the trial court found that defendant was not resident in Catawba County and denied defendant's motion.

On appeal the Court sustained the trial court's finding of fact regarding defendant's non-residence in Catawba County. In upholding the denial of defendant's motion, the Court stated that it was not incumbent on the trial court to determine the proper county but his denial would be sustained if it appeared that the county to which defendant asked the case be transferred was not a proper one.

**CONTEMPT—WITNESS' REFUSAL TO BE SWEARING**

In *In re Williams* defendant was on trial for rape. A Reverend Williams was subpoenaed by both the state and the defense as a witness. He had been consulted by the defendant and the prosecuting witness, both of whom were members of his church. When asked to be sworn on the part of the state, the minister declared he refused to be sworn and that he would not testify in the case under any circumstances because he felt to do so would violate his concept of a clergyman's religious duty. He was adamant in his position even though the court indicated he would not have to reveal any confidential communication that had been made to him.

In upholding a summary conviction for contempt, the Court declared that the minister's refusal was contumacious and willful regardless of his personal belief as to his moral or religious duty. The court found no reason to set aside the conviction because the contemner at the time was not represented by counsel nor supplied with counsel by the trial court.

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*268 N.C. 289, 150 S.E.2d 394 (1966).*

*269 N.C. 68, 152 S.E.2d 317 (1967).* In general on contempt see 34 N.C.L. Rev. 221 (1956).
ATTORNEY AND CLIENT—SCOPE OF IMPLIED AUTHORITY

In State v. Mason, defendant was on trial for failure to support his illegitimate child. He entered a plea of not guilty. He denied paternity and denied prosecutrix had made a demand on him for support prior to the issuance of the original warrant.

In his charge the judge told the jury that he understood the only question for them to determine was whether defendant was the father of the child, the defendant not claiming to have attempted to support the child but merely denying paternity. The trial judge asked counsel for defendant if that was correct. Counsel replied it was.

The jury found defendant guilty. On appeal the Court held that a plea of not guilty puts in issue each element of the crime charged. Further, the Court declared that in this type of case the jury not only had to find the defendant was the father of the child, but also that he wilfully and without just cause refused to support it. The statement of defense counsel that the only issue for the jury was paternity waived a substantial right of defendant and was not within the implied authority created by the relationship of attorney and client.

FINDINGS OF FACT BY TRIAL COURT

It frequently occurs that prior to making a ruling the judge must find facts. If he makes a ruling but fails to spell out the facts he found, is it to be presumed that he found the necessary facts to support his ruling, or is the case to be remanded with instructions to the judge to make specific fact findings so as to enable the appellate court to determine if the facts found support the court's ruling? The following cases point up the problem.

In State v. Conyers the trial judge held a preliminary voir dire examination as to the voluntariness of a defendant's alleged confession. At the conclusion of this examination the court had entered in the record a statement that he found the defendant's declarations in question to have been made to the officers "freely

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and voluntarily . . . without reward or hope of reward, or inducement, or any coercion from said officers."

On appeal the Court held that while under its earlier decisions this ruling would have been sufficient, it is now insufficient since the case of State v. Barnes\textsuperscript{11} in that it is the duty of the trial judge to make specific findings of facts. The lower court's declaration was said to be simply a statement of its conclusions. Absent findings of fact by the judge, the appellate tribunal was said to be in no position to determine whether the lower court erred in the admission of the alleged confession.

On the other hand, in Langley v. Langley\textsuperscript{12} the question for the trial court to determine was whether or not the counsel for defendant in a divorce action had been authorized by his client to inform the court that she did not wish to pursue the defense. Jury having been waived in the case, the judge found for plaintiff. Defendant then appeared through new counsel and moved to have the judgment vacated asserting that her former counsel had not had authority to inform the court that her defense was not to be pursued. After hearing evidence the court declared it was satisfied the judgment should not be set aside.

On appeal it was urged that there should be a reversal because the judge did not make any finding of fact. There had been no request for such finding and the Court held that in the absence of a request to find facts it would be presumed that the court found the facts necessary to support his ruling.

**"Erase It From Your Memory" Instruction to Jury**

It frequently occurs that improper remarks are made either by a witness, counsel or the judge which are followed by an instruction from the judge to the jury that the remarks are to be disregarded and that the jury is to "erase them from their memory." Uniformity would easily be had if jurors, who are presumed to be intelligent, were always found capable of following such an instruction. But no such simple rule has been attained. Occasionally, our Court does find that it is impossible to unroast a roasted apple and a new trial is ordered on the assumption that the improper remark could not be erased from the minds of the jurors. It does appear that improper

\textsuperscript{11} 264 N.C. 517, 142 S.E.2d 344 (1965).
\textsuperscript{12} 268 N.C. 415, 150 S.E.2d 764 (1966).
remarks of the trial judge are less subject to "erasure" than re-
marks of witnesses or counsel.

Thus in State v. Carter the trial judge, after taking some
testimony in the presence of the jury and other testimony outside
their presence, informed the jury that he found the statements made
by the defendants to a special agent of the State Bureau of Investi-
gation had been voluntarily given. A few minutes later the judge
told the jury that he had inadvertently advised them as to his find-
ing about the voluntariness of the statements and instructed them,
"I charge you now you will not consider that statement made by
the court in any way whatsoever, either for the State or against
the defendants or any of them." 14

In reversing the convictions that followed, the Court declared
that when once a trial judge, by the slightest intimation, informs
the jury of his opinion of the credibility of a witness, such error
cannot be corrected by asking the jury to disregard the judge's
comments.

On the other hand, in State v. Bruce, State v. McKethan and
Apel v. Queen City Coach Co. the Court took the position
that an "erase it from your mind" instruction was sufficient to wipe
out the effect of an improper statement by a witness. In Bruce the
Court quoted from an earlier case to the effect that the assumption
is "that the trial jurors are men of character and of sufficient intel-
ligence to fully understand and comply with the instructions of the
court, and are presumed to have done so." 18 In Queen City Coach
Co. the improper remark was reference to an insurance adjuster for
the defendant bus company. The Court said it would assume the
jury heeded the court's instruction and did not penalize the bus
company because of it. Doubtless the Court in this instance was
correct, for the defendant corporation by its very name may be said
to already have had two strikes against it and the fact it carried
insurance would hardly create additional jury prejudice.

14 Id. at 651, 151 S.E.2d at 604.
16 269 N.C. 81, 152 S.E.2d 341 (1967).
64, 145 S.E.2d 316 (1965), 44 N.C.L. Rev. 1060 (1966).
18 State v. Ray, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938).
In Callicutt v. Smith defendant had counterclaimed in an auto accident case and sought damages for his personal injuries as well as property damage to his automobile. In summing up to the jury counsel for defendant attempted to present to the jury a large chart setting forth the defendant's life expectancy and a number of computations to support a verdict far in excess of the amount sued for which was 26,180 dollars. Upon plaintiff's objection, the court excluded the chart. The jury gave the defendant a verdict of 1,000 dollars for his personal injuries. Defendant appealed claiming error because he was not permitted to argue from the chart to the jury.

In affirming the Court said, "While counsel is allowed wide latitude in argument to the jury, and to use figures and calculations in support of his position, he, in effect, was attempting to use this chart as an exhibit which had never been introduced in evidence."

Court's Charge—Expression of Opinion

Once again G.S. § 1-180 has lead to various reversals because the trial judge was found to have expressed an opinion in his charge in violation of the statute. Thus in State v. Belk the trial judge was held to have expressed an opinion because he referred to the defendants on trial as "three black cats in a white Buick" although the record failed to disclose that any witness had used that term.

In Belk v. Schweizer the court referred to the answer a doctor gave to a hypothetical question and said it was "difficult of comprehension generally." Such statement violated G.S. § 1-180 because it might lead the jury to believe the trial judge thought the doctor's testimony was so confused and vague as to be of little probative value.

In Beacon Homes, Inc. v. Holt the trial judge in answering a juror's question undertook to explain the nature of the judgment that would be rendered if they answered the issue in favor of the

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24 266 N.C. 467, 146 S.E.2d 434 (1966).
plaintiff and the procedure that would be followed by the plaintiff under such judgment. On appeal the Court held that by so doing the trial judge "may well have had the effect of prejudicing the jury against the position of the plaintiff although that was, of course, not the intention of the court."24

In *State v. Douglas*,25 the trial judge overstated the contentions of the defendant in such a manner as to ridicule the defendant in that he asserted that the defendant denied a fact which was obviously undeniable. On appeal the Court said that the jurors in recognizing the absurdity of the stated contention may have understood that the judge considered the rest of defendant's contentions on a par with that one. The Court pointed out that a trial judge need not state either the state's or defendant's contentions and that when the state's evidence seems to conclusively establish the guilt of the defendant so that to state a contention of the defendant would strain credulity, the court's "obvious solution is to state no contentions at all."26 A simple statement of the effect of the plea of not guilty will fulfill the requirement.

In *Pardue v. Michigan Millers Mut. Ins. Co.*,27 the judge in charging the jury told them that the plaintiff contends that if she does not recover from this defendant "she is out in the cold."28 In reversing judgment for the plaintiff the Court declared that if such a contention was made by counsel it would be the duty of the court to give no consideration to it and that when the court stated such contention to the jury the defendant was materially prejudiced. "[I]t seems probable," said the Court, that "the chivalry and compassion of the jurors of Wilkes would move them to take such action as might be necessary to keep plaintiff from being 'left out in the cold.' "29

**Coercion of Jury by Court**

In *State v. McKissick*30 defendant was on trial for robbery with a deadly weapon. The jury deliberated several hours without reaching an agreement. The court then told the jury he could not dis-

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24 *Id.* at 475, 146 S.E.2d at 440.
26 *Id.* at 271, 150 S.E.2d at 416.
28 *Id.* at 84, 147 S.E.2d at 576.
29 Ibid.
charge them lightly. That they should consider the case until they had exhausted every possibility of an agreement. That a disagree-ment meant a new trial with further expense and is a misfortune to any county. He failed to advise the jurors that they were not to surrender their conscientious convictions in order to reach an agree-ment. Because of that failure, the Supreme Court reversed holding that the charge was coercive or at least could be deemed coercive by the minority of jurors who thought they were obliged to defer to the views of the majority.

Verdict—Impeachment of by Jurors

It is a well established rule in this state that jurors may not impeach their own verdict and testimony may not be received from them for that purpose. In Selph v. Selph after the jury verdict had been rendered on specific issues submitted in a divorce case one of the jurors told plaintiff’s attorney that he and some other jurors had a question as to the legal effect of their answer to the fourth issue. The trial judge then, after hearing the juror’s statement in chambers, declared that he found as a fact that some of the jurors were mistaken as to the legal effect of their verdict and accordingly he set the same aside in his discretion and ordered a new trial. In reversing, the Supreme Court declared that although a trial judge has discretion to set a verdict aside, when as here, it is plain that he set the same aside on the evidence of a juror, which he had no right to receive, he will be held to have erred in point of law.

WORKMEN'S COMPENSATION

Phillip Thorpe*

Coverage

The past year produced a surprising number of cases involving questions of coverage under the Workmen’s Compensation statute. The basic purpose of workmen’s compensation is to provide com-

\[267 \text{ N.C. 635, 148 S.E.2d 574 (1966).}\]

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\[\text{N.C. GEN. STAT. §§ 97-1 to -122 (1965). [Hereafter referred to as the Act.]}\]
Compensation to persons injured while employed, and the right to receive benefits is dependent upon the existence of an employment relationship. However, the exact nature of the required relationship is not made clear by the Act. The Supreme Court has consistently applied common law tests to determine whether the requisite relationship of employer-employee exists. At common law, the employer-employee relationship is established by proof of mutual assent, benefit to the employer, and a right in the employer to control the activities of the employee. The most significant common law test is that of "right to control." As applied by the Supreme Court, if the person for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, the worker is an employee. In contrast, if he merely has the right to require results in conformity with the agreement between them, no employment relationship is established.

In *Hicks v. Guilford County*, plaintiff claimed the right to benefits under the Act as an "employee" of defendant county. She was injured in a fall in the courthouse while serving on a petit jury about to begin its deliberations. The Supreme Court held plaintiff to be an "independent contractor" rather than an "employee" and, thus, not entitled to compensation. Its decision was based upon the

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3 Neither N.C. GEN. STAT. § 97-2(1) (1965), defining "employment," nor N.C. GEN. STAT. § 97-2(3) (1965), defining "employer," purport to define the specific required relationship for coverage under the Act. Both sections specify certain employees who are included or excluded from coverage. N.C. GEN. STAT. § 97-2(2) (1965), defining "employee," requires an "appointment or contract of hire or apprenticeship," and excludes "persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." In addition, specified persons in N.C. GEN. STAT. § 97-2(2) (1965) are either included or excluded from the definition. N.C. GEN. STAT. § 97-13 (1965) also excepts certain categories from the provision of the Act.
7 Commonly the relationship is described as that of "independent contractor." McCraw v. Calvine Mills, 233 N.C. 524, 64 S.E.2d 658 (1951).
claimed lack of power in county officials to control the manner in which jurors discharged their duties and, in particular, the inability of the trial judge in all cases to direct jurors to reach a particular result. This decision is highly doubtful. In the first place, the trial judge and other court officers are given considerable control over jurors, particularly while sitting on a case. More significant is the Court's apparent suggestion that an employer-employee relationship cannot exist whenever the "employment" involves the exercise of discretion. Many employees, for example retail buyers, do in fact exercise a good deal of discretion in their jobs and are employed for that precise purpose, just as are jurors. Thus the suggestion that "right to control" requires the right to control each and every duty or function is unrealistic, and is not supported by prior cases. Undoubtedly, the Court was troubled by the short duration of a juror's service. However the Act excludes only persons whose employment is both casual and not in the course of the employer's occupation. Thus, the short time span should not affect any decision as to whether an employment relationship exists.

*Hicks v. Guilford County* is, of course, a case in which the plaintiff claimed to be covered under the Act. More commonly the

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9 The Court stated: "obviously a juror is not subject to direction and control of county officials as to the manner in which the juror discharges his duties, in the sense that an employee in an industry is subject to direction by his employer." *Hicks v. Gilford County*, 267 N.C. 364, 368, 148 S.E.2d 240, 243 (1966).

10 For example, N.C. Gen. Stat. § 9-17 (1953) authorizes juries to be placed in charge of court officers, and permits separation of juries in certain cases. The trial judge does in fact exercise considerable control over jury deliberations by ruling upon admission of evidence, and by instructions on the law. His power to set aside a verdict and enter a judgment n.o.v. or order a new trial is also a mode of exercising control over verdict.

11 In *Pearson v. Peerless Flooring Co.*, 247 N.C. 434, 101 S.E.2d 301 (1958), claimant was hired specially to supervise installation of dry kilns because defendant had no foreman with sufficient skills to do so. See also *Scott v. Waccamaw Lumber Co.*, 232 N.C. 162, 59 S.E.2d 425 (1950) (supervisory employee). In *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the exercise of independent knowledge, skill or training was held to be only one of several indicia for distinguishing an independent contractor from an employee.


13 See note 8 supra.
question of coverage is raised by a defendant who seeks to defend a common law negligence action by claiming plaintiff was an "employee" and thus limited to recovery of workmen's compensation benefits. Once an employment relationship between plaintiff and defendant is shown to exist, pursuant to the tests previously discussed, compensation benefits are the exclusive remedy available to the injured employee.14 In the past the Supreme Court has held that compensation is the exclusive remedy and thus has barred a negligence action by the injured employee in cases in which the particular injury was not compensable under the Act.15 In Horney v. Meredith Swimming Pool Co.,16 the Court reaffirmed this position, and barred a wrongful death action brought on behalf of the deceased employee's estate. In its previous decisions17 the injury was not compensable because it did not "arise out of and in the course of the employment."18 In Horney, however, the death was not compensable because the employee left no dependents.19 Although these cases seem harsh, the result is clearly called for by the Act.20 The justification for the exclusive remedy provision is the idea that the injured employee gives up his rights to potential recovery in a common law action for the more certain but less munificent benefits of workmen's compensation.21

Perhaps the largest producer of litigation involving questions of employment relationship is G.S. § 97-10.2, that permits the injured

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20 N.C. Gen. Stat. § 97-10.1 (1965). The Supreme Court seems to have created one exception in cases where the injury arises from activities disconnected with the employment. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943). Apparently, disconnected activities are those which are not within the normal range of activities demanded of the employee by the job.
employee to retain all common law rights of action he may have against a "third party."\(^{22}\) Frequently, in common law actions by injured employees, the defendant will claim not to be a "third party," but instead a party to the employment relationship. If he is held to be so, workmen's compensation becomes the employee's exclusive remedy,\(^{23}\) and his common law action is barred.\(^{24}\) The only statutory language which suggests the proper line to be drawn in defining "third parties" is contained in G.S. § 97-9. That section requires employers to secure payment of compensation and provides that while such security remains in force "he (the employer) or those conducting his business" shall be liable only as provided in the Act. Past judicial construction of this provision has resulted in the phrase being interpreted to include officers of a corporation,\(^{25}\) superiors of the injured employee,\(^{26}\) and co-employees.\(^{27}\) During the past year four cases\(^{28}\) involved the meaning of the above quoted phrase.

**McWilliams v. Parham:**\(^{29}\) was a negligence action by a caddy against a golfer for whom he was caddying to recover for injuries sustained when struck by a golf ball. It was conceded by both parties that the caddy was employed by the country club at which the defendant alleged he was enjoying membership privileges. The Supreme Court, commenting upon the lack of proof of defendant's relationship to the club, had no difficulty in concluding that plaintiff's action was not barred by the exclusive remedy provision. Since the

\(^{22}\) N.C. Gen. Stat. § 97-10.2 (1965) also permits the employer or his compensation insurer any rights of subrogation they may have against the third party because of compensation benefits paid to the injured employee. See Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Rogers v. Southeastern Constr. Co., 214 N.C. 269, 199 S.E. 41 (1938).


\(^{29}\) 269 N.C. 162, 152 S.E.2d 117 (1967).
club was apparently incorporated, it would seem that defendant, even had he been a member, would not have been within the group of persons "conducting the business" as required by G.S. § 97-9. Normally Corporate stockholders, as such, do not actively conduct the business of a corporation. The same would seem to be true of "members" of a non-profit incorporated association. Thus such persons would appear to be third party(ies) within G.S. § 97-10.2, against whom a common law action could be maintained.

_Bryant v. Dougherty_ presented another aspect of the problem in interpreting G.S. § 97-9. Plaintiff sued defendant for medical malpractice. Defendant argued that plaintiff's exclusive remedy was under the Act since plaintiff's employer had requested the examination, and that G.S. § 97-26 required the subsequent malpractice to be treated as a part of the original claim against the employer. The Court noted that this was not a case in which a physician was employed full time by the employer, and held that plaintiff's action was not barred by G.S. § 97-9 and G.S. § 97-101. The result is sound. G.S. § 97-26 speaks only of the employer's liability for subsequent malpractice, and does not purport to deal with the physician's liability. Furthermore, the "exclusive remedy" idea has

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80 Although the facts of _McWilliams_ are not clear on this point, defendant alleged facts from which it can be deduced the Country Club was incorporated, rather than an unincorporated association.

81 Although the point was not raised in _McWilliams_, had defendant alleged he "employed" plaintiff as a caddy, it is interesting to speculate as to whether the caddy would have been ruled a "casual employee," pursuant to N.C. GEN. STAT. § 97-2(2) (1965) and N.C. GEN. STAT. § 97-13 (1965), or an employee of a "sub-contractor" under N.C. GEN. STAT. § 97-19 (1965), or even a "borrowed servant." As to the latter, see the discussion of Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966), note 53 infra and accompanying text. Leggette v. McCotter, 265 N.C. 617, 144 S.E.2d 849 (1965). Presumably, the requirement that five or more employees be employed would, in any event, permit use of a common law action against most golfers.

82 Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952), in which the employee was permitted to maintain a common law malpractice action. But see Hayes v. Marshall Field Co., 351 Ill. App. 329, 155 N.E.2d 99 (1953), in which the second injury was held compensable, and malpractice action was not permitted.

83 The Supreme Court distinguished the somewhat confusing decision in _Hoover v. Globe Indem. Co._, 202 N.C. 655, 165 S.E. 758 (1932). In _Hoover_ the employee sued the compensation insurer for negligence in selecting a physician. The insurer filed a third party action against the doctor, whose demurrer was sustained. The theory was apparently that the doctor could not be held liable to the insurer, because the insurer could not be held by the employee.
not been extended to independent contractors, who have been permitted to recover in a common law action.\textsuperscript{35} Where, as in Bryant, it is an independent contractor who causes the injury, logic demands the same result. Perhaps most persuasive is the basic notion that the Act applies only where an employment relationship is established. Since "right to control" remains the basic test for deciding this question,\textsuperscript{36} and since an "independent contractor" cannot be under the control of the employer to be classed as such,\textsuperscript{37} it is difficult to class an independent contractor as a person who conducts the employer's business under G.S. § 97-9.\textsuperscript{38}

As has already been indicated,\textsuperscript{39} co-employees have been held to be included under G.S. § 97-9 as persons conducting the employer's business. Thus common law actions between co-employees are barred; at least when both are within the course of employment.\textsuperscript{40}

In Altman v. Sanders,\textsuperscript{41} plaintiff was injured when struck by a car being driven by a co-employee in a parking lot owned by their common employer. Both were on their way to work. Since both were within the course of their employment at the time,\textsuperscript{42} the Court held the action against the co-employee barred. While this result is supported by earlier holdings,\textsuperscript{43} it does not appear to be dictated by the provisions of G.S. § 97-9 as the phrase "those conducting his business" could easily be construed as being limited to situations in which the "employer" does not actively manage his business, rather than as it was in Altman to include co-employees. Support for the narrower construction is obtained from the section itself which deals


\textsuperscript{36} See note 6 supra and accompanying text.

\textsuperscript{37} See note 7 supra and accompanying text.

\textsuperscript{38} One of the tests prescribed by the Supreme Court, in Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944), for distinguishing an employee from an independent contractor is whether the person is engaged in an independent calling or trade.

\textsuperscript{39} Note 27 supra and accompanying text.


\textsuperscript{41} 267 N.C. 158, 148 S.E.2d 21 (1966).


\textsuperscript{43} See the cases cited note 27 supra. See also Weaver v. Bennett, 259 N.C. 16, 129 S.E. 610 (1963); Essick v. Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).
only with the obligation of the employer to secure payment of compensation benefits. Such an obligation is obviously directed at management, not all employees. Since, at common law, actions against co-employees were permitted, and since the General Assembly could easily have made explicit its intent to bar such actions, the narrower construction is preferable. The Act is intended as a substitute for common law actions between employer and employee to provide prompt and reasonable compensation to injured employees. It was not designed as a refuge for persons other than the employer.

Construing G.S. § 97-9 and G.S. § 97-10.1 to include co-employees creates such a refuge, and removes a large group involved in causing industrial accidents from the possibly beneficial deterrence effect of common law tort liability.

*Altman v. Sanders,* although barring plaintiff's action against the co-employee, did permit the action to be maintained against the co-employee's husband, who owned the automobile and furnished it to his wife as a "family purpose" vehicle. The Supreme Court interpreted the bar against actions against co-employees as a type of immunity. The immunity granted was held to be personal and did not prevent the action against the husband, despite the fact that his liability is derivative and dependent upon that of his wife. This is the position taken by most courts.

Since the Court has held common law actions against co-employees to be barred under G.S. § 97-9 and G.S. § 97-10.1, it has occasionally been called upon to decide whether an employee has been "borrowed" by plaintiff's employer so that his common law

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45 By use of the term "co-employee" or "fellow servant."
48 Apparently, there is no consistent pattern in the United States as to barring of common law actions against co-employees. In *Feity v. Chalkey,* 185 Va. 96, 38 S.E.2d 73 (1946) the situation was described as "a hopeless conflict."
50 See Seavey, Agency § 93A (1964). Restatement (Second), Agency § 217 (1958) also takes the position that a principal's derivative liability is not removed because of an immunity preventing an action against his employee.
51 See note 39 supra and accompanying text.
action is barred.\textsuperscript{62} In \textit{Lewis v. Barnhill}\textsuperscript{63} it was held that plaintiff and defendant were not co-employees. In determining whether an employee has been borrowed, the common law tests for determining employment relationship are also used. The "right to control" issue is, of course, crucial to this determination.\textsuperscript{64} Until recently, the Court, through application of the "right to control" test, attempted to decide which of two persons was the "employer."\textsuperscript{65} However, in the recent decision of \textit{Leggette v. J.D. McCotter, Inc.},\textsuperscript{66} the possibility that an individual could be employed by both the lending and the borrowing employer was recognized. In \textit{Lewis v. Barnhill},\textsuperscript{57} the \textit{Leggette} case was distinguished on its facts, the Supreme Court finding that defendant had not been "borrowed" by plaintiff's employer at all.\textsuperscript{58} \textit{Lewis} illustrates a major difficulty with the rule barring common law actions against co-employees. The injured employee finds his common law rights of action barred or not, depending upon the details of the arrangement between his employer and another. Although the details of that arrangement unquestionably must be significant in deciding whether an employment relationship has been created and, thus, whether compensation benefits must be paid, it is difficult to see their relevance in barring an action against someone not a part of that relationship. The legitimate policy of protection provided the employer by the "exclusive remedy" provision finds no counterpart where a co-employee, a "borrowed" servant, or an independent contractor is involved.

One other case decided by the Supreme Court this past year deserves mention here, because it makes clear a point as to the Act's coverage not previously decided. In \textit{Laughridge v. South Mountain Pulpwood Co.},\textsuperscript{59} defendant employer regularly employed less than five employees. It was thus exempted from the Act by G.S. § 97-2(1) and G.S. § 97-13(b). However, defendant purchased a policy

\begin{itemize}
  \item \textsuperscript{62} Weaver v. Bennett, 259 N.C. 16, 129 S.E.2d 610 (1963).
  \item \textsuperscript{63} 267 N.C. 457, 148 S.E.2d 536 (1966).
  \item \textsuperscript{65} See, \textit{e.g.}, Shapiro v. Winston-Salem, 212 N.C. 751, 194 S.E. 479 (1938).
  \item \textsuperscript{66} 265 N.C. 617, 144 S.E.2d 849 (1965).
  \item \textsuperscript{57} 267 N.C. 457, 148 S.E.2d 536 (1966).
  \item \textsuperscript{58} The distinction drawn by the Supreme Court between \textit{Lewis} and \textit{Leggette} rested in large part upon the fact that in \textit{Leggette} the borrowing employer had the right to terminate the employment, whereas in \textit{Lewis} he did not.
  \item \textsuperscript{59} 266 N.C. 769, 147 S.E.2d 213 (1966).
\end{itemize}
of compensation insurance to provide coverage for a single full time employee. Plaintiffs, who were dependents of a deceased corporate officer, claimed death benefits under the Act. Purchase of the policy was held to be a waiver of the exemption. Defendant argued that it waived its exemption from coverage only as to its full time employee. Since G.S. § 97-13(b) makes no mention of a partial waiver, the Court held that such a right should not be read into the Act. The difficulties created by allowing a partial waiver of exemption make this decision eminently sensible.

"ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT"

One case decided by the Court last year raised a substantial issue concerning the meaning of the phrase "arising out of and in the course of the employment," as used in G.S. § 97-2(6). In Bryan v. First Free Will Baptist Church, claimant was employed by defendant as its minister. Apparently claimant had accepted a call to another church. He was asked by defendant to move from the parsonage several weeks before his employment was to terminate so that a part of the parsonage could be refurbished. While moving his stove, claimant injured his back. Compensation was denied on the theory that the injury did not arise out of and in the course of the employment.

The Bryan case is representative of the difficulties which are presented under the "arising out of and in the course of" test. It is commonly accepted that two related but different ideas are embodied in the phrase. "Arising out of" is construed to require that the injury be incurred because of a condition or risk created by the job. "In the course of" is construed to refer to the time, place and circumstances in which the injury occurred. Together the

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61 N.C. Gen. Stat. § 97-13(b) (1965) provides for such a waiver by purchase of insurance.
62 For example, in the absence of a requirement that those employees who were intended to be covered be named, it would be almost impossible to discover exactly who the coverage was intended to benefit.
63 Petree v. Duke Power Co., 268 N.C. 419, 150 S.E.2d 749 (1966) also involved an "arising out of and in the course of" problem. A judgment for defendant was affirmed, due to a lack of evidence establishing the employee's death as work connected.
64 267 N.C. 111, 147 S.E.2d 633 (1966).
65 1 Larson, Workmen's Compensation Law § 6.00 (1952).
phrases are an attempt to separate work-related injuries from non-work-related injuries. Although this is standard doctrine, its application has caused considerable confusion in the Supreme Court, as the Bryan case illustrates.

As to the "arising out of" problem, it is difficult to understand the Court's decision finding claimant's injury non-compensable. His employer requested the move be made early, thus exposing him to the risk of injury which he actually suffered. The Supreme Court has recognized that the employment need not "cause" the injury in the sense that some job-related activity be the injury producing cause. It is enough if the employment requires the employee to expose himself to a risk of injury. The problem, as Larson points out, is that there are different classes of risks to which an employee is exposed while on the job. Some are distinctly job-related in the sense that the employee is only exposed to this type of risk while working. Other risks are so distinctly personal to the employee that injury would occur irrespective of whether the employee was on or off the job. The troublesome risks are those to which the employee is exposed both on and off the job. A lifting strain, such as was involved in Bryan, is a risk which could occur either while working or during leisure time activities. Although the Supreme Court has held in such cases that the employment must create or increase the risk, it is clear that such a rule is applied only where the risk itself is foreign to the employment and the only work-connection is the fact the employment required the employee to be in the location at the time. Whenever the facts have shown that the risk to which the employee was exposed arose from the job, com-

\[67\] In Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959), the claimant was struck by lightning and compensation was awarded on the theory the employment increased the risk of such a hazard. See also Goodson v. Bright, 202 N.C. 481, 163 S.E. 576 (1932).

\[68\] 1 Larsen, Workmen's Compensation Law § 7.00 (1952).


\[70\] See, e.g., Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963) (fall due to ideopathic condition).


\[73\] In Sandy the employee was off duty when killed by an automobile. The only work connection present was a showing that he was sent out of town by his employer on a repair job, and thus was not living at home.
pensation has been allowed, despite the fact the risk of injury was one to which the employee could be exposed as a citizen.\textsuperscript{74} Any other position would require denial of all lifting claims, since exposure to lifting strains may occur both on or off the job. Thus, in \textit{Bryan} it seems clear that claimant's employment in this instance exposed him to the risk of injury, since the move was necessitated by the employer's request.\textsuperscript{75}

Although the Supreme Court seemingly decided \textit{Bryan} as an "arising out of" case, the same result could have been reached had the case been treated as an "in the course of" problem. "In the course of" involves deciding whether the injury occurred within the time and space limitations of the job.\textsuperscript{76} In addition, however, it must be shown that the employee, at the time of injury, was in some way furthering his employer's interests.\textsuperscript{77} The employee must be on the job. In \textit{Bryan}, it would appear that the real difficulty facing the claimant was establishing that he was furthering his employer's interests rather than his own.\textsuperscript{78}

The point to be observed from the above discussion of \textit{Bryan} is simple but significant. Imprecision in distinguishing "arising out of" problems from "in the course of" problems has in the past led to decisions which appear unwarranted.\textsuperscript{79} Although both tests are

\textsuperscript{74} Compare Winberry v. Farley Stores, Inc., 204 N.C. 79, 167 S.E. 475 (1933) (bill collector killed by debtor), with Hollowell v. Department of Conservation & Dev., 206 N.C. 206, 173 S.E. 603 (1934) (game warden killed by person against whom he testified).

\textsuperscript{75} It is on this basis that Van Devanter v. West Side M.E. Church, 10 N.J. Misc. 793, 160 Atl. 763 (1932), relied on by the Supreme Court in \textit{Bryan}, can be distinguished. There claimant was injured while carrying ashes from the parsonage. There was no showing that a request to do so had been made by the employer, nor was there a showing that the normal ministerial duties included this type of activity.

\textsuperscript{76} See, \textit{e.g.}, Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

\textsuperscript{77} Thus compensation was denied in Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952), because claimant was washing his car, though doing so with his employer's consent during normal working hours.

\textsuperscript{78} Although arguably the employer's request could serve to expand the normal scope of activities, this is a difficult position to argue successfully, since employer requests may do no more than grant permission to cease job-related activities for the time being. The easy case here in Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943), where the injury occurred at an employer sponsored picnic. More difficult is Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939), where the injury occurred while the employee, a janitor, was mowing his employer's yard.

\textsuperscript{79} \textit{E.g.}, Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938). See also Walker v. Wilkins, 212 N.C. 627, 194 S.E. 89 (1937); Marsh v. Bennett College, 212 N.C. 662, 194 S.E. 303 (1937).
part and parcel of the single problem of determining relationship between injury and employment, there is a big difference between denying compensation because the claimant was not furthering the employer's interest, as in *Bryan*, and in denying compensation to an employee who is furthering such interests, but who is unfortunate enough to be injured by a cause which is not "peculiar" to the work. In recent years the Court has shown some tendency to treat "in the course of" problems as "arising out of" cases. Although in individual cases this may not affect the propriety of the result reached, it can serve to increase confusion in future cases and may lead to unjust results.

"Average Weekly Wages"

G.S. § 97-2(5) defines the term "average weekly wages," as used by the Act in establishing compensation rates for wage losses. The section provides several methods for computing average weekly wages, some of which are designed to permit a method of arriving at a wage rate in unusual situations. In *Barnhardt v. Yellow Cab Co., Inc.*, claimant was totally disabled as a result of being shot while "moonlighting" as a taxi driver for defendant. His primary wage source was his employment as a machine maintenance man for the National Cash Register Co., for whom he worked a normal 40 hour week. The issue presented was whether, in computing average weekly wages, claimant could use total wages earned from both employers or only those earned from defendant. The more precise issue involved a construction of that portion of G.S. § 97-2(5) which provides: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method . . . may be resorted to as will most nearly approxi-

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80 The classic illustrations of the denial of compensation in such cases are *Barn v. Travura Mfg. Co.*, 203 N.C. 466, 166 S.E. 301 (1932); *Whitley v. State Highway Comm'n*, 201 N.C. 539, 160 S.E. 827 (1931). In both cases claimant was shot while engaged in his work. Compensation was denied. Compare *Perkins v. Sprott*, 207 N.C. 462, 177 S.E. 404 (1934), in which compensation was granted claimant for an injury received when a baseball struck the windshield of the truck in which he was riding.


82 *E.g.*, N.C. GEN. STAT. § 97-29 to -31 (1965).

83 *266 N.C. 419, 146 S.E.2d 479 (1966). The same issue was presented in *Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), and was resolved in accord with *Barnhardt*. 
mate the amount which the injured employee would be earning were it not for the injury." Claimant, using the quoted language, argued that the statute authorized an averaging of both wage sources. The Supreme Court, in reliance upon the general statutory definition contained in G.S. § 97-2(5), which limits wages to those earned "in the employment in which he was working at the time of the injury . . . ," held that only wages received from defendant could be used in computing the claimant's average weekly wage. 84

One can feel a good deal of sympathy for the Court's dilemma. Although the initial problem involves construction of G.S. § 97-2(5), the statute is ambiguous as to the result in this situation. The language of the section, on the one hand, limits wages to those earned in the employment in which the claimant was working when injured. On the other hand, it also directs the Court, in exceptional cases, to the method which is the fairest in approximating the claimant's wage loss. None of the provisions of G.S. § 97-2(5) really answer Barnhardt, since the section makes no specific mention of dual employment. 85 Thus, although the Court's sympathies clearly lay with the employee, its decision, which did not, is difficult to criticize. 86 One is compelled, however, to point out that the construction of G.S. § 97-2(5) adopted by the Supreme Court does not lead inevitably from the statute itself. It rests upon an assumption that the General Assembly intended the language "in the employment in which he was working at the time of the injury . . . ." to exclude wages earned in another employment. This assumption rests upon another: that the General Assembly considered the dual em-

85 N.C. Gen. Stat. § 97-2(5) (1965) does make reference specifically to volunteer firemen. Although the Supreme Court made mention of this in Barnhardt, the provision cannot be construed to mean that the General Assembly considered dual employment problems generally, since volunteer firemen are an exceptional situation with respect to wage rate determination.
86 The only earlier North Carolina case which offers any help on the dual employment question is Casey v. Board of Educ., 219 N.C. 739, 14 S.E.2d 853 (1941). There claimant was employed as a janitor, and was paid from two wage sources. As the Supreme Court pointed out in Barnhardt, Casey involved a dispute between employers, and did not purport to answer the question raised in Barnhardt. Throughout the United States generally, authorities are unanimous in not allowing accumulations of wages from dissimilar employments, in the absence of statutory authorization. 2 Larson, Workmen's Compensation Law § 60.31 (1952). Barnhardt involved the question of whether N.C. Gen. Stat. § 97-2(5) (1965) authorized such accumulation.
ployment problem in drafting the quoted language. An equally permissible assumption is that the language relied upon by claimant evidences an intent to treat dual employment as an exceptional situation and that the language relied upon by the Court was meant to apply only to the usual situation in which only a single employment is involved.

The argument favoring the construction adopted by the Supreme Court in *Barnhardt* must rest upon the basic idea that it is unfair to the employer to require him to allocate, as a part of his cost of doing business, the cost of premiums to insure against payment of compensation in excess of wages actually earned and benefits actually received from employing the employee. Viewed in this light, *Barnhardt* represents a position that it is unfair to place the total burden of compensation upon the part-time employer. Two arguments suggest themselves as justifying an opposite conclusion. First, as Prof. Larson points out, the increased burden placed upon the employer or his insurer is minimal, since this type of case does not arise often. Thus the policy behind the Act to provide adequate wage compensation should be deemed sufficiently strong to justify asking the employer to absorb the slight additional premium costs. Second, it is not unfair to place the burden upon the employer because it was his failure to pay sufficiently attractive wages which created the employee's need for dual employment. The employer could eliminate dual employment by work rule or by contract. In doing so he must face the consequent problem of attracting and keeping employees. This might require a wage increase. In choosing to keep wage rates lower, he can be said to run the risk of "moonlighting." It would be proper to ask him to absorb the total wage loss of employees who are injured while working for him. This is a risk properly allocatable to his business, because of his relying upon employees to hold more than one job. Thus a construction of G.S. § 97-2(5) requiring accumulation of all wages would be just, particularly in light of the "exceptional reasons" language included by the General Assembly.

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87 See as to the risk distribution or allocation theory, Calebresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961). For a discussion of risk distribution as it relates to common law doctrines, see Douglas, Vicarious Liability and the Administration of Risk, 38 Yale L.J. 584 (1929).

88 2 Larson, Workmen's Compensation Law § 60.31 (1952).