Recently Developments in North Carolina Case Law (December 1972 to November 1973)

North Carolina Law Review

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol52/iss4/5

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Automobile Liability Insurance—Construing the Omnibus Clause
—Round One

Automobile liability insurance policies ordinarily contain a provision that extends coverage to persons other than the named insured while they are driving the insured's vehicle.\(^1\) The primary objective underlying the development of such “omnibus clauses”\(^2\) has been the protection of the insurance purchaser as well as certain persons who are the natural objects of his concern, particularly members of his household\(^3\) and friends to whom he might lend his car.\(^4\) Consequently, most omnibus clauses, whether voluntarily included as a policy option or required by state statutes,\(^5\) cover only those persons driving with the insured’s permission.\(^6\) In addition to indemnifying the owner for liability incurred because of the use of his car, the omnibus clause enhances the probability that innocent victims of traffic accidents will recover at least some damages in suits against legally responsible though possibly judgment-proof drivers.\(^7\) This important public policy consideration\(^8\) has been a major impetus behind state automo-

1. See 12 G. Couch, CYCLOPEDIA OF INSURANCE LAW §§ 45:284, :291 (2d ed. 1964) [hereinafter cited as Couch].

2. “The term 'omnibus clause' is ordinarily used to signify a provision of a liability insurance policy designating additional insureds by an expansive class description in terms of some relationship to the insured . . . . [The clause usually appears under a caption such as 'persons insured' or 'definition of the insured.']” R. Keeton, BASIC TEXT ON INSURANCE LAW § 4.7(a), at 221 (1971) [hereinafter cited as Keeton].

3. See 7 J. Appleman, INSURANCE LAW AND PRACTICE § 4352 (1962) [hereinafter cited as Appleman]; Keeton §§ 2.11(b)(1), (3), 4.7(a). In some jurisdictions the “family purpose” doctrine imputes a principal-agent relationship between the driver and the owner where the latter maintains an automobile for pleasure or use by his family. See, e.g., United States Fidelity & Guar. Co. v. Brann, 297 Ky. 381, 180 S.W.2d 102 (1944).

4. See 12 Couch § 45:293.

5. See 7 Appleman § 4353.

6. See id. § 4354; 7 D. Blashfield, AUTOMOBILE LAW AND PRACTICE §§ 315.5, .8 (3d ed. 1966). “[It is a universally accepted rule that permission which will effectuate coverage under the usual omnibus clauses may be either express or implied . . . .]” Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 384, 126 S.E.2d 161, 165 (1962).

7. See Keeton § 4.7(a). “[S]uit may . . . be brought against the insured by a third person, injured by the conduct of the automobile, by garnishment or otherwise.” 7 Appleman § 4371, at 333.

8. “Statutes requiring the insertion of the ‘omnibus clause’ in automobile liability policies reflect a clear cut policy to protect the public. They should be construed . . .
bile insurance legislation; North Carolina, for example, has required various types of omnibus clauses since 1931.⁹

Except for one brief period,¹⁰ North Carolina has adhered to the traditional omnibus clause format by requiring coverage for persons driving with the express or implied permission of the owner. However, in 1967 the legislature expanded the clause to read:

(b) Such owner's policy of liability insurance:

    (2) Shall insure the person named therein and any other person, as insured, using any such motor or motor vehicles with the express or implied permission of each named insured, or any other persons in lawful possession . . . .¹¹

The addition of the italicized language arguably created a new category of omnibus insureds,¹² but in 1972 the North Carolina Court of Appeals held that permission constitutes an essential element of “lawful possession,” thus discrediting this interpretation.¹³ Recently the

to carry out this policy.” Chatfield v. Farm Bureau Mut. Auto. Ins. Co., 208 F.2d 250, 256 (4th Cir. 1953). The North Carolina Supreme Court has stated that “[t]he primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway.” Allstate Ins. Co. v. Hale, 270 N.C. 195, 200, 154 S.E.2d 79, 84 (1967).


10. The statute was in effect only during the years 1947-1953; see note 9 supra.


12. One basis for this conclusion is the legislature’s use of the conjunction “or,” which normally indicates supplementary rather than cumulative intent. Other bases are discussed in the text accompanying notes 50-56 infra.

13. See text accompanying note 17 infra. Although the phrase was contained in the 1947 version of the omnibus clause, see note 9 supra, no judicial interpretation of the phrase has been found other than a statement in Hawley v. Indemnity Ins. Co., 257 N.C. 381, 126 S.E.2d 161 (1962), that it “was sufficiently broad to embrace the liberal rule.” Id. at 387, 126 S.E.2d at 166; see text accompanying note 31 infra. At least two cases have recently presented ample opportunity for elaboration upon the phrase, but the issue was ignored in both. See Nationwide Mut. Ins. Co. v. Fireman’s Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971) (son had father’s consent to operate substitute car even though he obtained it without his father’s knowledge from the garage where the father’s car was being repaired); International Serv. Inc. Co. v. Iowa Nat’l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970) (buyer’s brother had buyer’s permission but was not covered under seller’s policy since seller still had title and had
North Carolina Supreme Court apparently adopted a similar stance.\textsuperscript{14}

Although these courts may have impeded vigorous implementation of the victim-compensation policy, they should not be hastily accused of failing to discern an obvious legislative intent. The expansive term “lawful possession” clearly permits various interpretations, and North Carolina’s “temporary larceny” statute\textsuperscript{15} provides substantial support for a permission-oriented definition of “lawful possession.”

In \textit{Jernigan v. State Farm Mutual Automobile Insurance Co.}\textsuperscript{16} the owner’s daughter, who had received blanket permission to drive her father’s car, was accompanied by her mother on a shopping excursion. The mother, who was not a licensed driver, had neither her husband’s nor her daughter’s permission to drive the car. While waiting in the parked car for her daughter, she was requested to drive a short distance to facilitate another car’s exit from its space. In the process of complying with the request, she collided with the plaintiff’s vehicle. The court of appeals held that the mother was not an additional insured under the owner’s policy because “[r]egardless of the liberality of the rule of construction applied, permission of the named insured or the original permittee is essential to extend coverage to a second permittee.”\textsuperscript{17} As previously noted, the amended omnibus clause specifically establishes coverage when either permission or lawful possession exists. Therefore the court’s assertion that permission is \textit{essential} to omnibus clause coverage countermands the statute’s disjunctive format by implicitly predating lawful possession upon the existence of permission.

Moreover, the court suggested that permission given to third parties need not originate with the owner. But if the court intended

\footnotesize{not given express or implied permission). The issue was present but not examined by the court of appeals in Marlow v. Reliance Ins. Co., 15 N.C. App. 456, 190 S.E.2d 417, cert. denied, 282 N.C. 153, 191 S.E.2d 602 (1972); see note 20 infra.


15. N.C. GEN. STAT. \$ 20-105 (1965). For pertinent portions of the statute, see text accompanying note 69 infra.


17. \textit{Id.} at 52, 190 S.E.2d at 871 (emphasis added). In addition, the so-called “emergency driver” situation is only one of several conceivable situations fraught with unfairness by the strictures of such an ironclad doctrine. \textit{See, e.g.,} Welchel v. Sommer, 413 F.2d 521 (8th Cir. 1969), noted in 48 N.C.L. REV. 984 (1970). \textit{In Welchel}, the owner’s wife passed out at the wheel and was taken home in another car. One of her passengers attempted to return the car to avoid vandalism or theft and was involved in an accident while enroute to the owner’s home. The court held that he was not covered under the owner’s liability policy.
the original permittee to have such authority, it neglected to articulate the constraints placed on him. Standing alone, Jernigan thus conceivably holds that an owner may not restrict further extensions of permission once he himself has granted initial permission to another.

The supreme court sequel to the Jernigan decision unfortunately provides neither an explicit definition of "lawful possession" nor a comprehensive discussion of the owner-permittee relationship. In *Iowa National Mutual Insurance Co. v. Broughton*18 the owner rental agency leased one of its automobiles to Victor Carraway under a written agreement stipulating in part that the lessee would permit no one under age twenty-one to operate the vehicle.19 Shortly after leaving the agency's premises, Carraway relinquished control of the car to nineteen-year-old Elijah Massey who subsequently was involved in the collision in issue. The court held that Massey was not afforded coverage under the agency's liability policy since the plaintiffs, in failing to adduce evidence of the lessor's permission,20 were unable to establish that he was in lawful possession at the time of the accident.21

*Broughton* was not necessarily the most appropriate occasion for the court to analyze the amended omnibus clause. As Justice Branch noted, the identical result could and should have been reached under the North Carolina statute that specifically allows leased or rented vehicles to be covered by a policy that insures only "the owner and

---

19. At the time, only persons over age twenty-one were legally responsible for their actions under North Carolina law. *Id.* at 313, 196 S.E.2d at 246. Ironically, the age limit of a "minor" was lowered to eighteen on July 5, 1971, less than a month after Massey's accident. See *N.C. Gen. Stat.* ch. 48A (Supp. 1973). In upholding the age restriction, the court refers to the rental agency's need to recoup its losses through a breach of contract action. Given this fact and the public policy considerations involved in the case, a possible solution would be to uphold coverage but allow the insurer to be indemnified by way of subrogation to the insured's breach of contract action against the first permittee.
20. See 283 N.C. at 314, 196 S.E.2d at 247. A glimpse of the court's attitude was provided by its denial of certiorari in Marlow v. Reliance Ins. Co., 15 N.C. App. 465, 190 S.E.2d 417, *cert. denied*, 282 N.C. 153, 191 S.E.2d 602 (1972). There, the trial court held as a matter of law that an express prohibition precluded a finding of express or implied permission or "lawful possession." The court of appeals affirmed this holding without commenting on the meaning of "lawful possession."
21. Placing the burden of proof on the injured plaintiff contrasts sharply with the legislature's attempts to minimize the barriers separating traffic accident victims from their rightful compensation. Mr. L. P. McLendon, Jr., a member of the Senate Insurance Committee when the amendment was passed, has opined that "the proviso was clearly intended to place the burden on the insurer to show that one is not in 'lawful possession.'" McLendon, *Coverage Disputes: Basis of Defenses in North Carolina Bar Association Foundation, Institute on Liability Insurance Litigation* III-1, III-13 (1968) (emphasis added) [hereinafter cited as *Coverage Disputes*].
rentee or lessee and their agents and employees while in the performance of their duties.”

The court obviously wanted to comment on the omnibus clause, but whether it succeeded in clearly establishing its interpretation of “lawful possession” is subject to debate. The court intentionally ignored *Jernigan,* and its equivocal language suggests a deliberate attempt to preserve the option of overruling the case. Narrowly viewed, *Broughton* merely identifies one situation that does not fall within the ambit of “lawful possession.” Although this interpretation is justifiable, *Broughton* may also be regarded as an implicit approval of the *Jernigan* interpretation of “lawful possession.” This note will proceed under the assumption that *Broughton* actually approves *Jernigan;* hopefully the implications of this interpretation will encourage the issuance of a more precise definition of “lawful possession.”

If *Broughton* confirms the importance of permission in establishing coverage under the statutory omnibus clause, it nevertheless fails to clarify the extent of the owner’s control over that permission once given to the initial permittee. *Jernigan’s* broad implications have only

22. N.C. GEN. STAT. § 20-281 (Supp. 1973). A fundamental axiom of statutory construction holds that “[w]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling . . . .” 7 J. STRONG, N.C. INDEX 2d STATUTES § 5, at 73 (1967), cited in 283 N.C. at 315-16, 196 S.E.2d at 248 (Branch, J., concurring).


24. This issue should not be confused with the debate concerning the extent of the owner’s control over subsequent extensions of permission by the initial permittee. The critical language affecting this issue appears in the court’s statement that “[n]o provision is made for owner’s liability either by the policy or by G.S. § 20-279.21, as amended, until lawful possession is first established. This may be done by express or implied permission of the owner.” 283 N.C. at 314, 196 S.E.2d at 247 (emphasis added). At least two arguments can be made in favor of interpreting *Broughton* as a tacit affirmation of *Jernigan’s* definition of “lawful possession.” First, the court states that no omnibus clause coverage exists unless lawful possession is established. This statement appears incongruous with the statute’s explicit provision for coverage when either permission or lawful possession exists. However, the court’s statement can be reconciled with the statute if one assumes that permission is an essential element of lawful possession, as the court of appeals so held. Secondly, if the statement that lawful possession may be established by express or implied permission indicates that other means of establishing lawful possession exist, the court would not have terminated its inquiry after failing to find either express or implied permission. If the court did not intend to follow *Jernigan,* its next logical step would have been to inquire whether other evidence of lawful possession existed. If none were offered, only then could it have safely concluded that Massey was not in lawful possession.
been limited to situations where the owner fails to prohibit expressly further extensions of permission; thus an unconditional grant of permission arguably allows the permittee to extend subsequent permission at will. Prior to the 1967 amendment a permittee could extend permission only when authorized to do so by the owner. The court of appeals evidently considered this restrictive rule incompatible with the liberal policy represented by the amendment, but the supreme court merely reiterated the pre-amendment rule by quoting a 1965 case, Bailey v. General Insurance Co. If the amendment failed to weaken the owner’s authority over extensions of permission, Jernigan’s implications should have been challenged. Yet the court’s failure to speak authoritatively on the amended statute leaves the present limits of an owner’s control over his permittee undefined.

Regardless of its failure to dispel the present uncertainty surrounding the owner-permittee relationship, the court’s resolution of the actual dispute in Broughton appears unassailable. Unfortunately, the tortuous route followed by the court led it further away from the North Carolina policy of protecting the motoring public.

Despite its commendable attributes, the omnibus clause has developed into a “prolific source of litigation,” predominantly concerned with factually oriented “permission” issues. Under conventional analysis, three related but distinct lines of authority have evolved to govern such disputes: (1) under the strict or “conver-

25. See note 26 infra.

26. 265 N.C. 675, 144 S.E.2d 898 (1965). “Ordinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured.” 283 N.C. at 314, 196 S.E.2d at 247. A discussion of Bailey is contained in the text accompanying note 38 infra.

27. See, e.g., N.C. GEN. STAT. § 20-71.1 (1965) (presumption that operator is owner’s agent); id. §§ 20-279.1 to .39 (Supp. 1973) (financial responsibility laws); id. § 20-280 (Supp. 1973) (taxicab operator required to prove financial responsibility); id. §§ 20-281 to -284 (Supp. 1973) (motor vehicle lessors required to obtain insurance); id. § 58-194.1 (1965) (insurance required for all state owned vehicles).

28. KETTON § 4.7(b)(1), at 223.

29. See text accompanying note 6 supra. A detailed treatment of the major issues in omnibus clause litigation may be found in Note, The Omnibus Clause and Extension of Coverage by the Court, 45 N.D.L. REV. 505 (1969).

30. Some earlier cases utilized a bifurcated analysis that focused on “whether the permission is confined to the time when the accident occurs, or whether it is defined as permission ‘in the first instance . . . .’” Hodges v. Ocean Acc. & Guar. Corp., 66 Ga. App. 431, 435, 18 S.E.2d 28, 31 (1941), cert. denied, 316 U.S. 693 (1942).

31. See generally APPLEMAN §§ 4366-72; COUCH §§ 45:463-78. One court has enunciated a fourth rule that amalgamates the moderate and liberal rules. See Ryan v. Western Pac. Ins. Co., 242 Ore. 84, 408 P.2d 84 (1965).
sion" rule, any deviation from the time, place, or purpose specified by the person granting permission will defeat omnibus clause coverage; (2) under the moderate or "minor deviation" rule, a slight or "non-material" deviation will not exclude the permittee from coverage; and (3) under the liberal or "initial permission rule," permission, once given, extends to any subsequent uses.32 Since the courts generally place a great deal of emphasis on legislative expressions of public policy,33 it is not surprising that many have opted for the liberal construction rule.34

Yet in spite of numerous legislative attempts to reduce the number of uncompensated accident victims,35 the North Carolina courts have adhered to the moderate rule of construction since 1953.36 An adjunct to this rule requires the injured plaintiff to prove the existence of express or implied permission.37 Broughton continues this tradition by citing Bailey v. General Insurance Co.,38 a moderate rule case that graphically depicts the frequent impossibility of such proof.

In Bailey the insured's daughter drove the family car to another town and left it at a girlfriend's home while on a brief vacation trip. During this time the girlfriend's date, a mutual friend, was involved in an accident while driving the car to a party. The court denied coverage because the plaintiff-victims could not establish permission. More importantly, the court expressly held that the original permittee

35. See note 27 supra.
36. In Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 126 S.E.2d 161 (1962), the court theorized that the 1953 deletion of the "in lawful possession" phrase from the omnibus clause reflected the legislature's intent to repeal the liberal rule in North Carolina. The court's reasoning has been soundly criticized on the ground that the legislature had no intentions other than conforming the North Carolina clause with the uniform legislation enacted in many other states. See Coverage Disputes III-13; Note, Automobile Insurance—Permissive User Under the Omnibus Clause, 41 N.C.L. Rev. 232, 237 (1963).
37. The court reiterated in Broughton that "[n]o provision is made for owner's liability either by the policy or by G.S. § 20-279.21, as amended, until lawful possession is first established." 283 N.C. at 314, 196 S.E.2d at 247. However, Mr. McLendon has emphasized that the amendment "was clearly intended to place the burden on the insurer to show that one is not in 'lawful possession.'" Coverage Disputes III-13 (emphasis added); see note 57 infra.
38. 265 N.C. 675, 144 S.E.2d 898 (1965).
could not select another permittee "without specific authorization from the named insured," which of course had not occurred.

In 1967 the General Assembly responded to Bailey with the passage of Senate Bill 618, which amended section 20-279.21(b)(2) of the North Carolina General Statutes by reinserting the phrase "or any other persons in lawful possession." Since the court of appeals interpreted this action as a command to revive the liberal rule in this state, a brief look at the rule's current status will be helpful. The seminal decision in this area, Matits v. Nationwide Insurance Co., held that once initial permission had been given, "any subsequent use short of theft or the like while it remains in his [the permittee's] possession, though not within the contemplation of the parties, is a permissive use . . . ." Since the rule applied only to the first permittee's use of the car, commentators quickly pointed out that excessive litigation would persist as long as the courts continued to require factual inquiry into the scope of the owner's permission with respect to the user of the car. In response, the New Jersey Supreme Court expanded the Matits rule: "[O]nce initial permission is given . . . coverage is fixed, barring theft or the like."

The court's attempt to comport theory with reality was exemplified by its statement that an "insured's admonitions . . . regarding the use of his vehicle by other drivers is rarely if ever intended to restrict the scope of insurance coverage." Although Jernigan may reflect a movement toward this type of realistic approach, Broughton's conservative vagueness has slowed the pace, at least for the time being.

39. Id. at 678, 144 S.E.2d at 900. The court's reliance on Bailey to limit Jernigan raises the disturbing possibility that the supreme court will never recognize the distinction between cases decided under the moderate and liberal rules.


42. See text accompanying note 11 supra.


44. 33 N.J. 488, 166 A.2d 345 (1960).

45. Id. at 496-97, 166 A.2d at 349.


48. 55 N.J. at 548-49, 264 A.2d at 42.

49. See text accompanying note 18 supra.

50. See text accompanying note 26 supra.
Regardless of the outcome of the debate over the "initial permission" rule, the crucial question remains whether the 1967 amendment merely resurrected the liberal rule of construction or effected a more fundamental change in North Carolina insurance law. The courts have indirectly rejected the latter possibility, but since the amendment was specifically devised to rectify the inequities exemplified by Bailey, a persuasive argument exists that certain drivers previously excluded by lack of permission should henceforth be covered by the statutory omnibus clause. The preamble to the session law corroborates this conclusion by its explicit recognition of the non-permission-permission dichotomy:

WHEREAS liability coverage under the laws of North Carolina is provided for an operator of a vehicle who has the "express or implied permission" of the titled owner but does not extend to persons otherwise lawfully in possession of vehicles . . . .

Mr. Joe K. Byrd, the drafter of Senate Bill 618 and a member of the Senate Judiciary Committee, to which the bill was referred, has emphasized that "the precise intention of the bill was to hold the liability carrier responsible for the negligent actions of every driver of a vehicle insured by it other than a thief." Furthermore, even the automobile insurance industry was well aware that this was the legislature's intent. Prompted by a common awareness of the critical need to further protect innocent tort victims, the legislature concluded that public policy compelled protection of accident victims except in the "thief situation." Of course, extending coverage to any driver not in-
tending to permanently deprive the owner of possession would bring North Carolina much closer to its public policy goals than even New Jersey's expanded "initial permission" rule.

The North Carolina courts have long recognized that the first step in statutory construction involves the ascertainment of legislative intent:

In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context.

If the courts had interpreted "lawful possession" to mean "anything short of theft," as the legislature arguably intended, they would not have found much authority for holding permission to be an essential element of "lawful possession." Since the term "theft" generally connotes a felonious intent to permanently deprive another of his property, possession of another's car with the intent to "borrow" it normally would not be considered "theft" even though the owner had not given permission. Thus the borrower would fall within the "anything short of theft" category and likewise within the coverage of the omnibus clause regardless of the absence of permission.

Nevertheless, the courts merely accepted the words "lawful possession" at face value, and substantial authority in North Carolina supports their interpretation. For example, lack of permission is an element of conversion, which although usually considered a civil wrong constitutes a misdemeanor under North Carolina law in limited circumstances. Thus a converter may be precluded from "lawfully pos-


59. "The rule that initial permission will suffice applies only when that permission was actually granted...." 7 APPLEMAN § 4366 (Cum. Supp. 1972).


62. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 637 n.2 (1972).


64. N.C. GEN. STAT. § 14-168.1 (1969) provides: "Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with fraudulent intent to convert it to his own use, shall be guilty of a misdemeanor."
sessing" that which he converts. The supreme court has characterized conversion as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another . . . to . . . the exclusion of the owner's rights."65 In the preamble to the 1967 amendment, the legislature acknowledged one such "owner's right" to be the "absolute authority under the law to allow or not to allow anyone else to operate his vehicle . . . ."66 In fact, most jurisdictions hold that violation of an owner's express prohibition excludes the prohibited driver from coverage regardless of the rule of construction employed.67

North Carolina's "temporary larceny"68 statute further complicates matters by stating that anyone who drives another's vehicle "without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession . . . is guilty of a misdemeanor."69 Since anyone who borrows another's car usually intends to temporarily deprive the owner of possession, even if only for a few minutes, lack of permission theoretically precludes any borrower from being in "lawful possession" even though he is not a thief. Although the statute apparently was ignored or circumvented as a matter of convenience during the judicial and legislative deliberations over the meaning of "lawful possession," it constitutes a formidable obstacle to the proposition that permission is not necessary for "lawful possession." It seems fruitless to contend that one may "lawfully possess" a vehicle while contemporaneously violating a criminal statute because of that possession.

Moreover, the legislature now faces a more fundamental problem than convincing the courts to adopt a more liberal interpretation of "lawful possession." Even if the courts interpreted the phrase to mean "anything short of theft," they could still retain the permission requirement on the grounds that a situation exists under the theft cate-

67. See Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 386, 126 S.E.2d 161, 166 (1961); 12 Couch § 45:409. For cases holding to the contrary, see 12 Couch § 45:410 (Supp. 1972). It should be noted that this "majority rule" is premised upon a "permission" oriented omnibus clause, which arguably no longer exists in North Carolina.
68. This appellation was employed in State v. Wall, 271 N.C. 675, 678, 157 S.E.2d 363, 365 (1967) (temporary larceny not an included lesser degree of larceny).
gory—temporary larceny—which depends upon the absence of permission. Consequently, for a borrower to show that he is not a temporary larcenist and therefore within the ambit of the “anything-short-of-theft” category, he must establish the owner’s permission. While this problem could be avoided by convincing the courts that the generic term “theft” does not include “temporary larceny,” the comprehensive nature of “theft” makes this an unlikely prospect. Therefore a more feasible solution lies in the use of the more specific term “larceny,” which clearly does not encompass “temporary larceny.”

In light of the present stalemate, the legislature would be ill-advised to rely solely on the courts to improve the present victim-compensation system. Even though the courts have stated that “[a] compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment . . . may be accomplished,” they can operate only within the framework constructed by the legislature. Hence, the legislature must assume responsibility for instituting needed improvements in state insurance law.

The most progressive improvement in the delivery of compensatory damages to accident victims would be the enactment of a “no-fault” insurance system for North Carolina. Since indemnification is completely unrelated to “fault” under such a system, immediate recovery would be available without the uncertainty or trauma of expensive, time-consuming litigation. However, a modified “no-fault” plan, such as that recently proposed by the Governor’s Study Commission, still would require the legislature to clarify its intentions concerning omnibus clause coverage.

As previously intimated, wasteful “permission” litigation possibly could be eliminated by: (a) requiring owner’s policies to cover anyone using or operating the insured’s vehicle except in cases of lar-
and (b) excising the “express or implied permission” language from the present statute. This second step, deletion of a subcategory of the drivers defined in step (a), fosters simplicity and minimizes confusion over the legislature’s precise intent.

Cost-conscious skeptics of a larceny-oriented omnibus clause should note that the scope of the insurer’s risk is as broad as the policyholder’s discretion, which conceivably spans the entire community, and that current premiums are calculated in light of this risk. Therefore removal of the “permission” restriction would not greatly increase premium costs, since breadth of coverage would remain fairly constant. Neither can one freely assume that owners will become less circumspect in regulating access to their cars, thus increasing the number of unreliable drivers on the highways. As the New Jersey Supreme Court noted, an owner seldom considers the insurance ramifications of lending his car—if he does, his attention is probably focused only on his deductible collision policy. Even if the number of accidents increased, the resulting impact on insurance rates would be minimized by the insurer’s ability to recoup payments compelled by statute that would not otherwise have been made. Moreover, most drivers are covered by their own liability policies when operating another’s vehicle, thus confining the suggested expansion in coverage to a relatively small group of heretofore uninsured drivers. Regardless of the extent of expansion, the resulting decrease in insurance company litigation costs theoretically would result in a “net savings to the mot-

or incurred medical expenses in excess of one thousand dollars. See Byrd, supra note 73, at 263.

76. Of course, this approach may prove vulnerable in light of the principle of statutory construction generally described as expressio unius exclusio alterius. Under this concept, setting forth one specific exception to a statute’s applicability constitutes an implied exclusion of any other exceptions. See W. LaFAVE & A. SCOTT, supra note 62, at 79. This would effectively mandate omnibus clause coverage for those drivers who obtained possession of a car by means of robbery, embezzlement, false pretenses, temporary larceny, or conversion by bailee or lessee. Any of the preceding circumstances which the legislature considers undeserving of coverage should be specifically enumerated in addition to larceny.

77. See 12 COUCH § 45:293, at 307.
78. See text accompanying note 66 supra.
79. See 12 COUCH § 45:298.
80. See text accompanying note 48 supra.
81. “Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article.” N.C. GEN. STAT. § 20-279.21(h) (1965).
82. See KEETON § 2.11(b)(4). North Carolina permits a so-called “operator’s” policy to suffice as proof of financial responsibility. See N.C. GEN. STAT. § 279.21 (c) (1965).
toring public as well as reduced friction among automobile liability insurers, their insureds, and accident victims." 

Whether or not one agrees with changes proposed in this note, it cannot be denied that the ambiguities inherent in the present statute constitute compelling grounds for legislative reappraisal. The inadequacies and inequities in the existing reparations system simply cannot be ignored in light of the demands of a clear and unequivocal public policy. Whether the hiatus between the courts and the legislature merely reflects a simple communications problem or a more fundamental difference in philosophies, the legislature should clarify its position to eliminate the possibility of future judicial misinterpretation.

SAXBY M. CHAPLIN

Civil Procedure—Involuntary Dismissals Under North Carolina Rules of Civil Procedure 41(b) and (c)

Since the adoption of North Carolina's new rules of civil procedure, there has been some uncertainty and confusion in the courts about the proper application of rules 41(b) and (c). In Helms v.

84. See U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 14 (1970); Byrd, supra note 73, at 247-48; Comment, The Time Has Come to Examine Objectively the No Fault Concept in North Carolina, 50 N.C.L. REV. 1104, 1107-13 (1972). In 1968, "total system costs were $2.07 for each $1.00 in net benefits received." Bombaugh, The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform, 71 COLUM. L. REV. 207, 231 (1971).

1. N.C.R. Civ. P. 41(b) provides:

Involuntary dismissal; effect thereof.—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party operates as an adjudication upon the merits. If the
Rea\(^2\) the North Carolina Supreme Court had occasion to explain one aspect of the operation of these new rules.

The case arose out of a one-car accident in which plaintiff was injured and defendant's intestate killed.\(^3\) The car belonged to the intestate, and she and plaintiff were its only occupants at the time of the accident.\(^4\) Plaintiff instituted an action against the defendant administrator, and the defendant counterclaimed for wrongful death.\(^5\) Pursuant to a pretrial conference, the parties stipulated that the negligence of the driver proximately caused plaintiff's injuries and the intestate's death.\(^6\) The critical issue of fact to be determined at trial was the identity of the driver. Jury trial was waived,\(^7\) and at the close of all the evidence the plaintiff, "pursuant to rule 41(b) and (c), [moved] for an involuntary dismissal of defendant's counterclaim."\(^8\) The trial judge granted plaintiff's motion to dismiss, finding that defendant's evidence was not sufficient to carry the case "to the jury."\(^9\) Later

---

3. Id. at 611, 194 S.E.2d at 2.
4. Id.
5. Id.
6. Id. at 612, 194 S.E.2d at 2.
7. Id.
8. Id. In the actual sequence of the various motion made at the trial, defendant first moved for involuntary dismissal at the close of plaintiff's evidence. This motion was denied, and defendant introduced evidence, at the close of which plaintiff offered rebuttal evidence. Plaintiff then moved for an involuntary dismissal of defendant's claim pursuant to rule 41(b) and (c). The trial court heard arguments on this motion at a later date and at that time allowed defendant to present additional evidence. It was after this evidence that plaintiff renewed his motion for involuntary dismissal. See note 69 infra for the appropriateness of making the motion at the close of all the evidence.
9. 282 N.C. at 619, 194 S.E.2d at 7. The court treated the reference to the jury as inadvertent and characterized the dismissal as being granted because the trial judge found no evidence that plaintiff was driving. This the court considered to be a question of law. Id.
the trial judge made findings of fact on plaintiff's claim which included a finding that defendant's intestate was the driver of the vehicle and that her negligence caused the accident. Judgment was entered for plaintiff, and defendant appealed, alleging as error the grant of dismissal of his counterclaim.

The court of appeals affirmed, finding that although it may have been technical error to grant the involuntary dismissal at the close of all the evidence, it was not prejudicial error. The court reasoned that since all the evidence was in, the judge as fact-finder would not have dismissed the counterclaim if the defendant had convinced him by the greater weight of the evidence that plaintiff was the driver. On the other hand, if the defendant had not met this burden then dismissal would not have been prejudicial because there would have been no finding for defendant in any event.

The North Carolina Supreme Court granted certiorari and reversed. The court found first that the trial judge erred when he concluded there was no evidence that would support a finding for defendant. Therefore the dismissal of defendant's counterclaim for insufficient evidence was improper. The court then found that the error in granting dismissal was not cured by the subsequent finding of fact that the defendant's intestate was driving. The court reasoned that by erroneously concluding that there was no evidence of plaintiff driving, the trial judge must have failed to consider much of the evidence in the record which would have supported that finding. Since he did not consider the evidence which pointed to plaintiff as the driver and since either plaintiff or defendant's intestate had to be driving, his finding that the intestate was the driver was unavoidably affected.

Also the court held the finding that there was no evidence of plaintiff's driving was an erroneous legal conclusion, and since facts determined "under a misapprehension of the law [should] be set aside on the theory that the evidence should be considered in its true legal

10. Id. at 612, 194 S.E.2d at 3.
12. Id. at 469, 190 S.E.2d at 292-93.
13. Id.
14. Id.
16. Id. at 618, 194 S.E.2d at 6.
17. Id. at 620, 194 S.E.2d at 8.
18. Id.
19. Id.
light," the case was remanded for trial de novo.21

20. Id. This final point made by the court is applicable to the review of findings of fact made under rule 52 (and thus those which are found when an involuntary dismissal is granted under rule 41(b)). The practice of setting aside facts determined or rulings made under a misapprehension of law seems to be well established in North Carolina. See 1 J. STRONG, N.C. INDEX 2d Appeal and Error § 57, at 227 (1967). This practice has been used (1) to set aside facts found against plaintiff when it appeared that the fact-finder misapprehended which party had the burden of proof on a crucial issue, see Lindsay v. Brawley, 226 N.C. 468, 471, 38 S.E.2d 528, 530-31 (1946); (2) to set aside orders which the trial judge made without considering all the factors which should have gone into his decision, Davis v. Davis, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967) (The trial judge, in dismissing plaintiff's complaint for increased alimony because he found a Florida separation agreement valid in North Carolina, failed to consider whether the alimony payments were reasonable as required by North Carolina law. Thus his findings that the agreement was valid could not stand because he had misapprehended the law in making the decision); In re Gibbons, 247 N.C. 273, 283, 101 S.E.2d 16, 23-24 (1957) (Trial judge in awarding custody failed to consider the child's wishes as required by North Carolina law); (3) to set aside rulings where the trial judge grants or denies a motion as a matter of law when the motion should have been considered as a discretionary matter, Farris v. First Citizens Bank & Trust Co., 215 N.C. 466, 467, 2 S.E.2d 363 (1939) (per curiam); (4) to set aside a judgment when the trial judge found evidence insufficient on the question of a bond requirement because of misinterpretation of the applicable statute, Morris v. Wilkins, 241 N.C. 507, 514, 85 S.E.2d 892, 897 (1955); and (5) to set aside facts where it did not appear that the fact-finder had given effect to an inference or presumption raised by plaintiff's evidence, see McGill v. Lumberton, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939).

The use of this rule of review in the Helms case seems to differ somewhat from these prior uses. In this case the misapprehension of law was the erroneous conclusion that there was no evidence which would support a finding that plaintiff was driving. The trial judge misapprehended neither a substantive rule of law nor a procedural rule, nor did he fail to consider issues which should have been determined prior to taking his action. The error in the Helms case rather resembles an erroneous conclusion that a party's evidence fails to present a prima facie case on a particular issue. This leads to an interesting question.

Suppose in a nonjury trial the judge, after surveying the evidence, manifests the opinion that plaintiff has not presented prima facie evidence on a particular issue of fact. Suppose further that instead of stopping at this point he says, "But if I am wrong as to whether there is prima facie evidence on this fact, I nonetheless conclude that plaintiff has failed to sustain his burden of persuasion on this issue. Therefore I will find this fact against plaintiff." The question which arises is whether this would lead to a reversal if the appellate court concluded that the plaintiff had presented a prima facie case on the factual issue. An argument could be made, using the Helms case, that the factual determination in defendant's favor would have been made under a misapprehension of law—the misapprehension being that plaintiff had not produced prima facie evidence when in fact he had—and that therefore the findings should be set aside. However, in the hypothetical posed it is hard to understand how the plaintiff would be prejudiced by such a misapprehension. In such a case it would be clear that the judge had considered the plaintiff's evidence and found that it failed to persuade him. In such a context it would seem irrelevant that he also concluded that plaintiff's evidence failed to meet the prima facie standard as well.

Those who would contend that the Helms case would require a remand fail to comprehend the import of that decision. What the court found objectionable in the Helms case was the apparent failure of the trial court to consider the evidence which would have supported defendant's counterclaim. The court construed the trial court's dismissal as a finding of no evidence that plaintiff was the driver. Thus it appeared
Basically the Helms case explains and reiterates the treatment given rule 41(b) by the majority of the North Carolina lower courts. First, as the case points out, the rule provides that in a nonjury case the defendant may move for an involuntary dismissal of plaintiff's claim at the close of plaintiff's evidence on the ground "that upon the facts and the law plaintiff has shown no right to relief." Thus the motion replaces the old motion for involuntary nonsuit in a nonjury trial. Nevertheless, there are important distinctions. Under the old practice the judge in considering the motion for nonsuit viewed the evidence in the light most favorable to plaintiff. Thus if plaintiff produced a prima facie case, nonsuit was precluded. Under rule 41(b) the judge may at the close of plaintiff's evidence grant judgment for defendant not only because plaintiff has failed to produce evidence on an essential aspect of the case but also because the facts as he may then determine them to be do not support plaintiff's claim. In other words, the judge as the trier of fact may then weigh the evidence and pass on credibility. He is not required to view the evidence in the light most favorable to plaintiff or to indulge in any inferences in plaintiff's favor. He may find the facts against plaintiff and sustain defendant's motion even though plaintiff has produced a prima facie case.

21. 282 N.C. at 620-21, 194 S.E.2d at 8.
22. It should be noted that rule 41(c) (reprinted note 1 supra) allows the plaintiff to move for a dismissal of defendant's counterclaim at the close of defendant's evidence on that claim. In the Helms case it was the plaintiff who moved for the involuntary dismissal and his motion was directed to defendant's counterclaim.
24. 282 N.C. at 618, 194 S.E.2d at 7; International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).
25. 282 N.C. at 618, 194 S.E.2d at 7.
26. Id.
27. Id. at 619, 194 S.E.2d at 7.
29. 282 N.C. at 619, 194 S.E.2d at 7; Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973). It is important to distinguish the motion for involuntary dismissal under rule 41(b) from the motion for directed verdict under rule 50(a). When the judge is ruling on a motion for directed verdict, he may not weigh the evidence, and if the nonmoving party has produced a prima facie case, a directed verdict may
By allowing the judge to make this mid-trial determination, the rule seeks to avoid the waste of time and money involved in making defendant put on his evidence when the trial judge, as fact-finder, has already concluded that plaintiff's evidence fails to persuade him. The rule does not, however, require the judge to determine the facts at the close of plaintiff's case, and he may decline to render judgment until the close of all the evidence. If the judge grants the motion, it is an adjudication on the merits, and he must make findings of fact and conclusions of law as provided by rule 52(a). The judge, however, may specify that the dismissal is without prejudice, in which event fact findings apparently are not required. If the dismissal is without prejudice, the trial court may "specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal."

These aspects of the rule seem to be now settled in North Carolina and are in accord with the application of its federal counterpart. Nevertheless, the court's opinion in Helms raises three points which may be of interest.

First, the court, in emphasizing that the judge is not compelled to make fact determinations at the close of plaintiff's evidence, strongly suggested that in close cases judgment should be deferred until the close of all the evidence and that the motion should be granted only "in the clearest cases." Although the court did not give its reasons for this suggestion, it probably felt that in close cases the defendant's evidence or the evidence produced by cross-examination of his witnesses

not be granted against him. Also the judge when ruling on motions for directed verdict must view the evidence in the light most favorable to the nonmoving party.


32. N.C.R. Civ. P. 41(b); Louis, supra note 30, at IV-2; Sizemore, General Scope and Philosophy of the New Rules, 5 WAKE FOREST INTRA. L. REV. 1, 36-37 (1969).


34. N.C.R. Civ. P. 41(b).

35. Louis, supra note 30, at IV-9.


37. 282 N.C. at 619, 194 S.E.2d at 7.
may persuade the judge in plaintiff's favor and that in the interest of fairness the judge should not determine the case without a full view of all the evidence. This suggestion is in accord with the recognized application of the rule in the federal courts and is to be applauded as a method to assure fair adjudication on the merits. However, the North Carolina Supreme Court perhaps went a step beyond this suggestion by citing an Alaskan case, Rogge v. Weaver.

In Rogge the Alaskan Supreme Court, recognizing that it was deviating from federal practice, held that it would be reversible error for the trial judge to grant defendant's motion made at the close of plaintiff's evidence if plaintiff had presented a prima facie case based on unimpeached evidence. This case has been praised by one authority who points out that it is only when plaintiff's evidence is impeached that any true weighing can occur. Nevertheless it is unwise to adopt an inflexible approach what would require the trial judge to deny defendant's motion unless plaintiff's prima facie case had been impeached. Such an approach would inevitably necessitate a definition of what amounts to sufficient impeachment to allow the motion to be granted. It would be better to adopt a flexible approach that would allow the trial judge to assess credibility and rely on his own sense of fairness to avoid the necessity of defendant's proof when plaintiff's case, though technically unimpeached, has failed to persuade him.

It is impossible to tell whether the North Carolina Supreme Court embraced the rule of the Rogge case. Practically it will make little difference because the trial judge will more than likely deny defendant's motion for involuntary dismissal when plaintiff's case is unimpeached.

A second point made by the court was that "the significance of the motion to dismiss is that it may be made at the close of plaintiff's case." The court, quoting Professor Wright, said, "There is little

38. See Louis, supra 30, at IV-9.
40. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2371, at 227 (1971) [hereinafter cited as WRIGHT & MILLER].
41. 368 P.2d 810 (Alas. 1962).
42. Id. at 813.
43. 9 WRIGHT & MILLER § 2371, at 227.
44. The court stated: "He [the trial judge] may decline to render any judgment until the close of all the evidence and, as suggested by Phillips, 'except in the clearest cases' he should defer judgment until the close of all the evidence. This was the view adopted in Rogge v. Weaver . . ." 282 N.C. at 619, 194 S.E.2d at 7.
45. See 9 WRIGHT & MILLER § 2371, at 227.
46. 282 N.C. at 619, 194 S.E.2d at 7 (emphasis by the court).
point in such a motion at the close of all the evidence since at that stage
the judge will determine the facts in any event . . . . "47 This lan-
guage illustrates that the primary purpose of the motion is to ask the
trial judge to perform at an earlier point in the trial what rule 52 re-
quires him to do at the termination of the case. However, it also raises
the question of whether it is necessary to make or renew the motion to
dismiss at the close of all the evidence to secure appellate review of
the sufficiency of the evidence.48 This question is of interest since un-
der the former practice in North Carolina, it was apparently necessary
to move for an involuntary nonsuit at the close of all the evidence even
in a nonjury trial to allow appellate challenge of the sufficiency of the
evidence.49 Nevertheless a motion to dismiss under rule 41(b) may
no longer be a prerequisite to appellate review.50 Rule 41(b) does
not expressly provide for a renewed motion at that point,51 and rule
52(c) provides for review of the trial court's findings without men-
tioning a requirement that a motion to dismiss be made at any point
in the trial.52 In addition to these rules, the language from the Helms
case quoted above supports this conclusion.

47. Id., quoting C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 428 (2d
48. This language also raises the question whether the motion to dismiss under
rule 41(b) is a permissible motion made at the close of all the evidence. For a dis-
cussion of this point see note 69 infra.
49. See International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192
S.E.2d 707 (1972); 7 J. Strong, N.C. INDEX 2d Trial § 20, at 292 (1968). The ques-
tion is also of interest because since the adoption of the new rules, many attorneys
have perhaps felt that it is still necessary to make the motion for involuntary dismissal
at the close of all the evidence. See note 69 infra.
50. Professor Louis has written that the motion should be made at the close of
all the evidence primarily to preserve the movant's rights on appeal. See Louis, supra
note 30, at IV-8. Although the rule 41(b) motion need not be made, the attorney
should nonetheless raise his "objection to the action taken by [the court] and the grounds
of the objection." 9 Wright & Miller § 2581 at 721. This is necessary because points
not raised below will ordinarily not be considered on appeal.
51. N.C.R. Civ. P. 41(b) (reprinted note 1 supra). For a discussion of the per-
missibility of a rule 41(b) motion at the close of all the evidence, see note 69 infra.
52. N.C.R. Civ. P. 52(c) provides:

Review on appeal—When findings of fact are made in actions tried by
the court without the jury, the question of the sufficiency of the evidence to
support the findings may be raised on appeal whether or not the party raising
the question has made in the trial court an objection to such findings or has
made a motion to amend them or a motion for judgment, or a request for
specific findings.

It appears, however, that it is a requirement in North Carolina that the findings
of fact be excepted to particularly in order to allow the sufficiency of the evidence
supporting them to be reviewed. The court of appeals said in Peagram-West, Inc. v.
Hiatt Homes, Inc., 12 N.C. App. 519, 525, 184 S.E.2d 65, 68 (1971), "Plaintiff argues
that several of the court's findings of fact are unsupported by the evidence. However,
no exceptions were taken to any of the court's findings and they are therefore presumed
To understand better why the rule 41(b) motion may not be prerequisite to challenging the sufficiency of the evidence on appeal, it is necessary to examine the motion for directed verdict employed in jury trials.\(^5\) The motion for directed verdict under rule 50, unlike the involuntary dismissal motion, must be made or renewed at the close of all the evidence to enable the moving party to challenge the sufficiency of the evidence on appeal.\(^5\) There are several reasons for this requirement.

First, a directed verdict motion must be made at some point in the trial to preserve a question of law for appeal.\(^5\) The motion basically asks the legal question of whether the evidence is sufficient to take the case to the jury.\(^5\) Thus when a motion for a directed verdict is made and either granted or denied by the trial court, the appellate court can consider the legal question raised and review the trial judge’s disposition of the motion. In making this review the appellate court is examining the action of the trial court which is its proper function. On the other hand, if no directed verdict motion is made, no legal question is preserved. If the appellate court were to re-examine the evidence, it would be reexamining the actions of the jury in violation of the constitutional right to jury trial.\(^5\) In addition, the motion for directed verdict is a vehicle for raising issues in the trial court and thus avoids the general rule that issues not raised below will not be considered on appeal.\(^5\)

This reasoning explains why the motion for directed verdict must be made at some point in the trial, but it does not explain why it to be supported by competent evidence and are binding on appeal [cites omitted].” In Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972), the defendant alleged that the trial court committed error in its findings of fact, conclusions of law, and judgment. He did not, however, take exception to any particular finding. The court said “[T]his is a broadside exception. It merely challenges the sufficiency of the facts found to support the judgment entered,” *Id.* at 686, 187 S.E.2d at 376. *See also* Jackson v. Collins, 9 N.C. App. 549, 551, 176 S.E.2d 878, 879 (1970).

53. The motions are similar in that they both allow a mid-trial attack upon the sufficiency of plaintiff’s evidence and thus provide a means for determining whether it is necessary for defendant to present his case. However, the standards for granting the two motions are very different. When considering the motion for directed verdict, the trial judge may not weigh the evidence and find the facts as he may when considering a rule 41(b) motion. 5A J. MOORE, MOORE’S FEDERAL PRACTICE ¶ 50.03[1], at 2332 (2d ed. 1971) [hereinafter cited as MOORE].

54. *Id.* ¶ 50.05[1], at 2340-45; 9 WRIGHT & MILLER § 2536, at 593; Louis, *supra* note 30, at IV-8.

55. *See* 5A MOORE ¶ 50.05[2], at 2345; 9 WRIGHT & MILLER § 2522, at 538.

56. Kelly v. International Harvester Co., 278 N.C. 153, 157, 179 S.E.2d 396, 398 (1971); *see* 5A MOORE ¶ 50.03[2], at 2333-34.

57. *See* 5A MOORE ¶ 50.05[1], at 2345; 9 WRIGHT & MILLER § 2522, at 538.

58. 5A MOORE ¶ 50.05[1], at 2345.
must be renewed at the close of all the evidence. However, the reason for this further requirement is simple. If a party introduces evidence after his motion for directed verdict has been denied, he will be held to have waived his objection to the sufficiency of his opponent’s evidence. Thus with the original motion waived, it is necessary to renew the motion for directed verdict at the close of all the evidence to once again preserve a legal question proper for appellate review. The reason traditionally given for the waiver rule is that once all the evidence is before the jury, the jury should be allowed to consider it all and reach a determination based upon the evidence in its entirety. The defendant, having introduced evidence, may renew his motion for directed verdict and once again challenge the legal sufficiency of the evidence to go to the jury.

There are additional reasons why the motion for directed verdict should be made at the close of all the evidence. The United States Supreme Court in an early case held that it would be unconstitutional for the federal courts to grant a motion for judgment notwithstanding the verdict if the motion were based on the grounds that the evidence was so insufficient that the action should not have been submitted to the jury. To grant the motion, the Court reasoned in that case, would be to re-examine the jury’s verdict which is prohibited by the Constitution. In a later case, however, the Supreme Court held that if a motion for directed verdict were made at the close of all the evidence and a decision on that motion reserved before submission of the case to the jury, the JNOV motion could properly be considered after the jury’s verdict. The Court reasoned that since the decision on the directed verdict motion was reserved, the case was submitted to the jury conditioned upon a later determination by the court of the legal question raised by the motion. Thus since the action was conditionally submitted to the jury, the court could, after the jury verdict, decide the legal question of the sufficiency of the evidence. In this context the court would not be re-examining the jury verdict itself but would rather be making a delayed determination of the legal ques-

---

59. Id. at 2341; 9 Wright & Miller § 2534, at 587.
60. 5A Moore ¶ 50.05[1], at 2342, quoting Bogk v. Gassert, 149 U.S. 17, 23 (1893).
61. 5A Moore ¶ 50.05[1], at 2342; 9 Wright & Miller § 2534, at 587.
63. 228 U.S. at 379-81; see 5A Moore ¶ 50.07, at 2352.
65. Id. at 657-59; 5A Moore ¶ 50.07, at 2352.
tion initially raised by the directed verdict motion. Clearly this is nothing more than a fiction but, nevertheless, the directed verdict motion at the close of all the evidence is a prerequisite for moving for JNOV.

These concerns, however, do not require that the motion for involuntary dismissal be made at the close of all the evidence in a non-jury case.

First, when an appellate court reviews the findings of the trial judge, it is not re-examining the verdict of a jury. Rather it is reviewing an action of the trial judge himself, and there is no possible infringement of the right to a jury trial. Secondly, since there is no constitutional concern involving the right to jury trial, the problem of waiver of the initial motion is irrelevant. Finally, since the JNOV motion is a procedure used in jury trials, concern over its constitutionality is also irrelevant when the trial is before the judge. Thus since the three primary reasons for requiring a motion for directed verdict at the close of all the evidence have no application in nonjury trials, there is perhaps little point in requiring that the motion for involuntary dismissal be made at that point in a nonjury trial.

66. See 9 WRIGHT & MILLER § 2522, at 539.
67. FED. R. CIV. P. 50(b); N.C.R. CIV. P. 50(b). The fiction of the Redman case is preserved in these rules.

There is, however, a strong policy reason in addition to this constitutional concern for requiring the motion for directed verdict as a prerequisite for a motion for JNOV. 5A MOORE ¶ 50.08, at 2359; Louis, supra note 30, at IV-11. The motion for directed verdict must state the grounds on which it is made. FED. R. CIV. P. 50(a); N.C.R. CIV. P. 50(a). Thus when the motion is made the non-moving party is alerted to possible defects in his proof. 5A MOORE ¶ 50.08, at 2359; Louis, supra note 30, at IV-11. If the motion is made before the case is submitted to the jury, the non-moving party, having thus been alerted, may take steps to reopen the evidence and supplement his proof. Id. On the other hand, if the motion for JNOV were allowed without requiring the previous motion for directed verdict, the nonmoving party would not be alerted to the legal defect in his proof until after the jury had reached a verdict in his favor. At this point it would be too late to reopen the evidence, and the only possible way to cure the defect in his proof would be through a new trial. Id. The requirement of a motion for directed verdict made at the close of all the evidence thus prevents the JNOV motion from becoming a trap for an unalerted party. Id.

68. It is often held that if the defendant offers evidence after his motion to dismiss at the close of plaintiff's case, he waives his initial motion and the right to appeal any error in the disposition of the motion. 9 WRIGHT & MILLER § 2371, at 221. This does not mean, however, that he waives the right to challenge the sufficiency of the evidence to support the trial judge's findings. It means rather that the appellate court will look to all the evidence and not merely that put in as a part of plaintiff's case when determining whether the findings are clearly erroneous. Id. The North Carolina practice is apparently in accord with this view. See Mills v. Koscot Interplanetary Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).
69. This is apparently in accord with the federal practice. See 5 MOORE ¶ 41.13 [1], at 1150 & n.28; C. WRIGHT, supra note 47, at 428; 9 WRIGHT & MILLER § 2371, at 221-22.
This leads to a final point of interest raised by the \textit{Helms} case. In \textit{Helms} the involuntary dismissal was granted on the basis of insuffi-

This leads to the question posed in note 48 \textit{supra}. Assuming that the motion for involuntary dismissal is not \textit{required} at the close of all the evidence, is it nonetheless a \textit{permissible} motion at that point? This question is of interest because in North Carolina, since the adoption of the new rules, it has been a common practice for attorneys to make or renew the motion for an involuntary dismissal at the close of all the evidence. In the \textit{Helms} case itself, the motion was renewed at the close of all the evidence. 282 N.C. at 612, 194 S.E.2d at 3. In the following cases the motion was either made at the close of all the evidence or renewed at the close of all the evidence after the moving party had introduced evidence. Castle v. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973); Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973); Ramsey v. Ramsey, 16 N.C. App. 614, 192 S.E.2d 664 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972); Presson v. Presson, 12 N.C. App. 109, 182 S.E.2d 614 (1971); Airport Knitting, Inc. v. King Kotton Yarn Co., 11 N.C. App. 162, 180 S.E.2d 611 (1971); Wells v. Sturdivant Life Ins. Co., 10 N.C. App. 584, 179 S.E.2d 806 (1971). In the following cases the motion was renewed after the defendant rested without introducing any evidence. Rogers v. City of Asheville, 14 N.C. App. 514, 188 S.E.2d 656 (1972); First Nat'l Bank v. Black, 10 N.C. App. 270, 178 S.E.2d 108 (1970). For the difference in the consequences in making the motion and \textit{resting} when it is denied and making the motion and \textit{introducing evidence} when it is denied, see note 68 \textit{supra}. It cannot be determined whether the practice of making or renewing the motion for involuntary dismissal at the close of all the evidence is a holdover from the old nonsuit rule, whether it is done through comparison with the directed verdict procedure, or whether it is done because the attorneys feel that they are solidifying their position for appeal. It has also been common to allege as error on appeal the denial of the motion to dismiss made or renewed at the close of all the evidence, see the cases cited above. The court of appeals has treated the exception taken to such denial as raising the question of whether any findings could be made from the evidence which would support a recovery as opposed to the question of whether the particular findings made by the court are supported by the evidence which is raised by particular exceptions taken to those findings. Peagram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 523-26, 184 S.E.2d 65, 68-69 (1971). Apparently the court feels that if plaintiff has produced a prima facie case then it would not be error to deny such a motion. Mills v. Koscot Interplanetary Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).

The language in the \textit{Helms} case to the effect that there is little point in making the motion at the close of all the evidence casts doubts as to its permissibility at that point. Also rule 41(b) does not itself provide for a renewal of the motion, but speaks of the motion as being made at the close of plaintiff's case. In addition, since the \textit{Helms} case the court of appeals has held that rule 41(b) does not sanction a motion to dismiss made at the close of all the evidence. Castle v. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973). In that case defendant moved for an involuntary dismissal of plaintiff's claim at the close of plaintiff's evidence. Defendant's motion was denied and he elected not to introduce evidence but instead renewed his motion for involuntary dismissal. The motion was granted with the judge making fact findings and conclusions of law. On appeal the plaintiff alleged as error the grant of the involuntary dismissal. The court of appeals affirmed the decision below stating that:

\textit{Rule 41(b) of the Rules of Civil Procedure does not provide for a motion for involuntary dismissal made at the close of all the evidence. The fact that defendant made such a motion which is not sanctioned under the rules and that the trial judge inadvertently allowed it, in no way prejudiced plaintiff. The trial judge thereafter entered a judgment on the merits pursuant to Rule 52.}

\textit{Id. at 635, 197 S.E.2d at 613.}
cient evidence.\textsuperscript{70} Since 41(b) requires the judge, when he grants the motion, to make findings of fact and conclusions of law as provided by rule 52,\textsuperscript{71} the question arises whether a mere legal conclusion that the evidence is insufficient will satisfy the rule's requirement or whether in all cases the judge when granting the motion must make findings of fact. Dean Phillips feels that it is apparently the intention of rule 41(b) to require the trial judge to make findings of fact.\textsuperscript{72} He says:

On this view, [the trial judge] should never presume merely to rule on the legal sufficiency of the evidence as on a motion for directed verdict in a jury case. If he nevertheless does, and dismisses without findings of fact, an appellate court should not review to determine whether the evidence was legally sufficient to raise an issue for the trier of fact. It should instead simply remand for findings of fact . . . .\textsuperscript{73}

However, there is authority to the effect that findings of fact are not required when the judge dismisses solely on the grounds of legal insufficiency.\textsuperscript{74} The question apparently\textsuperscript{75} is an open one in North Car-

\textsuperscript{70} 282 N.C. at 612, 194 S.E.2d at 3.
\textsuperscript{71} 1 McIntosh NORTH CAROLINA PRACTICE AND PROCEDURE § 1375, at 269-70 (Phillips Supp. 1970).
\textsuperscript{72} Id. at 270.
\textsuperscript{73} Ray v. Foreman, 441 F.2d 1266 (6th Cir. 1971). In this case the trial court granted defendant's motion to dismiss made at the close of plaintiff's evidence; however, the court did not make any written findings. The court of appeals wrote:

Obviously, the court was accepting as true, arguendo, all the testimony presented in plaintiff's case in chief, and thus no formal findings of fact were
lina, but it seems that Dean Phillips' view is the better one. The purpose of findings of fact is "'to aid the appellate court in understanding the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel.'" When the trial judge grants a motion for involuntary dismissal at the close of plaintiff's evidence, he is performing substantially the same function as he would at the close of all the evidence under rule 52. Therefore the policy reasons which underlie rule 52 should require the trial judge to weigh the evidence and determine the facts instead of merely ruling on the sufficiency of the evidence. This approach would also prevent more retrials. If the trial judge at the close of plaintiff's evidence merely rules that plaintiff's evidence is insufficient and the appeals court rules that it is sufficient, the case will necessarily be remanded. If however, instead of ruling on legal sufficiency, the judge weighs the evidence and makes findings of fact, these findings will be upheld unless they are not supported by competent evidence. The judge should not feel uncomfortable making these findings because if plaintiff has not produced even prima facie evidence, he clearly has not met his burden of persuasion. Of course, the moving party can avoid this problem by always insisting that the judge make findings when the motion is granted.

**CONCLUSION**

The purpose of the new rules of civil procedure is to provide an efficient and orderly procedure through which claims and disputes...
may be settled quickly without needless expense. At the same time, a primary goal of the rules is to achieve fair adjudication on the merits. Rule 41(b) reflects both of these policies, and through its proper application they both may be obtained. In order to ensure proper application, however, it is necessary for the North Carolina Supreme Court to constantly re-examine the rule as it is being used in everyday practice and to provide guidance to the lower courts. This the court did in the *Helms* case. Although it can not be regarded as a complete statement on the subject, the case does illustrate the fundamental use and characteristics of rule 41(b), and it can be looked to for direction in the application of the rule.

E. G. Walker

Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff?*

The doctrine of collateral estoppel has never been explored adequately or explained fully by the North Carolina courts. Nevertheless, North Carolina adheres to the "long-settled" rule of mutuality, which limits the right of asserting a prior judgment as collateral estoppel to parties to the prior action or to those in privity with such parties. Although North Carolina has recognized a narrow exception to this rule by permitting a person not a party to the prior action (non-party) to assert the estoppel defensively in a subsequent action, a non-party has never been permitted to plead the estoppel offensively. In *King v. Grindstaff* the plaintiff, a non-party to the prior action, was allowed to assert the prior judgment offensively.

At first glance the *King* decision appears to represent a startling reversal of prior precedent. However, because the court limited its ruling to the case's "rather unique factual situation," the precedential

* The writer of this note, while employed as a summer clerk by the Greensboro law firm of Smith, Moore, Smith, Schell & Hunter, assisted in the preparation of the brief of the defendant Bradley Lumber Company, submitted to the North Carolina Supreme Court in connection with the case of *King v. Grindstaff* here noted. The Smith firm does not adopt any of the views expressed herein.

1. See notes 30-33 infra.
3. Id. at 358, 200 S.E.2d at 806. The court stated: "Thus it is important to note that our holding that the parties in this litigation are the same as those in the Federal litigation is limited to the particular facts in the instant cases." Id.
value of King may be negligible. Nevertheless, the court’s failure to properly analyze the use of the estoppel will create more confusion and is likely to lead to further litigation. For these reasons the opinion deserves careful scrutiny.

On the morning of November 25, 1966, an automobile, operated by Alice K. Sharpe and occupied by her husband, Berlin, and their two minor children, Juanita and Byron, collided with a tractor-trailer driven by Leonard Lewis on Highway I-85 just outside of Lexington, North Carolina. As a result of this accident, Alice and Juanita suffered severe personal injuries, and both Berlin and Byron were killed. 4

The truck involved in this accident was owned by Ronald K. Grindstaff, Jr., who transacted business with his father as R. K. Grindstaff & Son, a partnership. Lewis, the driver of the truck, was employed by the Grindstaffs but was compensated through a rather complicated arrangement with Bradley Lumber Company. 5 Prior to the accident, Lewis had delivered a load of lumber to Lexington, North Carolina for Bradley. At the time of the accident, he was driving to Charlotte, North Carolina to have some repairs made on the Grindstaff truck. 6

As a result of injuries sustained in the accident, Alice and Juanita Sharpe filed separate actions based on diversity of citizenship in the United States District Court for the Middle District of North Carolina. 7 Lewis, the Grindstaffs, and Bradley Lumber Company were named as de-

5. Ronnie and his father were in the trucking and sawmilling businesses. Ronnie supervised the trucks, which were registered in his name, and his father supervised the sawmilling operations. The Grindstaffs sold lumber to Bradley, and a large portion of Grindstaff’s trucking business consisted of contract hauling for Bradley.

6. See note 73 infra.
7. The Sharpes, residents of Atlanta, Georgia, filed the federal diversity actions under 28 U.S.C. § 1332 (1970). Alice Sharpe and Juanita Sharpe, by her next friend, H. L. King, brought the actions to recover damages for medical expenses, permanent injuries, and pain and suffering. The cases were consolidated and tried before the court without a jury. Sharpe v. Grindstaff, 329 F. Supp. 405, 408 (M.D.N.C. 1970).
fendants. At the same time H. L. King, as ancillary administrator of the estates of Berlin and Byron Sharpe, filed separate wrongful death actions in the Superior Court of Forsyth County, North Carolina. The same parties were named as defendants in these actions. However, these two wrongful death actions, upon motions by the administrator, were ordered continued, pending the final outcome of the two federal diversity actions.

In the federal actions the Grindstaffs admitted that at the time of the accident Lewis was employed by them and was in the course and scope of his employment. Bradley made no such stipulation, but plaintiffs contended that Lewis was also an employee of Bradley because of the rather “unique business arrangement” between Lewis, the Grindstaffs, and Bradley. The federal district court, acting as trier of fact, found that since Bradley “retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation [could not] be considered their employer. Bradley Lumber Company, Inc., therefore, [was] not liable for the negligence of Lewis.” Plaintiffs, however, were awarded a combined judgment of 115,000 dollars against Lewis and the Grindstaffs.

On appeal the Fourth Circuit held that Lewis was also an employee of Bradley and ordered entry of judgment against Bradley. The court stated that although the business relationship among the parties “can only be described as loose and informal,” the “facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that his negligence... is imputable to both.” The court further added that “although Pierce Bradley testified that he did not supervise any of Lewis’ activities, we think there can be no doubt that Bradley Lumber Company retained the right to control Lewis.” As a result of this rever-

8. See note 71 infra.
13. The court found that Alice Sharpe was entitled to recover $50,000 from all the defendants except Bradley, and that Juanita Sharpe, acting by her next friend, H. L. King, was entitled to recover $65,000 from the same defendants. Id. at 411.
15. Id. at 154.
16. Id. at 155.
17. Id.
Bradley paid the unsatisfied amount of the federal judgments. Following the entry of these judgments against Bradley in the federal actions, the ancillary administrator was allowed to amend his complaints in the pending state wrongful death actions in order to allege the prior federal adjudications as res judicata. Bradley, in answering the amended complaints, denied that the federal judgments were or should be res judicata and affirmatively alleged specific defenses to such a plea. Plaintiff King then moved for summary judgment in both actions on all issues other than damages. These motions were granted. Bradley appealed, but the North Carolina Court of Appeals, failing to clearly distinguish between the doctrines of res judicata and collateral estoppel, affirmed. On further appeal the North Carolina Supreme Court, while recognizing that the theory of res judicata did not apply because of the presence of two separate causes concerned the amount of damages. The presiding superior court judge held that res judicata applied because "the state and federal actions arose out of the same incident," involved the same "named, beneficial, or real parties in interest," and involved the "same subject matter and issues. Since these factors precluded the presence of any genuine issues of fact, the judge believed that the motions for summary judgment should be granted. 284 N.C. at 354, 200 S.E.2d at 804.

22. N.C.R. Civ. P. 56(d) permits a party to move for partial summary judgment on all issues other than damages. King v. Grindstaff, 284 N.C. 348, 353, 200 S.E.2d 799, 803 (1973). The court stated that the "sole question presented on this appeal is whether the court erred in allowing plaintiff's motion for summary judgment, based on their plea of res judicata, leaving only the issue of damages for trial." Id. at 615, 195 S.E.2d at 366. Quoting from Shaw v. Eaves, 262 N.C. 656, 661, 138 S.E.2d 520, 525 (1964), the court revealed its confusion between the doctrines of res judicata and collateral estoppel as follows: "In order for a judgment to constitute res judicata in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual." 17 N.C. App. at 615, 195 S.E.2d at 366 (emphasis supplied). See discussion of distinction between res judicata and collateral estoppel at notes 26, 37 & 38 infra.
of action, affirmed on the ground of collateral estoppel.\textsuperscript{25}

Unfortunately, the terminology used by many courts in ruling on the collateral estoppel effect of a prior judgment has not been precise,\textsuperscript{26} a shortcoming arising in many North Carolina decisions.\textsuperscript{27} Nevertheless, the traditional North Carolina rule clearly has been that before collateral estoppel applies, either the strict requirement of mutuality between the parties must be met, or one of the limited exceptions to this rule must apply.\textsuperscript{28} The mutuality rule provides that a non-party, not bound by the prior judgment, is not entitled to rely upon

\textsuperscript{25} King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973). The court held: "In Federal Court the Sharpes sought recovery for their own personal injuries. The present litigation seeks recovery for the alleged wrongful deaths of Byron and Berlin Sharpe. Hence the causes of action are not identical." \textit{Id.} at 355-56, 200 S.E.2d at 805. With this distinction in mind, the court went on to state that "[u]nder a companion principle of \textit{res judicata}, collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." \textit{Id.} at 356, 200 S.E.2d at 805.

\textsuperscript{26} Because the crucial distinction between collateral estoppel and \textit{res judicata} has not always been appreciated by either the judiciary or practitioners, a discussion of these concepts is necessary to understand the implications of \textit{King}. See \textit{Goolsby v. Derby}, 189 N.W.2d 909, 913 (Iowa 1971) (noting the general confusion in this area).

"\textit{Res Judicata}" is a term that has been given many different meanings. It is broad enough to include the effect of a prior judgment in a subsequent action under what is known as "collateral estoppel." This fact has obviously created much of the confusion in this area of the law. See \textit{Cromwell v. County of Sac}, 94 U.S. 351, 352-53 (1876) for an excellent discussion of the distinction between these two doctrines.

There are three ways in which adjudication in one civil action may affect a subsequent lawsuit. First, through the doctrine of "merger"—a money judgment for the plaintiff merges with and supplants his original cause of action. \textit{See}, e.g., \textit{Reid v. Bristol}, 241 N.C. 699, 86 S.E.2d 417 (1955); \textit{Rodman v. Stillman}, 220 N.C. 361, 17 S.E.2d 336 (1941). The second such principle is merger and bar, or more commonly, \textit{res judicata}. A judgment on the merits for the defendant bars subsequent suits by the plaintiff on the same cause of action. \textit{See}, e.g., \textit{Masters v. Dunstan}, 256 N.C. 520, 124 S.E.2d 574 (1962); \textit{Humphrey v. Faison}, 247 N.C. 127, 100 S.E.2d 524 (1957). Finally, under collateral estoppel (sometimes called estoppel by judgment or estoppel by verdict) even if the later suit does not involve the same cause of action as the first, questions of fact and perhaps law that were litigated in the prior action are treated as settled and cannot be relitigated. \textit{See}, e.g., \textit{Garner v. Garner}, 268 N.C. 664, 151 S.E.2d 353 (1966); \textit{Shaw v. Eaves}, 262 N.C. 656, 138 S.E.2d 520 (1964); \textit{Crossland-Cullen Co. v. Crosland}, 249 N.C. 167, 105 S.E.2d 655 (1958); \textit{Current v. Webb}, 220 N.C. 425, 17 S.E.2d 614 (1941).

Often courts have used the term "\textit{res judicata}" when referring to "collateral estoppel." \textit{E.g.}, \textit{Shaw v. Eaves}, 262 N.C. 656, 661, 138 S.E.2d 520, 525 (1964). One commentator has made a helpful distinction between \textit{res judicata} and collateral estoppel by substituting the term "claim preclusion" for the former and the term "issue preclusion" for the latter. \textit{A. Vestal, RES JUDICATA/PRECLUSION} 107-09 (1969).


\textsuperscript{28} \textit{See} notes 30-33 \textit{infra}.
the res judicata or collateral estoppel effect of that judgment.\textsuperscript{29} Thus the mutuality rule conceptually is closely related to the requirement of identity of parties or privity.\textsuperscript{30} Because the boundaries of privity have never been defined clearly, it is neither very helpful as an analytical tool in res judicata matters nor very helpful in explaining the decisions.\textsuperscript{31} North Carolina, in recognizing this mutuality-iden-


\textsuperscript{30} The identity of parties rule is based upon the doctrine of mutual estoppel. Thus, the estoppel effect of a judgment operates mutually if the person taking advantage of the judgment would have been bound by it had the judgment gone the other way. See Meacham v. Larus & Bros. Co., 212 N.C. 646, 194 S.E. 99 (1937). In Carolina Power & Light Co. v. Merrimack Mut. Fire Ins., Co., 238 N.C. 679, 79 S.E.2d 167 (1953), the relationship between these two rules was expressed as follows: "Generally, in order that the judgment in a former action may be held to constitute an estoppel as res judicata in a subsequent action there must be identity of parties, of subject matter and of issues. It is also a well established principle that estoppel must be mutual, and as a rule only parties and privies are bound by the judgment." Id. at 691, 79 S.E.2d at 175.

It has recently been held that the doctrines of res judicata and collateral estoppel are subject to the overriding public policy that "a party must not be deprived of an actual opportunity to be heard." Menendez v. Saks & Co., 485 F.2d 1355, 1364 (2d Cir. 1973), citing B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 145, 225 N.E.2d 195, 197, 278 N.Y.S.2d 596, 600 (1967). This type of analysis more succinctly states the underlying purpose of the mutuality-identity of parties rule, i.e. fundamental fairness.

\textsuperscript{31} The boundaries of privity have never been defined clearly. North Carolina appears to have adopted the definition of privity expressed in \textit{RESTATEMENT OF JUDGMENTS} \S 84 (1942). See Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 692, 79 S.E.2d 167, 176 (1953). Early definitions tended to concentrate on the existence of concurrent or successive property interests. See Rabil v. Farris, 213 N.C. 414, 417, 196 S.E. 321, 322 (1938). Justice Barnhill strongly dissented in \textit{Rabil}, arguing that regardless of privity a person should be "bound by a judgment in a suit in which he has the right to adduce testimony, to cross-examine witnesses, and to appeal from the judgment entered." Id. at 417, 196 S.E. at 322. Justice Barnhill's dissenting view in \textit{Rabil} was adopted by the court in Smoky Mountain Enterprises, Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973); cf. Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965). More recently, some writers have attempted to isolate the specific relationships that may serve as a basis for establishing privity. See, e.g., IB J. MOORE, \textit{FEDERAL PRACTICE} 0.411(1) (1970); Currie, \textit{Civil Procedure: The Tempest Brews}, 53 CALIF. L. REV. 25, 27, 38-46 (1965); Comment, \textit{Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered}, 56 CALIF. L. REV. 1098 (1968). Nonetheless, perhaps the concept of privity has been defined most accurately as "merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata [or collateral estoppel]." Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring).

In McFadden v. McFadden, 239 Ore. 76, 396 P.2d 202 (1964), the court stated: "If any generalization about collateral estoppel is valid, it is that a court which is satisfied that the first litigation provided substantial protection of the rights and interests of the party sought to be bound in subsequent litigation will find that the parties have been 'in privity.'" Id. at 79, 396 P.2d at 204.
tity of parties rule, is aligned with a majority of other jurisdictions.\textsuperscript{32} 

North Carolina’s mutuality-identity rule has never been absolutely followed.\textsuperscript{33} Prior to \textit{King} the leading North Carolina decision recognizing an exception was \textit{Crosland-Cullen Co. v. Crosland}.\textsuperscript{34} In that case an insurance company had paid the proceeds of a life insurance policy to the wife of the deceased president of Crosland-Cullen. Thereafter Crosland-Cullen sued the insurance carrier in federal district court, alleging that the assignment of the policy to the wife was invalid under the doctrine of ultra vires and that the proceeds should have been distributed to the company. The federal trial judge ruled in favor of Crosland-Cullen,\textsuperscript{35} but on appeal the Fourth Circuit reversed, finding that the assignment was valid under North Carolina law.\textsuperscript{36} Plaintiff in the federal action then filed a complaint in the North Carolina Superior Court against the wife, again basing its cause of action upon the alleged invalidity of the assignment. In her answer, the wife defensively asserted the prior judgment as an estoppel to the issue of the validity of the assignment.\textsuperscript{37} In response,

\begin{itemize}
\item \textsuperscript{32} See Adamson v. Hill, 202 Kan. 482, 486, 449 P.2d 536, 539 (1969). In Mackris v. Murray, 397 F.2d 74, 77 (6th Cir. 1968), the court observed that most state courts recognize and apply the doctrine of mutuality, subject to certain exceptions, but that all of these exceptions involve the defensive pleading of collateral estoppel. For examples of two North Carolina exceptions, see Smoky Mountain Enterprises, Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973) (control and notice) and Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955) (respondeat superior exception in favor of employer).
\item \textsuperscript{34} 249 N.C. 167, 105 S.E.2d 655 (1958).
\item \textsuperscript{36} Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780 (4th Cir. 1956).
\item \textsuperscript{37} The distinction between the \textit{offensive} and the \textit{defensive} use of collateral estoppel can best be illustrated by several examples. \textit{B} sues \textit{A}; \textit{B} wins; \textit{C} sues \textit{A} and seeks to establish \textit{A}'s liability by relying on the former judgment (\textit{offensive} assertion). \textit{A} sues \textit{B}; \textit{A} loses because of his own contributory negligence; \textit{A} sues \textit{C}; \textit{C} attempts to bar \textit{A}'s suit by relying on the prior judgment (\textit{defensive} assertion). \textbf{See} Note, \textit{Collateral Estoppel—The Doctrine of Mutuality: A Dead Letter}, 47 NEB. L. REV. 640, 645 nn.25 & 26. Compare Kayler v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967) (attempted offensive assertion), \textit{with} Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965) (attempted defensive assertion). Thus defensive use of collateral estoppel means that a non-party to the prior judgment, usually the defendant in the second ac-
Crosland-Cullen contended that since the wife was not a party to the federal action, there was no mutuality and thus the plea of collateral estoppel was not available. Notwithstanding the absence of mutuality, the North Carolina Supreme Court held that the doctrine of collateral estoppel was applicable.\(^{38}\) Thus the company was not permitted to relitigate the identical issue of the validity of the assignment.

The *Crosland* type exception to the mutuality rule is based on the public policy favoring an end to litigation when the issue currently in dispute has been decided against the complaining party in a prior action.\(^{39}\) However, *Crosland* has often been overlooked by the prac-
ticing bar and by the court. Nonetheless, the recent case of *Gil-\[Vol. 52\]lispie v. Thomasville Coca-Cola Bottling Co.*, may indicate a new vitality for this exception. There the plaintiff sustained injuries to his left hand and wrist when two bottles of soft drink exploded while he was carrying them to the check-out counter of the A&P grocery in Thomasville. He first instituted an action against A&P, alleging breach of an implied warranty of merchantability. The jury rendered a verdict in favor of A&P. Thereafter the plaintiff instituted a second action against the Thomasville Coca-Cola Bottling Company based on the same theory. The defendant asserted defensively the prior judgment in favor of A&P as collateral estoppel. Summary judgment was granted for the defendant based on this plea, and the North Carolina Court of Appeals affirmed. The court stated: "Logic and precedent mandate that this case be an exception to the general rule that identity of parties and mutuality of estoppel exist as a prerequisite to plea of *res judicata*." In *Smoky Mountain Enterprises, Inc. v. Rose* the court recognized another exception to the mutuality-identity of parties rule. W. F. Burbank, the president and sole stockholder of Smoky Mountain, and Jesse Rose had executed a sales contract. However, in signing Burbank did not denote his corporate capacity. After Rose ceased making the payments required by this agreement, Burbank individually instituted a civil action for breach of contract. The trial judge granted Rose's motion for summary judgment and dismissed the action with prejudice. Thereafter the corporation sued Rose on the same claim. The prior action was asserted defensively, and the court allowed this assertion, holding that the "control" exercised by the president over the prior action was sufficient "notice" to the corporation to bar the subsequent action. Thus the defendant was permitted to assert defensively the prior judgment as an estoppel and bar to the second action.

655, 657 (1958): Public policy demands that every person be given an opportunity to have a judicial investigation of the asserted invasion of complainant's rights. But public policy is equally as adamant in its demand for an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred. 40. It has been said that *Crosland* "stands by itself, a wise exception to an ancient rule, but one lamentably often overlooked by the practicing bar and perhaps by the court that wrote it." Note, *Civil Procedure—Broadening the Use of Collateral Estoppel—The Requirement of Mutuality of Parties*, 47 N.C.L. Rev. 690, 699 (1969). 41. 17 N.C. App. 545, 195 S.E.2d 45, cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973). 42. 17 N.C. App. at 547, 195 S.E.2d at 47. 43. 283 N.C. 373, 196 S.E.2d 189 (1973). 44. *Id.* at 377, 196 S.E.2d at 192.
The application of collateral estoppel in Crosland, Gillispie and Smoky Mountain seems to have been correct. However, during the fifteen year interval between these decisions numerous cases failed to recognize exceptions to the mutuality-identity rule. These inconsistent opinions cannot be distinguished on the basis of an offensive, as opposed to defensive, assertion of collateral estoppel. Yet, in every North Carolina case other than King the plea of collateral estoppel has been allowed only in a defensive context by a party to the prior action or by a non-party who came within one of the narrow exceptions to the mutuality-identity rule. This fact emphasizes the importance of King. It also implies that the court in that case may have been aware of its departure from precedent, and it explains why such an effort was made to find an identity of parties.

Although a number of jurisdictions have abandoned the mutuality identity rule, they nevertheless make a case by case inquiry to deter-

45. One of the best examples is Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965). A minor plaintiff, through his father as next friend, sued the defendant for personal injuries. Judgment was entered for the defendant. Then the father, in his own right, sued the same defendant to recover the child's medical expenses. The defendant asserted the prior judgment as collateral estoppel to the issue of his negligence. The court refused to permit this defensive assertion against the father because of the lack of mutuality. See also Sumner v. Marion, 272 N.C. 92, 157 S.E.2d 667 (1967) (per curiam) (refused to allow defensive assertion).


47. See cases cited notes 37-46 supra.

48. In the majority of jurisdictions that have abandoned the mutuality rule, one of the most dependable indicators for the application of collateral estoppel is whether the plea is being used offensively or defensively. Defensive collateral estoppel is more often permitted. See, e.g., Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966); International Ry. of Central America v. United Brands Co., 358 F. Supp. 1363 (S.D.N.Y. 1973); Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969) (court observed collateral estoppel usually has been asserted defensively); Albernaz v. City of Fall River, 346 Mass. 336, 339, 191 N.E.2d 771, 773 (1963); Currie, Mutualty of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 289-94 (1957).

On the other hand, a few jurisdictions have permitted the offensive use of collateral estoppel because of their conviction that there is no real distinction between the offensive and defensive use of the plea. See, e.g., Waitkus v. Pomeroy, 506 P.2d 392, 395-96 (Colo. Ct. App. 1972) (action involved both the offensive and defensive assertions of collateral estoppel); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967) (4-3 decision). Although DeWitt totally rejected the mutuality rule, the court nonetheless promulgated several rules of "fairness" for the application of collateral estoppel. Id. at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.
mine the fairness of applying collateral estoppel. This approach is also characteristic of those jurisdictions that have abandoned the rule only in the context of a defensive assertion of the estoppel. One court has summarized this fairness inquiry as follows: "If the particular circumstances of the prior adjudication would make it unfair to allow a person who was not a party to the first judgment to invoke res judicata or collateral estoppel then the requirement of mutuality must still be applied."

This fairness approach demands judicial analysis of several factors: (1) whether the application would lead to anomalous results; (2) whether the amount at stake in the prior action was for substantially less than the amount involved in the subsequent action; (3) whether the party asserting the estoppel was a party to the prior action; (4) whether the party against whom the estoppel is asserted had a full and a fair opportunity to contest the decision now held to be controlling; (5) whether there is the necessary identity of issues that have been decided in the prior action; (6) whether the issues in the prior action were competently, fully, and fairly litigated; (7) whether the party against whom the prior judgment is being asserted presents any reasonable grounds for denying its application; and (8) whether the estoppel plea is being asserted offensively or defensively.

The court in King failed to consider any of the above factors in

---

49. See notes 50-59 infra.
allowing the offensive assertion of the prior federal judgments. Rather, the court simply concluded that since Alice and Juanita Sharpe were the real parties in interest in both the federal and state actions, there was sufficient identity of parties to permit the plea of estoppel.\textsuperscript{60}

Because the court's analysis of collateral estoppel was limited to the issue of the identity of parties, this point must be carefully examined. The court reasoned that in the prior federal actions the real parties in interest were Alice and Juanita Sharpe since H. L. King, who appeared as next friend for Juanita, was only a nominal party.\textsuperscript{61} The court relied on \textit{In re Estate of Ives}\textsuperscript{62} for the proposition that in an action for wrongful death the real party in interest is the beneficiary under the intestate statute and not the personal representative. Thus because the Sharpes were the real parties in interest in both the federal and the state actions, the identity of parties requirement was satisfied.\textsuperscript{63}

The validity of the court's assumption that the Sharpes were the real parties in interest in both the state and federal actions is highly questionable,\textsuperscript{64} particularly in light of the cases on which King relied. First, \textit{In re Estate of Ives}\textsuperscript{65} was an action initiated by the administrator of the decedent's estate for advice and instruction regarding the distribution of the estates' assets, which consisted entirely of the proceeds from a settlement between the administrator and the insur-

\textsuperscript{60} King v. Grindstaff, 284 N.C. 348, 357, 200 S.E.2d 799, 806 (1973).
\textsuperscript{61} Id.
\textsuperscript{62} 248 N.C. 176, 102 S.E.2d 807 (1958).
\textsuperscript{63} 284 N.C. at 357, 200 S.E.2d at 805-06. By bringing the case within the traditional identity of parties rule, the court managed to avoid the difficult problems that arise when a non-party to the prior judgment attempts to assert that judgment offensively as collateral estoppel. See note 48 supra. For a contra holding on the identity of parties issue in a similar factual situation see Smith v. Bishop, 26 Ill. 2d 434, 187 N.E.2d 217 (1953). In Smith the first action was brought by the mother as next friend for the wrongful deaths of her two deceased minor children. A jury verdict found the defendant not negligent. Thereafter the mother sued the same defendant for her personal injuries arising out of the same incident. The defendant pleaded the prior judgment as collateral estoppel. The court refused to permit such a plea because of the lack of mutuality and of privity.

\textsuperscript{64} Syllogistic reasoning is a basic tool of judicial analysis. However, the syllogism is valid only so long as its premises are valid. The syllogism is made up of (1) a major premise (collateral estoppel applies if the parties in the prior and subsequent actions are the same), (2) a minor premise (the Sharpes were the real parties in interest in both the federal personal injury actions and in the state wrongful death actions), and (3) a conclusion (thus there is sufficient identity of parties to use the federal judgments as collateral estoppel). An examination of the cases relied on by the court, notes 65 & 66 infra, will demonstrate the invalidity of the minor premise, and thus of the entire syllogism.

\textsuperscript{65} 248 N.C. 176, 102 S.E.2d 807 (1958).
ance carrier for one of the decedent's sons. The issue before the court was whether the son, the operator of the automobile in which his mother had been killed, could participate in the distribution of the insurance proceeds. The court applied the common-law maxim that no man can take advantage of his own wrong and ruled against the son's participation in the distribution. Therefore the court's statement that the beneficiary, and not the administrator, was the real party in interest was limited by the case's special factual situation. Additionally, King relied on Davenport v. Patrick, a case factually similar to Ives. An action for wrongful death was instituted by the administrator against the intestate's husband, who was also the sole statutory beneficiary of any recovery. The court held that it would look beyond the administrator to the husband as the real party plaintiff. Thus recovery was denied under the principle that a wrongdoer will not be permitted to enrich himself as a result of his own misconduct. Accordingly, the significance of the phrase "real party in interest" as used in Ives and Davenport must be considered solely within the context of the factual situations there presented. In King none of the parties were trying to enrich themselves from their own misconduct; hence, there was no basis for relying on the above case law.

More importantly, an action for wrongful death in North Carolina is a statutory cause of action that accrues only to the personal representative of the decedent for the benefit of a specific class of beneficiaries. A personal representative who institutes a wrongful death action is not a "mere figurehead or naked trustee but has the sole authority and responsibility to bring the action." Thus the right of an injured person to sue for personal injuries is distinct from the right of the personal representative to sue under the authority of the wrongful death statute. The court in King should have held that the personal representative was the real party in interest. Thus, because the re-

68. See, e.g., Webb v. Eggleston, 228 N.C. 574, 46 S.E.2d 700 (1948); Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969); see note 71 infra.
71. In North Carolina only the personal representative may institute an action for wrongful death, which he maintains in his official capacity as the representative of the estate and not as a representative of the distributees of the recovery. N.C. GEN.
quirement of the traditional identity of parties rule was not met, it appears that King created another ad hoc exception to the mutuality-identity rule by allowing a non-party to the prior action to assert the prior action offensively as collateral estoppel.\(^7\)

In conclusion, it seems that instead of clarifying the North Carolina law of collateral estoppel King has created more confusion. By attempting to place the decision within the traditional framework of the mutuality-identity rule, the court failed to discuss the difficult issues related to the fairness of applying collateral estoppel in the non-mutuality context. It also is regrettable that the court did not use King as a basis for a complete re-examination of the ancient mutuality-identity rule. Such an analysis would have aided greatly in clarifying the North Carolina law of collateral estoppel. Specifically, the court needs to develop some guidelines on when a non-party to the prior judgment can assert that judgment either offensively or defensively as collateral estoppel.

Nevertheless, perhaps judicial economy and the public policy favoring the termination of litigation justify the result in King. Also, on the facts, the result may not have been unfair to the defendant, although it is arguable that all of the factual issues were not fully litigated in the federal actions.\(^7\)

Yet, when all of the various factors are

---

Note that under N.C. Gen. Stat. § 28-8-(2) (1966) a wrongful death action must be prosecuted in the name of a "resident" administrator. This statute serves to destroy "complete" federal diversity jurisdiction. However, in Miller v. Perry, 456 F.2d 63 (4th Cir. 1972), the court held that in determining the presence of diversity of citizenship when state law requires that an action be prosecuted in the name of the resident administrator, the citizenship of the beneficiaries, rather than that of the administrator, is controlling.

72. In Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), Justice Traynor noted that "[t]he courts of most jurisdictions have in effect accomplished the same result [abandoned the requirement of mutuality] by recognizing a broad exception to the requirements of mutuality and privity . . . ." Id. at 812, 122 P.2d at 895.

73. As pointed out at text accompanying note 6, supra, Lewis was taking the truck to Charlotte at the time of the accident to have some repairs made for the Grindstaffs. Bradley strongly contended that there was never a finding that Lewis was acting in the course and scope of his employment at the time of the collision. See Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966) (condition precedent to employers liability). Thus, it was argued that collateral estoppel was not applicable at least as to this issue. However, the court disposed of this contention as follows: "While the
taken into account, something is fundamentally wrong with such an ad
hoc decision. Today in North Carolina it is virtually impossible to
predict the collateral estoppel effect of a prior judgment. Thus it
appears that the first lesson the North Carolina practitioner must learn
on the subject of collateral estoppel is that judicial reasoning and estab-
lished legal precedent must not be confused with the court’s subjec-
tive determination of which party should ultimately prevail.

O. MAX GARDNER III

Civil Procedure—Munchak Corp. v. Riko: Putting a Little
Polish on International Shoe

Federal courts have long faced the necessity of interpreting state
long-arm statutes in deciding whether out-of-state corporations are
properly subject to a state’s in personam jurisdiction. In Munchak
Corp. v. Riko Enterprises, Inc.\(^1\) the Federal District Court for the Mid-
dle District of North Carolina applied North Carolina’s general long-
arm statute\(^2\) as well as the older jurisdictional statute specifically ap-
plicable to foreign corporations\(^3\) in the course of an opinion which
held that jurisdiction was lacking over defendant Riko a Pennsylvania
corporation not incorporated or authorized to transact business in
North Carolina.

The court in Munchak was faced with a complex factual situation
involving multiple litigation and meager, somewhat atypical “contacts”
with North Carolina on the part of the defendant. The Carolina

Federal judgments do not set out in detail the specific fact that Lewis was acting in
the scope of his employment at the time of the collision, when a judgment does not
set forth in detail the facts found by the court, it is presumed that the court upon
proper evidence found the essential facts necessary to support the judgment entered.”
King v. Grindstaff, 284 N.C. 348, 359, 200 S.E.2d 799, 807 (1973). In this situation
it would have been more equitable to have given Bradley the benefit of all possible
inferences. For example, in Davis v. Nielson, 9 Wash. App. 864, 515 P.2d 995
(1973), the court stated: “If there is uncertainty as to whether a matter was previously
litigated, collateral estoppel is inappropriate.” Id. at --, 515 P.2d at 1002. See also
DeCancino v. Eastern Airlines, Inc., 283 So. 2d 97 (Fla. 1973) (burden of establishing
the certainty of the matter formerly adjudicated is on the party claiming the benefit
of it).

---

3. Id. § 55-145 (1965).
Cougars, a professional basketball team in the American Basketball Association (ABA), sought damages from Riko for alleged tortious interference with a contract between the Cougars and William Cunningham, an outstanding professional basketball player now under contract with the Cougars. Additionally, the Cougars sought to enjoin a suit then pending in the state courts of Pennsylvania. This latter action had been instituted by Riko as owner of the Philadelphia 76'ers, a professional basketball team in the rival National Basketball Association (NBA); it sought damages from the Cougars for interference with an earlier contract between the 76'ers and Cunningham.

The various contracts between Cunningham and the rival basketball clubs had arisen from the bidding war for talent between the NBA and the ABA. Significantly, the 76'ers were not a party to this earlier litigation but were obligated to pay Cunningham's legal fees pursuant to a contractual agreement. It was against this background of "unclean hands," previous litigation, and the possibility of present multiple suits that the court faced the 76'ers' motion to dismiss for lack of jurisdiction over the person.

In cases of contested jurisdiction federal courts engage in a two step inquiry, first seeking to determine whether any state jurisdictional statute authorizes the exercise of jurisdiction under the particular facts presented and then considering whether such an authorized exercise of jurisdiction comports with the due process guarantees of the fourteenth amendment. While the Cougars were able to satisfy the

---

4. The Cougars specifically alleged that the Philadelphia 76'ers (owned by Riko) of the National Basketball Association induced Cunningham to breach a contract which called for Cunningham to begin playing basketball for the Cougars on October 2, 1971. Cunningham failed to honor this contract, and the Cougars sued to obtain an injunction barring Cunningham from performing for any team other than the Cougars. Munchak Corp. v. Cunningham, 331 F. Supp. 872 (M.D.N.C. 1971), rev'd, 457 F.2d 721 (4th Cir. 1972). The lower court denied the Cougars injunctive relief on the grounds that the Cougars entered court with "unclean hands" since the contract they sought to enforce resulted from interference with contractual relations between the 76'ers and Cunningham. The Fourth Circuit reversed, however, and enjoined Cunningham from playing with any team other than the Cougars.

5. The plaintiffs sought to enjoin the action under 28 U.S.C. § 2283 (1970). The specific contention of the Cougars was that the 76'ers were attempting to relitigate legal issues previously decided in Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

6. Riko Enterprises (the 76'ers) contended that the contract between the Cougars and Cunningham was made at a time when Cunningham was lawfully under contract to the 76'ers and thus represented tortious interference on the part of the Cougars.

7. In Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948), the court of appeals, with regard to the two-step inquiry, held that:

The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case pre-
court that in personam jurisdiction was authorized by certain sections of the newer North Carolina long-arm statute, they were unable to meet their burden of showing sufficient contacts for the courts to exercise jurisdiction consistent with the defendant's due process rights. The federal court therefore granted the 76'ers motion to dismiss for lack of jurisdiction.

The court considered three statutes as potentially applicable to the facts of this case. North Carolina General Statutes section 55-145(a)(4), the state jurisdictional statute applicable to foreign corporations not transacting business in the state, was held insufficient to authorize jurisdiction on these particular facts. Specifically, the court held that the clear language of this section required that the defendant must have engaged in tortious conduct in North Carolina before in personam jurisdiction was authorized. The activity relied upon by the Cougars to support their tortious interference claim, however, occurred entirely in Pennsylvania.

The court thus rejected the argument of the Cougars that the requirement of tortious conduct in North Carolina could be met when the act which made the tort complete (the injury to the Cougars)
occurred in North Carolina. The court noted that it was defendant's conduct within North Carolina which was covered by section 55-145(a)(4) and not the result of that conduct. The court thus held that section 55-145(a)(4) requires, first, that the cause of action arise in North Carolina and, secondly, that the defendant must have committed one or more acts in North Carolina which give rise to the cause of action. Applying this test, the court held that plaintiff had failed to show that defendant's conduct satisfied either requirement.

The court next considered section 1-75.4(4). The only significant dispute over the applicability of this section was whether plain-

Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the leading case holding that the place of the wrong is the same for jurisdictional purposes as for the purposes of conflicts of laws:

In Gray, an Illinois resident, injured in that state as a result of an explosion of a water heater which had, in the court's words, found its way into Illinois "in the course of commerce." . . . brought suit against an Ohio corporation which had (it was alleged) negligently manufactured in Ohio a safety valve later incorporated into the heater. . . . In rejecting the defendant's contention that it had not committed "a tortious act" in Illinois, the court invoked the traditional choice-of-law rule that "the place of a wrong is where the last event takes place which is necessary to render the actor liable" . . . and concluded that, since the "last event," that is, the injury, had occurred in Illinois, "the tort was committed in Illinois" for the purposes of the jurisdictional statute. . . .

We find this argument unconvincing. It certainly does not follow that, if the "place of wrong" for purposes of conflict of laws is a particular state, the "place of the commission of a tortious act" is also that same state for the purposes of interpreting a statute conferring jurisdiction, on that basis, over nonresidents. . . . Not only are those separate and distinct problems but the rules formulated to govern their resolution embody different concepts expressed in different language. Moreover, the place of the "tort" is not necessarily the same as the place of the tortious act." In our view, then, the interpretation accorded the statute by the Illinois court disregards its plain language and exceeds the bounds of sound statutory construction.

15 N.Y.2d at 462-63, 209 N.E.2d at 79, 261 N.Y.S.2d at 23. There is some indication that the North Carolina Court of Appeals would follow Gray. In Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970), the court of appeals stated: "A cause of action arises only once. It would, in our opinion, be an anomalous position to say that a cause of action could arise at one time for purpose of the statute of limitations and at another time and place for the purpose of determining jurisdiction." Id. at 45, 177 S.E.2d at 911. This court's interpretation of section 55-145(a)(4)'s requirement of tortious conduct could, however, indicate some willingness to adhere to the Feathers rule. See also Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968).

14. The court thus held that N.C. GEN. STAT. § 55-145(a)(4) (Supp. 1973) does not authorize jurisdiction in cases when the occurrence of damage in North Carolina is not caused by acts within the state on the part of the defendant. This restrictive interpretation is consistent with the decision of the North Carolina Supreme Court in Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963). However, jurisdiction over a foreign corporation on such facts is not foreclosed because of the presence of N.C. GEN. STAT. § 1-75.4(4) (1969); see note 15 infra. See also Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

15. N.C. GEN. STAT. § 1-75.4 (1969) provides that jurisdiction may be asserted in the following actions:
tiff could satisfy either of the conditions set forth in the proviso to that section which requires that "at or about the time of the injury" the defendant must be engaged in either solicitation or marketing activities within North Carolina. Without discussing the "time" element set forth in the proviso, the court held that defendant's alleged contacts with North Carolina (scouting trips and receipt of revenue for television rights) were sufficient to satisfy the proviso conditions when considered in light of the liberal construction intended to be given section 1-75.4.16

The court found that section 1-75.4(6)(c)17 supplied an additional statutory authorization for the exercise of jurisdiction over the 76'ers in North Carolina. The court held that the Cougars' pleadings could be construed as seeking to compel the 76'ers to account for "an asset or thing of value" which was within North Carolina when the defendant acquired control of it.18 The court, however, refrained from an extensive analysis of this particular provision since it had previously found statutory authorization for the exercise of jurisdiction.19

The Cougars asserted four distinct contacts with North Carolina which, it argued, sustained in personam jurisdiction over the 76'ers under the due process clause: (1) alleged presence in North Carolina of the 76'ers for the purpose of controlling the earlier litigation between the Cougars and Cunningham;20 (2) the presence in North Carolina of

(4) Local Injury; Foreign Act. In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an Act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
   a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
   b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

17. N.C. GEN. STAT. § 1-75.4(6)(c) (1969) provides that jurisdiction may be asserted in actions involving: "(6) Local Property.—In any action which arises out of: . . . c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it."
18. This novel construction is based upon the fact that in North Carolina a contract right is a property right and therefore a thing of value; see Carolina Overall Corp. v. East Carolina Linen Supply, Inc., 8 N.C. App. 528, 174 S.E.2d 659 (1970).
19. See text accompanying notes 15-16 supra.
20. The court held, however, that presence within a state solely for participation in litigation could not supply a sufficient basis for the exercise of in personam jurisdiction; see Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 42 (9th Cir. 1966).
basketball scouts employed by the 76'ers; (3) the receipt of revenue by the 76'ers under a contract with the American Broadcasting Company which permitted nationwide telecasts of selected NBA basketball games; and (4) the commission of a tort which had its foreseeable consequences in North Carolina.

Although a major part of the opinion dealt with whether there was statutory authorization for the exercise of jurisdiction over the 76'ers, the significance of the court's decision lay in its discussion of due process. With the advent of International Shoe Co. v. Washington, the United States Supreme Court abandoned the "presence" and "implied consent to be sued" rationales relied upon in earlier cases to sustain jurisdiction over foreign corporations. Instead, the Court enunciated a new jurisdictional due process standard in holding that a foreign corporation, to be subject to in personam jurisdiction, must have certain "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Such a standard obviously calls for a careful analysis of the defendant's contacts with the forum state, and it was in this inquiry that plaintiff in Munchak proved unable to meet this burden.

The court in Munchak was called upon to consider two theories advanced by plaintiff to support jurisdiction against defendant's due process objections: first, that the 76'ers committed a tort with local consequences; and secondly, that the 76'ers were doing business in North Carolina to such an extent that in personam jurisdiction was proper despite the fact that the claim for relief was unrelated to the local activities.

The Cougars' attempts to apply the "tort effect" or "stream of commerce" theory of jurisdiction failed because of the inapplicability of that theory to the facts presented. Typically, the stream of commerce theory of jurisdiction is invoked when the plaintiff has been injured as a result of the manufacture or distribution of a harmful product by a defendant who acted with the reasonable expectation that such products would be distributed in the forum state. However, no

24. See, e.g., Jetco Electronics Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Burton Shipyard, Inc. v. Williams, 448 F.2d 640 (9th Cir. 1971); Jones Enterprises, Inc. v. Atlas Serv. Corp., 442 F.2d 1136 (9th Cir. 1971). As the court noted, jurisdiction follows the product so long as the product moves in a reasonably foresee-
exploitation of the markets of North Carolina occurred here; neither was the plaintiff a helpless individual physically damaged by the commercial activities of a foreign corporation. Instead, plaintiff stood on equal footing with the defendant and had ample opportunity to assert his injury as a counterclaim in the action to which he was already a party in Pennsylvania. Therefore, as the court noted, the stream of commerce theory was not applicable to the peculiar facts presented.26

In rejecting the alternative argument that defendant was doing sufficient business in North Carolina to subject it to in personam jurisdiction, the court held that while the activities of defendant may have satisfied the broad statutory conditions of section 1-75.4(4), such "contacts" with North Carolina were too fleeting to overcome the 76'ers' due process objections. An important factor in the court's decision was the fact that the alleged contacts with North Carolina were unrelated to the claim for relief asserted.26

Two other aspects of Munchak are significant. The 76'ers had argued that "intangible," non-physical injuries should be distinguished from the tangible, physical injuries usually sued upon in the typical products liability case for the purposes of applying section 1-75.4(4). Specifically, the 76'ers had contended that section 1-75.4(4) should not be a sufficient authorization for exercise of jurisdiction over a foreign corporation when the plaintiff has suffered a commercial injury such as that caused by breach of contract. The court chose not to engraft such a distinction on section 1-75.4(4) despite the fact that

able manner. Other factors which are important in deciding 12(b)(2) motions when the only "contact" with the forum state is the tort effect are the relationship between the plaintiff and the defendant, the nature of the harm caused locally, and the inconvenience to the defendant caused by having to stand suit in the proposed forum; see Restatement (Second) of Conflict of Laws §§ 87-93 (1956). Consideration of each of these factors serves to demonstrate the inapplicability of the stream of commerce theory of in personam jurisdiction to this particular case.

25. It is concluded that although the defendant could reasonably foresee that harmful consequences from his alleged tortious conduct would occur in North Carolina, this fact alone is insufficient for the exercise of in personam jurisdiction over him by this state. It is felt that such an extension of jurisdictional reach exceeds that upheld under the "stream of commerce" rationale, a doctrine which itself significantly extends due process concepts.

368 F. Supp. at 1374.

26. In the landmark case of International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court stated that: "Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single, or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." Id. at 317. See also Aftanese v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc., 345 F. Supp. 296 (S.D. Ga. 1972).
other courts,\(^{27}\) including courts interpreting the comparable section of the Wisconsin long-arm statute\(^{28}\) from which the North Carolina long-arm statute was taken,\(^{29}\) have recognized such a distinction and despite the fact that a change in wording of the North Carolina version of the particular provision seems to lend support to the argument that section 1-75.4(4) requires some tangible, physical injury.\(^{30}\)

The court's discussion of the proviso to section 1-75.4(4) leaves certain questions unanswered. First of all, the court failed to discuss the "at or about the time of the injury" requirement. Secondly, the court found that the 76'ers had engaged in both solicitation and marketing activities despite the fact that the 76'ers' conduct never quite conformed to traditional definitions of such activity.\(^{31}\)

---

27. The United States District Court for the State of Colorado, in interpreting the comparable Colorado long-arm jurisdictional statute in Gypsy Pipeline Co. v. Ivanhoe Petroleum Corp., 256 F. Supp. 567 (D. Colo. 1966), held that jurisdiction over a foreign corporation was improper on facts strikingly similar to those presented here. In that case, the foreign corporation was being sued by a Colorado corporation for interference with a contract between the plaintiff and a third party. In dismissing jurisdiction (despite the fact that the defendants had earlier been authorized to do business in Colorado and prior to the instigation of the suit, had maintained their principal office in Colorado) the court held that:

> It is here reasoned that if a manufacturer is to be held liable for the consequences of its negligent acts outside the state producing an injury within the state, that similarly jurisdiction should be assumed with respect to one who conspires to bring about the breach of contract outside the state upon the allegation that the consequences took place within the state. No case has recognized the applicability of the long-arm statute in a situation like the present one, that is, where what might be described as an intangible injury takes place within the forum state; indeed, the United States Court for the Northern District of Illinois refused, in the face of \textit{Gray} ..., to issue summons outside of the District of Illinois based upon alleged conspiracy similar to the present one wherein it was obscure as to whether the conspiracy occurred outside or inside Illinois.

\textit{Id.} at 569.

28. Wis. STAT. § 262.05(4) (1971) was held inapplicable to an intangible injury situation (breach of contract) in Nagel v. Crain Cutter Co., 50 Wis. 2d 638, 184 N.W.2d 876 (1971).


30. The one change in section 1-75.4(4) from the comparable Wisconsin provision is the addition of the words "wrongful death" directly preceding the words "or in any action claiming injury to person or property." The statute is quoted at note 15 \textit{supra}. It is thus arguable that the North Carolina version was really directed at situations in which some form of tangible or physical injury to person or property was suffered by a citizen because of the negligence of a defendant who has realized pecuniary benefit from activities or distributions within the state. Such an interpretation would mean that section 1-75.4 does not authorize jurisdiction in situations in which two corporate parties allege less than tangible injuries as a consequence of competition. Unfortunately, no legislative history exists to confirm or deny such speculation, the drafters having preferred to adopt the Wisconsin legislative history.

31. For instance, any consideration of solicitation as defined by N.C. GEN. STAT. § 55-145(a)(2) (Supp. 1973) leads to the conclusion that the kind of solicitation in-
Solicitation was found in the scouting of players, an activity more akin to observation than solicitation in view of the NBA by-laws which prohibit all but the most perfunctory verbal contact with the player being scouted. While a better argument might have been made for solicitation had the 76'ers indeed drafted ballplayers in North Carolina, it was uncontroverted that all negotiations with drafted players occurred in Philadelphia and that the 76'ers had last drafted a collegiate player from North Carolina in 1966, far too early to meet the time requirement of the section 1-75.4(4).\textsuperscript{2} Even assuming the correctness of the conclusion that scouting alone constituted solicitation, this activity may be analogized to the casual presence of traveling salesmen within the state, which in previous cases\textsuperscript{3} has been held to be insufficient to justify the exercise of jurisdiction even when orders were taken subject to acceptance at the home office.\textsuperscript{4} Clearly, much less in the way of contacts is involved here than in the traveling salesman cases.

CONCLUSION

In finding that the constitutional guarantee of due process would be violated by subjecting defendant 76'ers to in personam jurisdiction in North Carolina, the court has protected the rights of the defendant without stemming the trend which continues to increase the susceptibility of a foreign corporation to suit in a far-away forum.

The court has acted in conformity with previous cases in finding jurisdiction lacking where the defendant has had fleeting contacts with

\textsuperscript{2} See text accompanying note 16 supra.
\textsuperscript{4} In Plott v. Michael, 214 N.C. 665, 200 S.E. 429 (1939), the Supreme Court of North Carolina, in discussing the dismissal of jurisdiction over a foreign corporation, held that: "The only evidence of the corporate defendant doing business in this State was that tending to show that Michael solicited orders for its products in this State and took such orders, which were forwarded to the home office of the corporate defendant in New York to be approved or rejected there." \textit{Id.} at 668, 200 S.E. at 431; see Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957), in which the court held that irregular, casual, and insubstantial occasions of contact by traveling representatives of the foreign corporate defendant did not make it reasonable to subject the defendant to in personam jurisdiction, particularly in view of the fact that such contacts were unrelated to the claim for relief asserted.
the forum state that are neither commercial nor related to the claim for relief asserted. Also it has apparently increased the reach of section 1-75.4(4) by expanding the concepts of solicitation and marketing so crucial to the application of that section. At the same time, the court has upheld the previously announced rule that section 55-145(a)(4) authorizes in personam jurisdiction over a foreign corporation only for "local actions," or in the words of the court, for suits in which the cause of action arises in North Carolina out of acts committed here by the defendant.35

While the court's expansive reading of section 1-75.4(4) did not result in an unjust exercise of jurisdiction in this case, other courts applying this broad jurisdictional authorization must be careful to engage in the same thorough due process inquiry undertaken here. The danger of a less conscientious approach is that the combination of broad state jurisdictional statutes and liberal judicial construction of terms could well result in the unintended but very real erosion of the due process protection constitutionally guaranteed to foreign corporations.

LUTHER PARKS COCHRANE

Constitutional Law—Public Purpose—Restricting Revenue Bond Financing of Private Enterprise

In Foster v. Medical Care Commission1 and Stanley v. Department of Conservation and Development,2 the North Carolina Supreme Court struck down two statutes authorizing revenue bonds to finance the construction of health care, pollution control, and industrial develop-

35. In Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963), the Supreme Court of North Carolina held that section 55-145 applied only to local actions, stating:
   "However, the jurisdiction created by G.S. 55-145 pertains only to local actions. It has no application to any cause of action arising outside the State. The draftsmen have expressed the purpose of this section as follows:
   "Foreign corporations are by Section 145 made subject to local suits by residents of North Carolina in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so 'transacting business' as to be required to obtain a certificate of authority."

ment facilities by private enterprises. In both cases the court held that such state financing violated the "public purpose" limitation of the North Carolina constitution which prohibits the use of public money for private purposes. These decisions strongly reaffirmed North Carolina’s minority position on the public purpose doctrine as applied to revenue bond financing.

Revenue bonds are issued by a state or state agency but are repaid solely from the revenues of the project for which they were issued. By contrast, general obligation bonds pledge the taxing power of the issuing government for repayment. Generally, these bonds are exempt from taxation by the issuing state, and the interest is not subject to federal income taxation. The tax-exempt status of these bonds allows issuance at lower interest rates than comparable corporate bonds. In effect, the governments that allow these tax exemptions, in particular the federal government, are subsidizing the bond issuing agencies by absorbing the interest rate differential between public and private bonds.

A bond financing plan generally involves the issuance of revenue bonds to construct a facility that is leased to a private entity at a rental sufficient both to retire the bonds and pay any incidental state costs. Because these plans were increasingly used as a means of low-cost financing by major industries, they were widely criticized as a tax

---

3. "The power to tax shall be exercised . . . for public purposes only . . . ." N.C. CONST. art. V, § 2(1).
4. Although the wording of the North Carolina constitution is limited to the taxing power, the court has held that it applies to spending also. "The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury." Mitchell v. Industrial Dev. Financing Authority, 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968).
5. INT. REV. CODE OF 1954, § 103.
Consequently, Congress restricted the purposes for which tax exempt bonds could be issued but continued favorable tax treatment for small issues and for certain exempt purposes such as pollution control. Since the passage of the new tax provision, the use of revenue bonds to finance pollution control equipment has increased enormously.

Legislation authorizing revenue bond financing of privately operated projects has been passed in virtually every state. In the numerous suits challenging these acts, they have been upheld by a vast majority of state courts over arguments based on the public purpose doctrine or similar constitutional limitations on state entry into the marketplace. Courts sanctioning revenue bond financing usually have found the requisite public purpose in such benefits as relief of unemployment, growth of industry, and the development of commercial or

7. See Hendricks, Reconsideration of Industrial Development Bond Income Tax Exemptions, 48 Ore. L. Rev. 168 (1969); Spiegel, Financing Private Ventures With Tax-Exempt Bonds: A Developing "Truckhole" in the Tax Law, 17 Stan. L. Rev. 224 (1965). Two of the chief criticisms were that the interest rates for other types of municipal bonds were increased as a result of a flood of industrial development bonds on the market and that the practice of some corporations of buying the bonds for their own plant provided both a low-cost plant and tax-free income.


9. The bond issues rejected in Foster and Stanley would have been exempt under one of the exceptions.


11. The frequency of challenge to this sort of legislation results from an insistence by the bond market upon a judicial declaration of validity before the bonds can be sold. Consequently, a test case must be filed for each new authorization.


13. These restrictions arose following several periods of state investment in private industry, particularly railroads, during the Nineteenth Century. The collapse of many publicly financed railroads weakened the credit of many states and led to the adoption of restrictions in most jurisdictions. The general objections to state involvement in private investments were lack of state control over financing and lack of state regulation of the venture. Pinsky, supra note 6, at 277-80.

The limitations generally took three forms: statutory or constitutional restrictions on the lending of state or municipal credit, prohibition of government purchase of private securities, and the public purpose doctrine controlling expenditure of public money which was first stated in Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853). Pinsky, supra, at 278-81.

Even with these restrictions, state aid to railroads continued to be approved on a theory that railroads were a quasi-public utility, but aid to other industries was forbidden. The central question seems to have been whether a sufficient amount of public control over the objectives of the venture was retained. Modern projects involving leasing of government constructed projects eliminate the problems of lack of control over financing and planning. Id. at 283-84, 288.
transportation facilities. However, where courts have characterized a proposed plan as a subsidy to private corporations with only incidental public benefits, the plan has not met the public purpose test. The determination of the private or public character of the benefits of financing plans has proven difficult. The mere existence of private profit does not signify the lack of a public purpose since any private entity dealing with the state would be expected to make a reasonable profit.

A "net benefits" approach has been suggested as the best means of determining purpose. 14 Under this test the question becomes whether considering all the effects of the project, the community receives more in benefits from the project than it gives to the private party. 15 As one court stated, "The crucial question will be whether the water used to prime the pump is returned to the public in sufficient degree so as to negate the suspicion that a private benefit is foremost." 16

PUBLIC PURPOSE IN NORTH CAROLINA

The public purpose limitation was first inserted into the North Carolina constitution in 1936, 17 but a similar limitation had previously been applied by the courts. The state courts repeatedly have attempted to define the extent of the limitation, 18 and several basic

---

15. Recent Cases, 20 Vand. L. Rev., supra note 6, at 688; Note, 70 Yale L.J., supra note 6, at 795-96.
standards have been developed. An activity for a public purpose must be for the public benefit, welfare, or protection, but it is not required to benefit all citizens identically. Incidental public benefits are insufficient to justify the use of public money. It is clear that the ultimate advantage of the public, as contradistinguished from that of the individual, is its [the activity for a public purpose] characteristic feature.

Generally, the supreme court has held that governmental agencies cannot engage in a private business unless that business is incidental to a strictly governmental purpose, for instance, the operation of a hydroelectric plant on a lake owned by a resort community. In those projects in which private persons or businesses were direct beneficiaries, but in which achievement of the goals of the project would have a high societal value (for example, slum clearance), the court has upheld the plans when private financing was not available.

sioners of Durham County, 231 N.C. 604, 58 S.E.2d 696 (1950) (upholding construction and lease of a hospital); Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947) (rejecting bonds and taxes to purchase and operate a hotel); Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944) (upholding bonds and taxes for an airport); Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940) (upholding housing authority); Deese v. Town of Lumberton, 211 N.C. 31, 188 S.E. 857 (1936) (upholding joint construction with a private party of an alleyway); Burleson v. Town of Spruce Pine, 200 N.C. 30, 156 S.E. 241 (1930) (upholding bonds for a public hospital); Briggs v. City of Raleigh, 195 N.C. 223, 141 S.E. 597 (1928) (upholding city donation for construction of the State fairgrounds); Hudson v. City of Greensboro, 185 N.C. 502, 117 S.E. 629 (1923) (upholding bonds to build a railroad station to be leased to railroad). See also R. Byrd, County Finance 7-21 (1967); Note, Municipal Corporations—Public Purpose—Taxation and Revenue Bonds to Finance Low-Income Housing, 49 N.C.L. Rev. 830 (1971).

19. Although the North Carolina Supreme Court has stated that it will give "great weight" to a legislative determination of public purpose, such a determination will not be conclusive; the court has consistently held that the final determination of a public purpose is a judicial question. Mitchell v. Industrial Dev. Financing Authority, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968); Nash v. Town of Tarboro, 227 N.C. 283, 286, 42 S.E.2d 209, 211 (1947). Contra, Briggs v. City of Raleigh, 195 N.C. 223, 141 S.E. 597 (1928), where the court stated, "To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind." Id. at 227, 141 S.E.2d at 600, quoting State v. Cornell, 53 Neb. 556, 559, 74 N.W. 59, 60 (1898).


24. Martin v. Housing Corp., 277 N.C. 29, 49-50, 175 S.E.2d 665, 676-77 (1970);
Several earlier cases are particularly relevant to the issues raised in Foster and Stanley. In Hudson v. City of Greensboro\textsuperscript{25} the supreme court considered a plan in which the City of Greensboro would issue 1.3 million dollars of bonds to construct a passenger station and related underpasses for the Southern Railway Company.\textsuperscript{26} Chief Justice Clark held that the expenditure was within the power of the city and that sufficient benefits would accrue to the city to meet the public purpose requirement.\textsuperscript{27} After the court found a public purpose, it refused to examine the merits of the plan. Plaintiffs argued that the project might impair the city's credit by creating future borrowing difficulties, but the court left such judgments to the General Assembly and the city.\textsuperscript{28}

In Ports Authority v. First-Citizens Bank & Trust Co.\textsuperscript{29} the State Ports Authority, as part of a general expansion of port facilities in Morehead City, issued revenue bonds to construct a grain handling facility that the Authority would then lease to a private corporation at a rental sufficient to pay off the bonds.\textsuperscript{30} This plan was approved as part of a broad scheme to stimulate water transportation and increase trade. The court stressed that revenue bonds were not obligations of the state and, consequently, would involve no public money. This emphasis seemed to indicate that when the expenditure would not involve tax money, the court would apply a less stringent purpose standard.\textsuperscript{31} The court did not discuss the issue of private benefits stemming from the lease of the facility but did hold that the Authority had the power to select the best method of operation for its facilities. Since the ultimate use was characterized as public, the Authority could use private means to achieve it.\textsuperscript{32}

The best North Carolina precedent for Foster and Stanley is Mitchell v. Industrial Development Financing Authority.\textsuperscript{33} This case

\textsuperscript{26} 185 N.C. 502, 117 S.E. 629 (1923).
\textsuperscript{27} Id. at 516, 117 S.E. at 636.
\textsuperscript{28} Id.
\textsuperscript{29} 242 N.C. 416, 88 S.E.2d 109 (1955).
\textsuperscript{30} After the bonds were paid off in five years, the rental would decline, but the Ports Authority would retain ownership of the facility.
\textsuperscript{31} 242 N.C. at 420-21, 88 S.E.2d at 112.
\textsuperscript{32} Id. at 422-23, 88 S.E.2d at 113.
\textsuperscript{33} 273 N.C. 137, 159 S.E.2d 745 (1968).
challenged the constitutionality of the North Carolina Industrial Development Financing Act.\(^\text{34}\) In brief, the Act provided for an Industrial Development Financing Authority to issue revenue bonds for the construction of industrial plants.\(^\text{35}\) Under this plan, rentals were to be sufficient to pay off the bonds and any other costs incurred by the Authority,\(^\text{36}\) and the lessee was to pay *ad valorem* taxes or their equivalent on the property.\(^\text{37}\) At the termination of the lease, the property was to be conveyed to the local governmental unit in which the project was located.\(^\text{38}\)

In a lengthy opinion Justice Sharp declared that "[t]he financing of private enterprise with public funds contravenes the fundamental concept of North Carolina's Constitution."\(^\text{39}\) The court took judicial notice of North Carolina's expanding economy and concluded that there was no necessity for "pump-priming" legislation.\(^\text{40}\) Ordinary justifications for public support such as utility status or lack of private financing were found to be inapplicable to industrial development. In addition, although the State could expend money to advertise for new industry since that would bring general benefits to the State, such inducements to industry could not extend to providing industrial plants.\(^\text{41}\) Finally, the court noted that once construction of a plant was declared a public purpose, obtaining the land through eminent domain (even though the General Assembly had not granted the Authority such power) would be acceptable since the standards for eminent domain and taxation have been identical in North Carolina. "That the power of eminent domain should or could ever be used in behalf of a private interest is a concept foreign to North Carolina. . . ."\(^\text{42}\) In other words, providing facilities for private industry could not constitute a public use or purpose.\(^\text{43}\)

\(^{34}\) N.C. GEN. STAT. ch. 123A (Supp. 1973).

\(^{35}\) Id. §§ 123A-4 to -5 (Supp. 1973).

\(^{36}\) Id. § 123A-8 (Supp. 1973).

\(^{37}\) Id. § 123A-9 (Supp. 1973).

\(^{38}\) Id. § 123A-22 (Supp. 1973).

\(^{39}\) 273 N.C. at 156, 159 S.E.2d at 758.

\(^{40}\) Id.

\(^{41}\) Id. at 157-58, 159 S.E.2d at 759-60.

\(^{42}\) Id. at 158-59, 159 S.E.2d at 760.

\(^{43}\) In dissent, Chief Justice Parker criticized the court's willingness to strike down the Act because it feared untoward consequences. While the court relied on its optimistic judgment of North Carolina's industrial progress, Parker questioned whether "these conditions [will] continue when forty-two states of the Union, including six in close proximity to us, are inducing industry by legislative enactments similar to our Act to settle within their borders?" \(^\text{Id.} \) at 165, 159 S.E.2d at 764-65. Similarly, even though industry was expanding, the State's per capita income was very low and the
The North Carolina Medical Care Commission Hospital Facilities Finance Act challenged in *Foster* began with legislative findings of a need for new and expanded hospital facilities within the State. According to the General Assembly, the demand for these facilities could be met only with the aid of State financing. To that end the Medical Care Commission was authorized to issue revenue bonds for hospital facilities upon a finding that the area in which the facilities would be located needed hospital services and that the proposed operating agency would be able to repay the bonds. The Act exempted the bonds from State taxes and specifically stated that the bonds were not debts of the State. Instead, the entire repayment was to be generated by the new facilities or other health care facilities owned by the operating agency.

At the Commission's discretion, the facilities could be leased to public or non-profit private agencies at a rental not less than that sufficient to recoup all costs to the Commission. The lessee was to operate and maintain the facility at its own expense, for the benefit of the public, and without discrimination. Upon repayment of the bonds and attendant costs, the Commission was to convey title to the facilities to the lessee.

In an opinion by Justice Lake this financing plan was declared unconstitutional under the public purpose doctrine. The court recognized that construction of a public hospital served a public purpose and that the objectives of private non-profit and public hospitals were the same. Nevertheless, the court noted, "It does not necessarily fol-

---


47. Id. § 131-158 (Supp. 1973).

48. Id. §§ 131-147, -150 (Supp. 1973).

49. Id. § 131-145 (Supp. 1973).

50. Id.

51. Id.
low, however, that the construction and operation of the private hospital is for a public purpose . . . ." 52

That the private organizations operating the hospitals were non-profit was deemed irrelevant by the court. Quoting from Mitchell, Justice Lake wrote, "'Tax revenues may not be used for private individuals or corporations, no matter how benevolent.'" 53 Although the State was said to have the authority to promote public health under the police power, the court considered the taxing power more restrictive, particularly when exercised for the benefit of private parties.

Although the court previously had approved housing legislation that had benefited private individuals, these cases were distinguished on the ground that the private benefits were incidental to the public good of slum eradication. The court declared that the Act in Foster "has no purpose separate and apart from the operation by and ultimate conveyance of the hospital facility to the lessee thereof." 54 The General Assembly's purpose to aid non-profit organizations engaged in a valuable public service was not deemed sufficient to overcome the public purpose limitation. 55 Since the leasing provisions were integral parts of the Act, the court held that the Act in its entirety was unconstitutional. 56

In deciding that construction of private hospitals does not serve a public purpose, the supreme court seems to have taken a severely restrictive view of public purpose. Admitting that hospitals benefit the public, the court repeatedly declared that these benefits could not be provided by the State through assistance to non-profit private agencies. The court revealed no basis for the distinction between public and private, non-profit operation. The hospitals were obligated to provide care to all people in a non-discriminatory fashion, and aid was only to be provided upon demonstrated need for hospital facilities, thus preventing inequitable use of State funds. Similarly, the only eligible private lessees were non-profit organizations, thus preventing use of State funds for private gain. At a time when local governments are heavily burdened with providing services that are solely governmental, aid to private entities providing health care could only redound to the public's benefit.

52. 283 N.C. at 125, 195 S.E.2d at 527.
54. Id. at 126-27, 195 S.E.2d at 528.
55. Id. at 127, 195 S.E.2d at 528.
56. Id. at 128, 195 S.E.2d at 528-29.
The court's restricted interpretation of the Act as merely a means to transfer publicly built facilities to private lessees ignored the General Assembly's own statement of purpose and the stipulated need for new health care facilities in the State. In *Ports Authority* a lease of a State facility to a private business was upheld as a proper means to the public end of stimulating the state ports.\(^{57}\) In *Foster*, however, a similar lease to a charitable organization to operate a hospital was condemned as a predominantly private purpose.\(^{58}\)

*Foster* appears to conflict with two earlier decisions involving a similar grant of leasing authority to local governments. Under North Carolina General Statutes section 131-126.20,\(^{59}\) a municipal corporation may construct a hospital and then either operate it, contract for its operation, or lease it to a non-profit association with no restrictions on the rate of return or duration of the lease. This statute was upheld in *Trustees of Rex Hospital v. Commissioners of Wake County*\(^{60}\) and *Trustees of Watts Hospital v. Commissioners of Durham County*.\(^{61}\) There seem to be few functional distinctions between the proposed leases in *Foster* and those authorized by General Statutes section 131-126.20 except that the Act condemned in *Foster* precluded any public liability arising from the hospital, a matter which, under section 131-126.20, is within the discretion of the local authorities. However, the *Foster* opinion does not indicate that the court even considered the earlier statute.

### STANLEY V. DEPARTMENT OF CONSERVATION AND DEVELOPMENT

*Stanley* was a test case on the constitutionality of the North Carolina Pollution Abatement and Industrial Facilities Financing Act.\(^{62}\) Under the Act counties were authorized to establish local authorities for pollution control and industrial financing.\(^{63}\) The State Board of Conservation and Development was required to certify that each authority existed in a county with substantial air, water, or noise pollu-

---

57. *See text accompanying notes 29-32 supra.*
60. 239 N.C. 312, 79 S.E.2d 892 (1954).
61. 231 N.C. 604, 58 S.E.2d 696 (1950).
63. *Id.* § 159A-4 (1972).
A pollution control project could be constructed by any county authority, but only those in distressed areas could construct industrial facilities. Once approved, an authority could acquire property by any means except eminent domain. All projects constructed under the Act were to be leased to private organizations for operation under lease provisions similar to those litigated in Foster except that the lessee was to pay ad valorem taxes or their equivalent on the facility and the lessee was able to purchase the facility for a nominal sum after the bonds were retired.

Stanley consolidated cases arising from projects in Halifax, Northampton, and Jones Counties. The Halifax and Northampton facilities were part of the same plan to alleviate pollution issuing from the Albemarle Paper Company in Roanoke Rapids. The paper company had been allowed to operate under a conditional permit while facilities were constructed to bring its pollutant level within legal limits. These new facilities were to be financed by revenue bonds issued by the Halifax and Northampton County authorities. The third project involved the construction of a lumber mill for Albemarle Paper

64. Id. § 159A-3(6a) (1972). The criteria for determining a distressed area included a 6% unemployment rate, average factory wages at least 10% below the State average, per capita personal income at least 10% below the State average, a 1% or more population decline in the preceding ten years for which figures were available, a loss or expected loss of a major source of employment, and eligibility under § 401(a) of the Public Works and Economic Development Act of 1965, 42 U.S.C. § 3161 (1970).


66. Id. § 159A-7 (1972).

67. Id. § 159A-8 (1972).

68. Id. § 159A-7 (1972). Approval for each bond issue had to be obtained from the Department of Conservation and Development which had to find that the condition of pollution or economic distress continued to exist and that the proposed project would have a beneficial effect upon the problem identified. Further approval had to come from the Local Government Commission which was required to determine the ability of the lessee to operate the facility and repay the bonds, the ability of the locality to cope with the new facility, and the effect of the bond issue upon the sale of bonds of other state agencies. Id. §§ 159A-12, -21 (1972). In short, the State retained detailed control over financing, design, and operation of the projects since the necessity and careful planning of any project had to be demonstrated to the local authority and two state agencies.

69. This pollution had deleterious effects on the two counties and the Roanoke River. For years enormous amounts of air pollutants from the mill had corroded cars and peeled paint in the area and had caused a noxious odor that could be detected miles away. The discharge of effluents into the river caused numerous fish kills and encouraged the massive growth of slime, which resulted in an unpleasant odor from the river. Nevertheless towns downstream continued to use the river as a water source. 284 N.C. at 21-22, 190 S.E.2d at 646-47.

70. Id.
in Jones County, a distressed area.\textsuperscript{71} It was predicted that the three million dollar mill would directly employ eighty-three persons, activate a number of independent loggers, and provide "stumpage benefits" for local landowners.\textsuperscript{72}

After discussing the standing of the parties in the three suits, Justice Sharp briefly stated some conclusions about public purpose. Essentially, these conclusions were that government should not involve itself in the private arena and that any public benefits derived from promotion of private enterprise were incidental to the primary private aid. It is not the ultimate benefits to the community that must be examined, she wrote, but the character of the expenditure. Direct aid to a private entity could not be a proper governmental tool.\textsuperscript{73} The court repeated its admonition in \textit{Foster} that public revenues could not be used to aid private corporations, "no matter how benevolent."\textsuperscript{74}

Since the court in \textit{Mitchell} had objected to the possible use of eminent domain to acquire property for industry,\textsuperscript{75} the General Assembly had expressly prohibited its use by a local authority under the new Act.\textsuperscript{76} Nevertheless, the court chose to ignore this provision on the ground that the General Assembly could repeal it at any time and thus create a potential for misuse of eminent domain. Although recognizing that the statute's eminent domain restriction resulted from its earlier decision, the court wrote, "Petitioners suggest that the General Assembly's positive denial of the right of eminent domain . . . indicates a lack of confidence in its own declaration [of public purpose of pollution control]."\textsuperscript{77}

As to the public purpose of assisting in pollution abatement, the court recognized that environmental control was both necessary and

\textsuperscript{71} Jones County was eligible under all of the criteria for distressed areas set out in note 64 supra, except for the loss of a major employer. 284 N.C. at 19, 199 S.E.2d at 644.

\textsuperscript{72} 284 N.C. at 24-25, 199 S.E.2d at 648.

\textsuperscript{73} \textit{Id.} at 33-34, 199 S.E.2d at 653-54.

\textsuperscript{74} \textit{Id.} at 34, 199 S.E.2d at 654. Interestingly, Justice Sharp stated that an implicit ground for \textit{Foster} was the lack of control over private hospital rates that the Medical Care Commission would have had under the Act. This rationale was never mentioned in the court's opinion in \textit{Foster}. Indeed, the relevance of price controls to public purpose is unclear. Price controls were important in another health care case, \textit{In re Aston Park Hosp., Inc.}, 282 N.C. 542, 193 S.E.2d 729 (1973); see Comment, \textit{Hospital Regulation After Aston Park: Substantive Due Process in North Carolina}, 52 N.C.L. REV. 763 (1974).

\textsuperscript{75} \textit{See text accompanying note 42 supra.}

\textsuperscript{76} N.C. GEN. STAT. § 159A-20 (1972).

\textsuperscript{77} 284 N.C. at 35-36, 199 S.E.2d at 654-55.
within the reach of the State's police power.\(^7\) As in *Foster*,\(^9\) the police power was found to be more extensive than the spending power, and the existence of power to force an industry to stop polluting did not carry with it complementary authority to assist in the control.\(^8\) Although elimination of pollution would benefit the public generally, there was no apparent necessity for the State to assist in financing controls. Since no lack of ability or willingness to meet pollution standards without bond financing was shown, the only real beneficiary seemed to be the paper company.\(^8\)

According to the court, if the State were to aid Albemarle Paper in controlling its pollution problem, the company's ability to obtain inexpensive financing might give Albemarle an advantage over its competitors in the State who could not obtain similar financing. These competitors would be at a disadvantage since they still had to comply with state and federal pollution regulations.\(^8\) On the other hand, if revenue bond financing were provided for all industrial polluters, Justice Sharp raised the specter of a flood on the bond market with a detrimental effect on the borrowing power of local governments for needed public improvements.\(^8\)

The considerations applied to pollution abatement financing were also applied, without significant discussion, to the Jones County industrial development scheme.\(^8\) Therefore the rule in *Mitchell* was applicable to prevent the operation of any of the three county authorities.

The court's holding in *Stanley* that pollution control must be handled by the exercise of the police power rather than by state financial

\(^7\) Id. at 36-37, 199 S.E.2d at 655.
\(^8\) See text following note 54 supra.
\(^9\) 284 N.C. at 37, 199 S.E.2d at 656.
\(^10\) Id. at 38, 199 S.E.2d at 656-57.
\(^11\) Id. at 38-39, 199 S.E.2d at 657.
\(^12\) Id. at 39, 199 S.E.2d at 657. In discussing the possible effects of these bonds on the market for other government securities, Justice Sharp seems to have ignored N.C. GEN. STAT. § 159A-12(4) (1972) requiring the Local Government Commission to make such a determination of financial side-effects before approving a bond issue.
\(^13\) The lack of a separate discussion by the court of the Jones County project seems particularly unfortunate. It was treated as being on point with *Mitchell*, which it is not. The plan in *Mitchell* allowed financing in any amount for industries already situated in the State's most industrialized areas. By contrast, industrial financing under this Act was carefully limited to those areas that clearly were in need of economic stimulation. While the court might find that a new plant built for a corporation in Forsyth County would primarily benefit the private entity, the enormous pump-priming effect of bringing industry to poor rural counties would indicate at least an arguable distinction from *Mitchell*. 
assistance did not take into account all of the implications of reliance on the police power. Regulation has been the usual approach to pollution control, but it is hardly cost free. Policing polluters is both difficult and expensive. The expense and difficulty involved in meeting pollution regulations make corporations reluctant to comply, and penalties are often insufficient to bring prompt action. If the State offers financial assistance, faster and more complete compliance might result, thus lowering the cost of enforcement of environmental standards. Applying a net benefits test, the State would incur only the minimal costs of providing revenue bond financing, and it would gain not only a cleaner environment but also lower pollution control enforcement costs. Clearly, the court's view of the private entity as the primary, if not the sole, beneficiary of the Act will not stand up to a more than superficial analysis. The possible public benefits stemming from maintaining a source of employment in the State alone are significant.

Similarly, the court's argument that approval of the Act would result in discriminatory treatment and give Albemarle Paper a competitive advantage can be supported only by the most limited analysis. Although a plant located in another part of the State might be unable to use revenue bonds for pollution control financing, this ignores the fact that Albemarle's competitors in other states usually can obtain not only this financing but, in some cases, general plant financing as well. The court, by limiting its perspective to possible discriminatory advantages within North Carolina, may have ensured that the State's industries will face a competitive disadvantage as a result of pollution control costs.

DEVELOPING STANDARDS FOR PUBLIC PURPOSE

Both Foster and Stanley demonstrate an apparently increasing willingness of the North Carolina Supreme Court to question legislative judgments of public purpose. The general rule in North Carolina
has been that legislation will be struck down only if there is no possible interpretation by which it can be upheld. Earlier public purpose cases in North Carolina have treated the legislative judgment as nearly conclusive, and this view has been supported by the United States Supreme Court.

In each of its recent public purpose cases, the court has dutifully recited that it will give the legislative declaration of purpose great weight, but in practice it has not done so. In Foster the legislative determination of need for health care facilities was ignored; consequently, the court found that the real purpose was to aid private organizations with only incidental public benefits. In Stanley an unambiguous declaration by the General Assembly forbidding the use of eminent domain by the local authorities was specifically rejected by the court. While these examples are particularly egregious, they typify the court's current position that a judicial determination of need will be arrived at independently of the General Assembly.

The questions that the court's position raises concern not only possible effects on separation of powers but also the efficacy of having the court make such decisions. Public purpose determinations involve the weighing of disparate values to establish public priorities. This is a fundamentally legislative decision, which the courts are not equipped to make. Perhaps a better approach would limit the court to determining whether sufficient facts exist upon which the General Assembly could reasonably have determined the need for a particular state financing program.

Along with its shift to a more assertive role, the court has moved away from the historical basis of the public purpose doctrine. Originally developed to prevent raids on the public funds as a result of ear-
lier railroad financing scandals, the court has established the doctrine as an almost absolute barrier to State involvement in any private activity. This expansion seems particularly inappropriate in the two cases discussed here. Both involved revenue bonds, which do not commit the State’s credit at all. Both plans required administrative determination of the project’s necessity and its ability to pay for itself. Since the problems of lack of control over financing and project choice have been eliminated, there is little justification for the court’s restrictive view.

The stricter standard seems to be precipitating another shift in the court’s approach to public purpose questions. In the past the determination was one of the ultimate purpose of the project in question rather than the particular means used to achieve that goal. Recently the court’s attention has focused on questions of process—on how the money is to be spent. The prohibitions on aid to a private corporation of any sort are a symptom of this shift. At the very least, the words “public purpose” should be interpreted to mean the final goal of the expenditure. Virtually every state action involves some private benefit and may involve direct payments to private entities; the court’s emphasis on process could endanger many programs that seem to be clearly for public benefit.

The court’s decisions in Foster and Stanley have impeded State efforts in two essential areas, health care and environmental control. Stanley explicitly holds that state involvement in the private market in any fashion will be forbidden. Foster is similarly restrictive in the health care area, and in tandem with In re Aston Park Hospital, Inc., a police power case restricting state regulation of hospitals, almost totally ends State involvement in the private health care field.

If the court continues to move towards an increasingly stricter

94. See note 13 supra.
95. Another apparent change is the stricter standards for revenue bonds now being applied. In Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955), the court emphasized that no state revenues were being committed, implying that revenue bonds were subject to a lesser purpose standard; see text accompanying note 31 supra. Although this seems to be a reasonable distinction, the court’s identification of public purpose for expenditure and public use for eminent domain ends any such arguments.
96. In Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955), the court allowed the lease to a private corporation because it was a means to the public end of improved water transportation; see text accompanying notes 29-32 supra.
97. 284 N.C. at 40, 199 S.E.2d at 658.
98. 282 N.C. 542, 193 S.E.2d 729 (1973); see Comment, 52 N.C.L. Rev., supra note 74.
public purpose standard, as it gives every sign of doing, the sole method of creating authority to use the State's tax exempt borrowing power will be by constitutional amendment. In any event, the exigencies of modern state government virtually compel the use of tax exempt financing as an incentive to publicly desirable activities in the private sector. Justice Holmes once remarked that "[a] word is not a crystal . . . but the skin of a living thought." Just so, the public purpose doctrine need not be a static barrier to state activity in areas of consuming public importance.

JACK N. GOODMAN

Criminal Procedure—Judicial Legislation of Capital Punishment: State v. Waddell

In North Carolina a person convicted of a capital crime committed after January 18, 1973, must be sentenced to death. This return to the mandatory death penalty is the result of the "advisory" portion of the opinion in State v. Waddell. In that case the North Carolina...
The North Carolina Supreme Court applied *Furman v. Georgia* to the North Carolina capital crimes statutes and invalidated the proviso in each statute which enabled the jury, in its discretion, to fix punishment at life imprisonment. The decision to sever the discretionary proviso was reached through a reasoning process which may be divided into four distinct steps: (1) interpretation of *Furman*, (2) specification of the issue, (3) consideration of the legislative history of the capital crimes statutes, and (4) discussion of the rules of statutory construction and severability.

### Interpretation of *Furman*

The determination of the precise holding in *Furman v. Georgia* is difficult because the brief per curiam opinion was supplemented by five concurring opinions, none of which were concurred in

penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States." *Id.* at 666, 202 S.E.2d at 747.


6. See note 1 *supra*. Technically, the decision in *Waddell* affected only N.C. Gen. Stat. § 14-21 (1969), the rape statute. Realistically, however, since the decision applied equally to the other three statutes, they too were affected. See, e.g., State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973). The statutory provision prescribing the punishment for rape is representative of all four provisions:

> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.


7. 282 N.C. at 444-45, 194 S.E.2d at 28.

8. 408 U.S. 238 (1972) (per curiam). *Furman*, in which petitioner had been convicted of murder, was consolidated with *Jackson v. Georgia* and *Branch v. Texas*, in which petitioners had been convicted of rape.

9. [The imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.]

*Id.* at 239-40.
by another Justice.\(^\text{10}\) Clearly Justices Brennan and Marshall found capital punishment to be cruel and unusual per se.\(^\text{11}\) Justice Douglas, on the other hand, focused on the "untrammeled discretion" of the jury and found the statutes discriminatory in their operation and violative of the principles of equal protection implicit in the eighth amendment.\(^\text{12}\) Finally, Justices Stewart and White articulated two further reasons for the unconstitutionality of the discretionary statutes before the Court: first, the imposition of the death penalty had become so infrequent that its use no longer served the ends of criminal justice;\(^\text{13}\) and, secondly, the statutes permitted capricious infliction of the death penalty.\(^\text{14}\)

\(^{10}\) Although the four dissenters each wrote an opinion, the opinion of the Chief Justice and the opinions of Justices Powell and Rehnquist were each supported by the other dissenters.

\(^{11}\) Death is an unusually severe and degrading punishment; there is a strong possibility that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. . . . [D]eath stands condemned as fatally offensive to human dignity.

\(^{12}\) Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.

\(^{13}\) 408 U.S. at 309-10, 313. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." \(\text{Id.}\) at 309-10 (Stewart, J., concurring). "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there
Chief Justice Burger, attempting to assess the scope of the Court's ruling, criticized the five concurring opinions for leaving "the future of capital punishment in this country . . . in an uncertain limbo."16 In his view the Court did not declare the death penalty unconstitutional per se.18 Nevertheless, he asserted that "if legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner as they have in the past."17

This assessment, which focuses on discretionary sentencing procedures, is essentially the same as that made in Waddell. After discussing the various opinions in Furman, the North Carolina Supreme Court interpreted that case as holding "that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence as a matter of discretion."18

SPECIFICATION OF THE ISSUE

The court next posed the main issue in the case and set the framework for analysis as follows: "Does Furman invalidate G.S.14-21 in its entirety or invalidate only the discretionary proviso, leaving death as the mandatory punishment for rape in North Carolina?"10 The manner in which the issue was framed reflects the court's possible reliance on the Delaware Supreme Court's opinion in State v. Dickerson.20
Dickerson has been the only other decision after Furman to strike discretionary sentencing from a capital crimes statute, while leaving intact the death penalty.

In Dickerson the defendant, who was indicted for murder, challenged as unconstitutional the Delaware statutory scheme which contained one statute mandating death for conviction of first degree murder and another granting discretion to judge or jury to impose life imprisonment. The superior court had certified the following questions of law:

1. Are the discretionary mercy provisions of 11 Del. C. § 3901 unconstitutional under Furman v. Georgia?

2. If the answer to Question 1 is yes, is the mandatory death penalty prescribed in 11 Del. C. § 571 constitutional?

In response to the first question, the Delaware Supreme Court reasoned that the discretion condemned by Furman was delegated to the judge or jury by the mercy statute. Thus the mandates issued by the United States Supreme Court in the wake of Furman were said to have "conclusively demonstrated" the invalidity of the mercy statute.

The Delaware court then concluded that the unconstitutionality of the mercy statute did not invalidate the statute which called for the death penalty.

In his dissent in Waddell, Chief Justice Bobbitt stated that the questions certified in Dickerson seemed to have been "adroitly phrased to elicit the answers which were given." He then stated, "The true question was whether Furman had invalidated the death penalty provision of the Delaware statute." Justice Higgins, concurring in the result in Waddell, voiced similar concerns. He perceived the effect of Furman to be as follows:

Where discretion is given, Furman holds that a life sentence is valid but strikes down the death penalty. The rationale of the rule seems to be that if discretion between a death sentence or life imprisonment is given either to the court or the jury, the milder punishment must be imposed because in the interpretation

22. 298 A.2d at 762.
23. Id. at 764; see Seeley v. Delaware, 408 U.S. 939 (1972); Steigler v. Delaware, 408 U.S. 939 (1972). The mandate in these cases and others similarly decided the same day was, "The judgment is . . . vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings." Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam).
24. 298 A.2d at 767; see text accompanying notes 61-65 infra.
25. 282 N.C. at 473, 194 S.E.2d at 43.
26. Id.
of criminal statutes that which is more favorable to the accused must be accepted. 27

**CONSIDERATION OF LEGISLATIVE INTENT**

In order "to put the question into proper perspective," 28 the court next examined the legislative history of the North Carolina capital crimes statutes. This study convinced the court that the people and their representatives had manifested "a constant intent . . . to retain the death penalty." 29 Apparently relying on this finding, the court reached the incongruous conclusion that the proviso was the part of the statute that created the constitutional infirmity. 30 Both the preliminary finding and the court's conclusion are defective.

The first defect was pointed out by Chief Justice Bobbitt, who noted that the General Assembly had been forewarned that a decision not unlike *Furman* might be rendered. In 1969 House Bills attempting to repeal the discretionary proviso were referred to Judiciary Committee No. 2 but received unfavorable reports. In 1971 a House Bill deleting reference to the death penalty was reported favorably from Judiciary Committee No. 2 but failed to pass the House on a second reading. 31 The Chief Justice declared that "[t]he reasonable inference [to be drawn] from the foregoing [was] that the General Assembly wanted [the capital crimes statutes] to remain exactly as they had been since 1949 and as upheld by the decisions of this Court." 32

In addition, the majority's reluctance to grant the discretionary

27. *Id.* at 475, 194 S.E.2d at 44. Such an approach would have avoided what Chief Justice Bobbitt termed the "ironic and unrealistic . . . use [of] *Furman* as a basis for holding that *hereafter under present statutes* death will be the sole punishment for rape." *Id.* at 457, 194 S.E.2d at 33 (emphasis in original).


29. *Id.* at 442, 194 S.E.2d at 26.

30. *Id.*

31. *Id.* at 456-57, 194 S.E.2d at 32-33.

32. *Id.* at 457, 194 S.E.2d at 33 (emphasis in original).

Justice Sharp commented that the General Assembly had "rejected the proposal that capital punishment be retained without the discretionary power in the trial jury . . . ." *Id.* at 476, 194 S.E.2d at 48.

In his dissent in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974), Chief Justice Bobbitt noted that the fact that the 1949 Act, ch. 299, § 5, [1949] N.C. Sess. Laws 263, providing for discretionary sentencing, was made specifically applicable to offenses committed prior to its ratification was "further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation." *State v. Jarrette*, *supra* at 667, 202 S.E.2d at 748.

Justice Stewart, concurring in *Furman*, noted that since the legislatures have decreed discretionary sentencing, they have *not* concluded that death is necessary for all capital crimes. 408 U.S. at 309 (Stewart, J., concurring).
proviso a status commensurate with that of the death penalty is ironic in light of the declaration of the court in earlier decisions that the General Assembly intended "to give the jury the unencumbered . . . right to make the recommendation."33 Indeed, this scheme, as opposed to mandatory capital punishment, has been viewed as giving the defendant a "substantive right."34 Furthermore, there is evidence that the discretionary sentencing process was instituted to remedy the problem of jury nullification.35 These indications of the importance of the discretionary proviso, along with the more recent manifestations of legislative intent, seem to demonstrate a desire to retain the death penalty only in conjunction with the proviso.

Moreover, while the resolution of the question of severability, which followed the pronouncement that the proviso was invalid, certainly should have been guided by manifestations of legislative intent,36 the determination of which part of the statute was invalid was a question, not of legislative intent, but rather of the application of Furman.37

STATUTORY CONSTRUCTION AND SEVERABILITY

The court next determined that the invalid proviso was severable from the remainder of the statute, thus "making the death sentence


In view of the history of the legislation involved and the recommendations of the study commission in 1949 [proposing adoption of the discretionary proviso], it is apparent that juries were bringing in verdicts of murder in the second degree in too many cases in which the evidence warranted a conviction of first degree. In an effort to improve the administration of justice in that respect, the unconditional right to recommend life imprisonment . . . was granted to the jury, although the evidence warranted a conviction that had theretofore carried a mandatory sentence of death. Id. at 285, 108 S.E.2d at 654.

36. The rule of severability in North Carolina appears to have two different formulations, both of which give central importance to ascertainment of legislative intent. The two formulations are stated in Jackson v. Board of Adjustment, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969):

The invalidity of one part of a statute . . . does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature . . . to enact the part that is valid . . . When the statute . . . could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone.

37. A similar error seems to have been made in State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968), rev'd sub nom. Funicello v. New Jersey, 403 U.S. 948 (1971); see notes 44-60 and accompanying text infra.
mandatory upon conviction." The court's reliance on its assessment of the legislative history of the capital crimes statutes is apparent at this stage:

Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion.

The court quoted the *Third Edition of Sutherland, Statutes and Statutory Construction* for the proposition that although normally an entire statute should be declared invalid when severance of an invalid proviso would result in widening the statute's scope of operation, the act as a whole should not be found invalid where the proviso was added by way of amendment. The reasoning behind this proposition has been that "the Legislature did intend, at least originally, to pass the act without offering the exception." This rationale, however, has been challenged in the *Fourth Edition of Sutherland*:

This is a questionable position, however, since the fact that a limitation was added by amendment shows that legislative attention was focused very specifically on the question whether the limitation should be imposed and raises some degree of inference that a majority of the legislature was unwilling to pass the act without the limitation.

Moreover, the court's dependence on the addition of the proviso by amendment is vitiated somewhat by the fact that the General Assembly characterized the 1949 change by using the term "rewritten" rather than "amended."

The North Carolina Supreme Court also used the United States Supreme Court's decision in *United States v. Jackson* to support its severability decision. However, the court misapplied that case. The correct application of *Jackson* to a situation in which a capital crimes statute suffers from a constitutional infirmity would appear to be

38. 282 N.C. at 444, 194 S.E.2d at 28.
39. Id. at 442-43, 194 S.E.2d at 27.
41. Id. § 2412, quoted at 282 N.C. at 443, 194 S.E.2d at 27.
43. Ch. 299, § 1 [1949] N.C. Sess. Laws 262. Chief Justice Bobbitt emphasized that the phrasing of the legislature in this enactment was "rewritten" rather than "amended." 282 N.C. at 455, 194 S.E.2d at 32; see id. at 476, 194 S.E.2d at 48 (Sharp, J.).
44. 390 U.S. 570 (1968).
that, in order to cure the infirmity, the death penalty should be de-
leted leaving the remainder of the statute intact. This interpreta-
tion is supported by the successive opinions of the United States Supreme
Court and the New Jersey Supreme Court.

The United States Supreme Court in Jackson found the death
penalty clause of the Federal Kidnapping Act constitutionally de-
icient since defendants faced the dilemma of choosing either to con-
test guilt before a jury and risk imposition of the death penalty or to
plead guilty and avoid the risk of death. The validity of the Act
as a whole was upheld, however, with the result that violators could
"be prosecuted under the Act, but they [could not] be put to death
under its authority." In State v. Forcella the New Jersey Supreme Court considered
the effect of Jackson on the New Jersey statutes. One statute established
death as the punishment for first degree murder unless the jury in its
discretion recommended life imprisonment. Another provided for a
sentence of "either imprisonment for life or the same as that imposed
upon a conviction of murder in the second degree" upon acceptance
by the court of a plea of non-vult or nolo-contendere. The court
initially determined that Jackson did not apply to the two statutes but
declared that if Jackson were to apply, the statute providing for life

46. 390 U.S. at 581. "The inevitable effect of any such provision is, of course,
to discourage assertion of the Fifth Amendment right not to plead guilty and to
deter exercise of the Sixth Amendment right to demand a jury trial." Id. (footnote omitted).
47. Id. at 591. The Court quoted Champlin Ref. Co. v. Commission, 286 U.S.
210, 234 (1932), as to the test of severability:
"The unconstitutionality of a part of an Act does not necessarily defeat . . .
the validity of its remaining provisions. Unless it is evident that the legisla-
ture would not have enacted those provisions which are within its power, inde-
dependently of that which is not, the invalid part may be dropped if what is
left is fully operative as law."
390 U.S. at 585 (footnote omitted).
The Court also noted that here history confirmed "what common sense alone
48. 52 N.J. 263, 245 A.2d 181 (1968), rev'd sub nom. Funicello v. New Jersey,
403 U.S. 948 (1971).
51. 52 N.J. at 280, 245 A.2d at 190.
imprisonment upon acceptance of a plea of non-vult would fail leaving intact discretionary sentencing. The decision to sever the statute without invalidating the death penalty provision was based on the fact that, unlike the situation in *Jackson*, the death penalty was in existence in New Jersey prior to inclusion of the non-vult provision. This fact, when considered along with the repeated refusal of the legislature to abolish capital punishment, led the court to state that it “could not find the Legislature was so determined to have the non-vult plea that it would prefer to scuttle capital punishment.”

Thus by making the death penalty a possibility regardless of plea, the New Jersey Supreme Court appeared to have removed any unconstitutional incentive comparable to the guilty plea or waiver of jury trial in *Jackson*. Nevertheless, *Forcella* was reversed in summary fashion by the United States Supreme Court. On remand, the New Jersey Supreme Court in *State v. Funicello* concluded that the reversal not only required invalidation of death sentences already imposed but also forbade future imposition of the death penalty.

The *Waddell* court concluded its discussion of severability with citation of the Delaware decision, *State v. Dickerson*. This decision, however, because of distinctions between the states' statutory schemes, yields little or no support for the decision to sever the discretionary proviso from the statute. The Delaware court noted that, although legislative intent normally controlled resolution of questions of severability, the issue there was governed by the rules of construction set out in sections 308 and 301 of Title One of the Delaware Code. The first section declared that the invalidity of one provision shall not affect the validity of other provisions “that can be given effect without the invalid provision.”

---

52. *Id.* at 284, 245 A.2d at 192.
54. 52 N.J. at 283, 245 A.2d at 191.
55. *Id.* at 281, 245 A.2d at 191.
56. *See State v. Funicello*, 60 N.J. 60, 82, 286 A.2d 55, 66-67 (1972) (Weintraub, C.J., concurring) (“An appeal to the highest authority . . . should be more rewarding than a trip to Delphi.”)
58. 60 N.J. 60, 286 A.2d 55 (1972) (per curiam).
59. “Judgments, insofar as they impose the death sentence, reversed and cases remanded for further proceedings.” 403 U.S. at 948.
61. 298 A.2d 761 (Del. 1972).
fect without the invalid provision.”  The second said that the statutory rules of construction “shall be observed . . . unless such construction would be inconsistent with the manifest intent of the legislature.” The argument that the legislature could not have intended to revert back to the mandatory death penalty was termed a “strong” one, but it fell short of demonstrating the “manifest” intent of the legislature.

CONCLUSION

Significantly, neither the results nor the reasoning of Waddell and Dickerson have been accepted by other states that have considered the effect of Furman on their capital crimes statutes. For example, in a Florida decision, Donaldson v. Sack, petitioner, who had been indicted for murder in the first degree, sought a writ of prohibition to prevent the respondent circuit judge from proceeding with the trial on grounds that after Furman murder in the first degree was no longer a “capital case” and therefore jurisdiction vested in the county criminal court of record. Since the Florida courts traditionally had defined a capital crime as “one for which the punishment of death is inflicted” and since Furman invalidated “the death penalty as provided under present legislation,” the court held that the writ should issue. The court then declared that the remaining consistent portions

64.  Id. tit 1, § 301 (1953).
65. 298 A.2d at 765-67. The court also noted that “bly definition, the word ‘manifest’ included the concept of being ‘obvious’, ‘apparent’, or ‘beyond doubt or question’.”  Id. at 766.
66.  265 So. 2d 499 (Fla. 1972).
68.  Section 775.082(1) provided in part: “A person who has been convicted of a capital felony shall be punished by death, unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment.”  Ch. 136, § 3, [1971] Fla. Laws 554, as amended, Fla. Stat. § 775.082(1) (Supp. 1974).
70.  265 So. 2d at 501. In State v. Holmes, 263 La. 686, 269 So. 2d 207 (1972), the Supreme Court of Louisiana rejected the “classification approach” employed by Florida and declared that although Furman forbade “the imposition and execution of the death sentence, as now applicable” in Louisiana, no presumption of invalidity arose as to other procedural law in murder trials.  Id. at 691, 269 So. 2d at 209 (emphasis in original).  See also State v. Flood, 263 La. 699, 269 So. 2d 212 (1972).
of the statute were valid and that imprisonment for life, the only penalty provision left in the statute, should be the sentence for those convicted of "former capital offenses."\(^7\)

Also representative of the approach taken by the other states is the decision of the Ohio Supreme Court in *Vargas v. Metzger*.\(^7\) Defendant, under indictment for murder, petitioned for habeas corpus, alleging that *Furman* had voided the Ohio first degree murder statute,\(^7\) thereby rendering invalid his indictment and detention.\(^7\) The court, however, rejected this contention and held that *Furman* "enjoined . . . enforcement of the death penalty under the statute" but left intact the sentence of life imprisonment.\(^7\)

If *Waddell* had invalidated the death penalty and thus left life imprisonment as the sole punishment for convictions of capital crimes, the North Carolina Supreme Court would not have impinged upon legislative authority. That the advisory opinion is an "example of judicial overreaching"\(^7\) is a central theme of the opinions of Chief Justice Bob-

\(^7\) 265 So. 2d at 502; *accord*, State v. Whalen, 269 So. 2d 678, 679 (Fla. 1972). The same sentence was directed to be imposed upon those convicts already under sentence of death for murder in the first degree. Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972).

The *Donaldson* court noted that "[t]his position is consistent with the Legislature's express intent in this area," and quoted ch. 118, § 1, [1972] Fla. Laws 388 which was to become effective on October 1, 1972 and which provided that, if the death penalty were found unconstitutional, those convicted of capital felonies should suffer life imprisonment. 265 So. 2d at 503. This consistency was shortlived, however, for in Anderson v. State, *supra*, and In re Baker, 267 So. 2d 331 (Fla. 1972), decided two months later, the court, citing "factors sufficient to create an exception to [the rule] requiring the presence of the defendants at sentencing," 267 So.2d at 9; 267 So. 2d at 334, preempted the circuit courts and resentenced petitioners to life imprisonment. As the dissent in In re Baker commented, "This opinion seems to lend itself to an apparent effort to nullify in advance the Legislature's action . . . ." 267 So. 2d at 336. The legislative action was ch. 118, [1972] Fla. Laws 388, mentioned above, part of which required "sentences re-imposed after that date [October 1, 1972] to be life terms without benefit of parole." 267 So. 2d at 334 (footnote omitted).

\(^7\) 35 Ohio St. 2d 116, 298 N.E.2d 600 (1973) (per curiam).

\(^7\) *Ohio Rev. Code Ann.* § 2901.01 (Page 1953), which provided, in pertinent part, "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life."

\(^7\) 35 Ohio St. 2d at —, 298 N.E.2d at 600-01.

\(^7\) *Id.* at —, 298 N.E.2d at 602; *accord*, State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972); State v. Leigh, 31 Ohio St. 2d 97, 285 N.E.2d 333 (1972); *see* Bartholomew v. State, 267 Md. 175, 185, 297 A.2d 696, 701 (1972); Cowart v. State, 270 So. 2d 350 (Miss. 1972); Capler v. State, 268 So. 2d 338 (Miss. 1972); State v. Boothe, 485 S.W.2d 11, 15 (Mo. 1972). In State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973), the Kansas court, after holding the death penalty provision of its statute constitutionally impermissible, issued a warning to the state trial courts to the effect that no instruction as to jury discretion to fix punishment at life imprisonment should be given. *Id.* at —, 513 P.2d at 256.

\(^7\) 282 N.C. at 477, 194 S.E.2d at 48.
bitt\textsuperscript{77} and Justices Higgins\textsuperscript{78} and Sharp.\textsuperscript{79} For instance, a concern for separation of powers is implicit in the Chief Justice's view that "\textit{Furman} simply held that the death penalty provision of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out."\textsuperscript{80}

The proper course for the court would have been simply to forbid the imposition and execution of the death penalty, or, as Justice Sharp indicated, to follow a policy of "judicial restraint." Such a policy would have been appropriate in \textit{Waddell} for the following reasons: (1) the announcement of prospective application was an advisory opinion, the rendering of which has been discouraged by the court itself;\textsuperscript{81} (2) the issue of prospective application was neither briefed nor argued before the court;\textsuperscript{82} (3) "it is axiomatic [in North Carolina] that penal statutes are construed strictly against the State and liberally in favor of the private citizen . . . and all conflicts and inconsistencies are resolved in favor of the defendant;"\textsuperscript{83} (4) the responsibility for establishing a scheme of sanctions for criminal acts is vested in the legislature,\textsuperscript{84} and the question of death or life imprisonment for the four

\textsuperscript{77} \textit{Id.} at 457, 194 S.E.2d at 33, "In my view, this question [as to death or life imprisonment] must be answered now by the General Assembly rather than by this Court's speculation as to what the General Assembly at previous sessions would have done if they had been confronted with the necessity of making that decision."

\textsuperscript{78} Justice Higgins' disagreement with the majority opinion was voiced largely in terms of judicial restraint. "The Legislature may provide the death penalty or it may provide life imprisonment, but when it undertakes to give an option, the milder judgment must be imposed . . . . I am unfamiliar with any authority this court has to legislate on the subject by repealing either provision." \textit{Id.} at 475, 194 S.E.2d at 44.

\textit{Compare} the above position with the discussion at notes 44-60 and accompanying text, \textit{supra}. A notion of judicial restraint was arguably a basis for the Supreme Court reversals of cases applying \textit{Jackson} by eliminating the milder sentence provisions in their statutes.

\textsuperscript{79} 282 N.C. at 476-77, 194 S.E.2d at 47-48. "This Court, which has consistently deplored the encroachment of other courts upon the legislative perogatives during the past decade, now follows suit and sets its own example of judicial overreaching . . . ."

\textit{Id.} at 477, 194 S.E.2d at 48.

\textsuperscript{80} \textit{Id.} at 455, 194 S.E.2d at 32 (emphasis in original).

\textsuperscript{81} \textit{Id.} at 454, 477, 194 S.E.2d at 31, 48; \textit{see} Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960); Lide v. Mears, 231 N.C. 111, 122, 56 S.E.2d 404, 412 (1949).

\textsuperscript{82} Brief for the North Carolina Civil Liberties Union Legal Foundation, Inc., as Amicus Curiae at 3-4, State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

\textsuperscript{83} 282 N.C. at 475, 194 S.E.2d at 44 (Higgins, J., concurring in result); State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968); State v. Scoggin, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952). \textit{See also} 32 N.C.L. Rnv. 438, 441 (1954), where it was said that "at least when life is at stake the administration of criminal justice ought to be charitable and liberal."

\textsuperscript{84} State v. Whitehurst, 212 N.C. 300, 193 S.E. 657 (1937), "Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms, for the very obvious reason that the power of punishment is vested
“capital crimes” is one of “high public policy,” the determination of which is the exclusive province of the General Assembly.85

When he assessed the effect of Furman v. Georgia, Chief Justice Burger clearly stated the view that revision of capital crimes statutes should be left to the legislature:

While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that the result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.86

DAVID R. FRANKSTONE

Criminal Procedure—State v. Streeter—
Stop and Frisk Tarheel Style

The effectiveness of a system of law enforcement is manifested as significantly by its ability to prevent criminal behavior as by its success in apprehending offenders. Nevertheless, such preventive police

86. Furman v. Georgia, 408 U.S. 238, 403 (1972) (Burger, C.J., dissenting). In his dissent in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), Chief Justice Bobbitt characterized the view of the minority in Waddell as follows:

[T]he provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. Furman did not purport to delete, isolate or invalidate any particular portion of the statute. Furman simply held that the death penalty provision under the statutes as now constituted is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

Id. at 668, 202 S.E.2d at 749, (dissenting opinion).

On Friday, April 5, 1974, the General Assembly revised the capital crimes statutes by making first degree burglary and arson punishable by life imprisonment. In addition, the Act defines two distinct degrees of rape. First degree rape, punishable by death, is rape by a man over sixteen years of age who uses a deadly weapon to force submission or who inflicts serious bodily harm on his victim or the rape of a female under the age of twelve. All other rapes are considered second degree and are punishable by life imprisonment. Ch. 1201, §§ —, [1973] N.C. Sess. Laws —. The News and Observer, Apr. 6, 1974, at 1, col. 1.
procedures must be accommodated with fourth amendment\textsuperscript{1} protections before allowing intrusions upon personal security under circumstances short of probable cause to arrest. One such intrusion, "investigative detention," recently has been sanctioned by the North Carolina Supreme Court in \textit{State v. Streeter}.\textsuperscript{2}

While on routine patrol two officers of the Greenville Police Department observed a stranger with his shirttail outside his trousers walking beside a city street in a business district at 2:45 a.m. As the officers approached the pedestrian from behind in their patrol car, he looked back at them, then looked away and continued walking. The officers stopped their car, and one of them approached the man, who had stopped a short distance away. The officer asked for and received identification. Observing a "bulge" under the man's shirt, the officer told him not to move, patted the object through the man's shirt, and, believing it might be a gun, reached under the man's shirt and pulled a screwdriver out of his pocket. The officer then removed from the man's pockets a pair of gloves, a hammer, a small prybar, a flashlight, and a money bag, whereupon the officer ordered the man into the patrol car and placed him under arrest for possession of burglary tools.\textsuperscript{3}

Defendant Streeter was tried and convicted in Pitt County Superior Court for felonious possession of housebreaking implements.\textsuperscript{4} The State's evidence consisted solely of the arresting officers' testimony and the items seized from Streeter. On appeal the North Carolina Court

\begin{quote}
1. U.S. \textit{Const.} amend IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.


3. \textit{id.} at 205, 195 S.E.2d at 503-04; \textit{id.} at 211-12, 195 S.E.2d at 507-08 (Higgins, J., dissenting). The majority opinion implies that all of the tools were in plain view when the officer lifted the defendant's shirttail. However, the trial record and the dissenting justices make it clear that nothing was in view until the screwdriver was pulled from defendant's pocket, and the other items were thereafter removed from his other pockets. See Record at 16-17, Brief for Defendant at 4, 14, Supplemental Brief for Defendant at 4, \textit{State v. Streeter}, 283 N.C. 203, 195 S.E.2d 502 (1973) [hereinafter cited as Record, Brief for Defendant, Supplemental Brief for Defendant].

4. N.C. \textit{Gen. Stat.} \textsection 14-55 (1969) provides that it shall be a felony "[i]f any person . . . shall be found having in his possession, without lawful excuse, any pick-lock, key, bit, or other implement of housebreaking . . . ." The gravamen of the offense is possession without lawful excuse, and the burden is on the State to prove both elements of the offense. No intent to use the tools is required for violation of this section of the statute, which constitutes a separate offense. See, e.g., \textit{State v. Morgan}, 268 N.C. 214, 150 S.E.2d 377 (1966).
\end{quote}
of Appeals affirmed the conviction, rejecting defendant's contention that this evidence should have been excluded as the product of an illegal arrest and search. In an opinion by Justice Huskins, the North Carolina Supreme Court affirmed on alternative grounds. First, the court found that, because probable cause existed for defendant's arrest without a warrant, the tools had been seized in a proper search incident to a lawful arrest. Alternatively, they held that the officers had acted reasonably in stopping and frisking the defendant, and the items seized from him were admissible as the fruits of a lawful frisk. Justice Higgins, joined by Chief Justice Bobbitt, dissented, pointing out that the initial stop of the defendant was of questionable validity, and that, in any case, the subsequent frisk exceeded all permissible bounds. He admonished the court that “[n]owhere had he been able to find where a court has approved a search with so little factual background” and accused his brethren of sustaining nothing less than “a general exploratory rummaging.”

BACKGROUND

The idea that an ounce of prevention is worth a pound of cure is not a new one in the field of law enforcement. “Stop and frisk” refers to the time-honored police procedure of stopping suspicious persons for questioning on less than probable cause to arrest and, when necessary, searching them for dangerous weapons. These police practices were permitted either by statute or by judicial decision in both state and federal courts for some time prior to the United States Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968).

6. 283 N.C. at 208-09, 195 S.E.2d at 505-06.
7. Id. at 211, 195 S.E.2d at 507.
11. See, e.g., People v. Hennenman, 367 Ill. 151, 10 N.E.2d 649 (1937); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964). See also People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), which is probably the most noted common law stop and frisk case, setting the stage for the decision of the United States Supreme Court four years later in Terry v. Ohio, 392 U.S. 1 (1968).
State Supreme Court’s landmark *Terry-Sibron-Peters* trilogy. In *Terry v. Ohio* the Court for the first time validated these investigative tools, but in so doing it placed narrow constitutional limits on their initiation and scope.

In its opinion upholding the conviction of petitioner for carrying a concealed weapon discovered during a stop and frisk, the United States Supreme Court sought to strike a balance between the necessity for police flexibility in investigating crime and the rights of citizens to be free from unreasonable governmental intrusion. The Court made it clear that stops and frisks are searches and seizures within the fourth amendment but nevertheless sanctioned their use on less than probable cause. The standard enunciated was the reasonableness of the action under all the circumstances: the officer must be able to point to specific and articulable facts from which he concluded, and more importantly, from which a *reasonable* man would have concluded, that the intrusion undertaken was warranted. Further, the


14. In *Terry*, a police officer with thirty-nine years’ experience, while watching for theft in a certain vicinity of downtown Cleveland, observed defendant and a companion at 2:30 p.m. alternately pacing back and forth in front of a store, pausing each time to look into the window, and then conferring with each other. During one of the total of six such passes made by each, they conferred with a third man, who hurried away. The officer, suspicious that they were “casing a stick-up,” followed them, and when they rejoined the third man a short distance away, the officer approached him, identified himself, and asked for their identification. When defendant “mumbled something” in response, the officer spun him around and patted down his outside clothing. He felt a pistol in defendant’s overcoat pocket and removed it. 392 U.S. at 1-8.

15. Id. at 9-12.
16. Id. at 16-17.
17. Id. at 20. The Court concluded that such police activity by its nature could not be subject to the fourth amendment’s warrant clause; rather, it would be judged by the reasonableness clause. For an instructive discussion of the history of the fourth amendment and the debate which derives from the relationship between its two clauses, see Landynski, *supra* note 10, at 42-43. *Terry* is not the only time the Court has sanctioned a governmental intrusion, which it viewed as within the fourth amendment, on less than probable cause. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523 (1967).

18. 392 U.S. at 21-22. The Court emphasized that unparticularized suspicions and hunches would not justify a stop and frisk. Id. at 21-22, 27. The quantitative measure of reasonableness has been variously labeled. The Supreme Court in *Terry* phrased its requirement in terms of unusual conduct reasonably leading to the conclusion that criminal activity may be afoot. Id. at 30. The proposed stop and frisk stat-
Intrusion must have been reasonable in its conduct and scope.\textsuperscript{19}

The authority granted to the police under \textit{Terry} was narrowly drawn.\textsuperscript{20} In \textit{Sibron v. New York}\textsuperscript{21} the Court, while overturning the conviction of defendant for possession of heroin seized from him during a purported stop and frisk, re-emphasized how closely scrutinized this authority should be. The Court repeated its requirements of \textit{objective} reasonableness and specificity. The \textit{Sibron} frisk was disapproved because it was not reasonably limited in scope to the accomplishment of the \textit{only} goal which conceivably might have justified its inception—the protection of the officer by disarming a potentially dangerous man.\textsuperscript{22}

The Supreme Court's latest attempt to "flesh out" the skeleton of stop and frisk framed in \textit{Terry} and \textit{Sibron} came in \textit{Adams v. Wil-
STOP AND FRISK

liams. The Court there reinstated defendant's firearms and heroin convictions, holding that the tip of a known informant was sufficiently reliable to justify the forcible stop of the defendant and the protective seizure of a concealed handgun from his person, which in turn afforded probable cause to arrest defendant and to conduct an incidental search of the vehicle in which he had been sitting. Relying on Terry, the Court stated that the brief stopping of a suspicious individual to maintain the status quo while obtaining more information is reasonable, and that "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." The authority to frisk is thus narrowly circumscribed even though the requisite knowledge that will permit the initial encounter may be acquired from some source other than the officer's personal observation.

THE CASE

In State v. Streeter, the North Carolina Supreme Court employed a dual analysis. It viewed the facts as giving rise to both probable cause and stop and frisk issues, ultimately resting its conclusion upon both in the alternative. Such a "snowballing" approach, even if legitimate in a given fact situation, tends to obscure some issues while overemphasizing others. Consequently, if one is to comprehend the North Carolina court's first flirtation with stop and frisk, he must examine each ground of the decision independently.

The Stop. Although the Supreme Court of the United States has not yet approved specifically an investigative "stop" on less than proba-

24. A known informer had told the officer that defendant, who was sitting alone in his car in a high-crime area at 2:15 a.m., had heroin and a handgun on his person. When the officer approached to investigate, the defendant rolled down his car window rather than stepping out of the car as requested. The officer reached through the window and seized a gun from defendant's waistband where the informer had stated it would be found. The officer arrested defendant and a subsequent search of the defendant's person and car revealed the heroin. The Court found that the officer's actions were reasonable because he had been forewarned that defendant was armed and because the defendant acted furtively in response to his inquiries. Id. at 143-46.
25. Id. at 145-46, citing Terry v. Ohio, 392 U.S. 1, 30 (1968).
26. See text accompanying note 6 supra.
27. See Cook, The Art of Frisking, 40 Ford. L. Rev. 789, 790 (1972). The author demonstrates how easily facts justifying at most a stop can be "snowballed" into full-blown probable cause for arrest and search incidental thereto and cautions that the facility with which this can be done may convert the stop and frisk into a tool of abuse in close cases.
ble cause, there is little doubt it will eventually do so. In any event, other courts in dealing with such intrusions have taken this bifurcated approach, analyzing as independent issues the legality of stops and frisks. The North Carolina court in Streeter purported to adopt this dual analysis, but if it did so it has misapplied its own test.

Since North Carolina does not have a stop and frisk statute, Justice Huskins relied primarily on the decisions of the United States Supreme Court in Terry and Adams to support the officer's stop of defendant Streeter. Yet both cases require the existence of specific, articulable facts from which may be drawn an objective and reasonable inference that criminal activity is or may be afoot. In Terry, an officer with many years of experience watching for suspicious activity in a particular area observed unusual conduct by defendants over a considerable period of time. In Streeter, the officers, whose length and nature of experience is not mentioned by the court, observed the defendant only moments prior to stopping him and testified that their

28. In Terry, the Court noted that it was in no way passing upon "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation," apart from the degree of detention necessarily involved in a protective frisk for weapons. 392 U.S. at 19 n.16. In Sibron the Court likewise did not reach the issue of the stop antecedent to the physical seizure of the defendant which was required to accomplish the search. 392 U.S. at 63.

29. See, e.g., Justice Harlan's concurring opinion in Terry, where he says, "I would make it perfectly clear that the right to frisk ... depends upon the reasonableness of a forcible stop to investigate a suspected crime," 392 U.S. at 33, and his concurrence in Sibron, where he argues that before an officer may even stop an individual, "[t]here must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended." 392 U.S. at 73. See also the language of the Court in Adams, in text accompanying note 25 supra. Furthermore, the Court's emphasis in Terry on the fact that a frisk on less than probable cause is reasonable partly because it is less intrusive than a full search suggests a reasoning that is applicable as well to a stop, which constitutes a restraint less harsh than an arrest, and would seem to require no greater showing to justify a stop than that which is required to support a frisk.


31. [I]f the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect. If, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection.


32. 283 N.C. at 209, 195 S.E.2d at 506. For a discussion of a proposed stop and frisk statute, see Nakell, supra note 31, at 317-19, 333-37.

33. See notes 18, 20, 24 and text accompanying note 25 supra.

34. See note 14 supra.
Only reasons for doing so were that (1) it was late, and they did not know defendant, and (2) he looked back at the police car as it approached. They did not indicate that they suspected the defendant of any particular criminal activity. These facts do not comport with the "specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment." The observations of the officers at most called for continued surveillance of defendant.

In Robinson v. United States, the District of Columbia Court of Appeals reached a result opposite from that in Streeter on facts similar to, if not more persuasive than, those in the latter case. There police officers stopped the defendant in an alley after observing him walking down a street in Washington, D.C. at 2:00 a.m. in an area similar to that in Streeter. A weapons inspection of a bag into which defendant had reached produced heroin. On appeal of defendant's consequent narcotics conviction, the court of appeals reversed the trial court's decision that the officer properly stopped and questioned the defendant on suspicion of an unlawful entry. "It may be that presence on the streets of a city at an early hour in the morning is suspicious conduct, given present crime statistics, but something more than that is required to justify police detention and interrogation." Certainly this is true in a college town in light of the proclivity of students and professors to frequent late-night restaurants and taverns.

The fact that defendant looked back at the police car as it approached was arguably not unusual or furtive conduct, particularly because he made no attempt to flee or evade the police. Any signifi-

35. See 283 N.C. at 211, 195 S.E.2d at 507 (Higgins, J., dissenting); Brief for Defendant at 11.
40. East Carolina University is located in Greenville, North Carolina.
41. Defendant Streeter testified that he had been in such a tavern with a group of friends less than an hour and one-half prior to his encounter with the police. See Brief for State at 9-10, State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973) [hereinafter cited as Brief for State]. Furthermore, the stop of defendant was accomplished in an area near Pitt (County) Memorial Hospital. See Supplemental Brief for Defendant at 3. See also note 61 infra.
42. See, e.g., People v. Collins, 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970), where the court reversed defendant's drug conviction based on marijuana seized from him during a frisk. The court held that the frisk was unreasonable in its scope and in dictum stated that it also had "grave doubts" about the lawfulness of a stop based on the suspect's "furtive actions" of thrusting his hands into his pockets and turn-
cance attributable to the fact that defendant was not known to the officer was diminished by his inability to state why he singled out the defendant after admitting that he did not stop every unknown person he saw on the streets late at night. Indeed, of greater significance than what the officers did know is what they did not know. They were aware of no curfews in effect. They were not investigating a particular crime recently committed in the area, nor were they searching for a particular suspect. Finally, the officers had received no tip which would give rise to a reasonable suspicion that the defendant was committing or contemplating a crime.

The lack of even an informer's tip distinguishes Streeter from Adams and State v. Stanfield, the most recent North Carolina stop and frisk case. In Stanfield a night-shift policeman received a telephone tip that a man, whom the officer had known for over ten years and whose violent conduct he had personally and professionally observed, was armed while in a public place known to the police to be a local trouble spot within the officer's area of patrol responsibility. The officer proceeded to the spot and found defendant wearing a heavy

43. Record at 16.

44. 283 N.C. at 211, 195 S.E.2d at 507 (Higgins, J., dissenting); see, e.g., Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969) (stop reasonable where officer observed men fitting broadcast description of bank robbers passing in car meeting description of getaway car along logical escape route and acting furtively upon seeing police); United States v. Lee, 271 A.2d 566 (D.C. Ct. App. 1970) (stop held reasonable when in process of investigating recent robbery at a store, officer observed individual, pointed out earlier by store owner as "acting in a suspicious manner," alternatively loitering outside store and hiding behind truck parked outside). Compare United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (stop held unreasonable where it was based only on facts that car which police had observed defendant enter at 11:00 p.m. to speak with another man had out-of-state tags and was parked outside pool hall in predominately Negro area known to have heavy narcotics traffic), with Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969) (stop of defendant's out-of-county automobile held reasonable where police first observed car being driven erratically through deserted streets of small town at 3:30 a.m. and subsequently saw it being driven slowly past closed business in area which had recently had series of burglaries), and People v. Lee, 48 Ill. 2d 272, 269 N.E.2d 488 (1971) (stop held reasonable where officers, alerted by superiors of expected "gang wars" in their patrol area, heard loud reports like gun blasts and within two minutes observed defendant and his group, sporting headgear of type worn by one of area gangs, walking along otherwise deserted street two blocks from area where shots had been heard). See also Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969) (stop of defendant who partially fit police broadcast description of suspect in robbery committed shortly before in same area held unreasonable); Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970) (stop of persons dressed like suspect wanted in connection with a shooting perpetrated twenty minutes earlier in area of stop held unreasonable).

overcoat and seated in a crowd where the informant had said he would be. When the officer appeared, the defendant refused to speak with
the officer and attempted to move away, keeping his right side turned
away from the officer. Observing a large bulge in defendant's right
clothing, the officer patted down the outside of the defendant's
right coat pocket and felt a heavy object. Upon reaching into
defendant's pocket and discovering a loaded pistol, the officer placed de-
fendant under arrest for carrying a concealed weapon. The North
Carolina Court of Appeals upheld defendant's conviction, stating
that the stop and frisk were justified particularly in light of the factual
similarity to Adams. The facts in Stanfield, when contrasted with
those in Streeter, demonstrate the necessary requisite which was present
in the former but lacking in the latter: facts which gave rise to "an ob-
jectively reasonable suspicion that something out of the ordinary [had] taken place, that the activity [was] related to a crime, and that the
defendant [was] connected to the activity." The court approved the search in Streeter primarily on the
grounds that it was conducted after the officer had probable cause to
arrest defendant for carrying a concealed weapon. But if the stop
which provided the officer with probable cause was itself illegal, the
probable cause was tainted with the illegality of the stop and could not
justify a subsequent arrest or search. Assuming, however, that the
stop was justified, the question remains whether the court correctly de-
cided the issue of probable cause.

Probable Cause. The court correctly pointed out that in North
Carolina the authority to make a warrantless arrest is granted by stat-
ute. "Reasonable ground" as used in that statute and "probable
cause" as used in the fourth amendment have been held to be equiva-
lents. Probable cause has been variously defined, but it usually ex-
ists if, at the moment of arrest, the facts and circumstances within the
officer's knowledge and of which he had reasonably trustworthy in-

46. See notes 24-25 and accompanying text supra; United States v. Frye, 271
The court thus enunciated its interpretation of the degree of specificity required by
Terry to sustain a stop and frisk.
48. 283 N.C. at 208, 195 S.E.2d at 505-06.
50. In affirming the conviction, the court of appeals made no mention of probable
51. 283 N.C. at 207, 195 S.E.2d at 505, quoting N.C. Gen. Stat. § 15-41
formation were sufficient to warrant a prudent man in believing that
the suspect had committed or was committing a crime.58 Thus the
question becomes whether at any time prior to the search of Streeter,
the officer had probable cause to arrest the defendant without a war-
rant.

The court in Streeter stated that probable cause to arrest the de-
fendant for carrying a concealed weapon arose when the officer "saw
the bulge" under his shirt.64 But at this time the officers knew no
more than before the stop,65 other than that defendant had something
under his shirt. The defendant still had not acted in a manner which
might imply he was armed. These facts would not meet the standards
applicable to a magistrate's determination that a warrant should issue;
no less strict standards may be applied in assessing probable cause for
a warrantless arrest.66 Accordingly, the courts have required greater
specificity to sustain a warrantless arrest for carrying a concealed
weapon.57

Even if probable cause to believe defendant was armed existed
some time prior to the seizure of the "weapon," once it was identified
as a screwdriver, probable cause to arrest defendant on a weapons
charge evaporated.68 To explain the officer's actions in continuing

53. See, e.g., Adams v. Williams, 407 U.S. 143, 148 (1972); Beck v. Ohio, 379
U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Stacey
v. Emery, 97 U.S. 642, 645 (1878); accord, State v. Harris, 279 N.C. 307, 311, 182
S.E.2d 364, 367 (1971); State v. Roberts, 276 N.C. 98, 106-07, 171 S.E.2d 440, 445-
54. 283 N.C. at 208, 195 S.E.2d at 505. The court cites no authority for this
proposition; the author has been unable to find another court which has so held.
55. See notes 35, 42-44 and accompanying text supra.
57. Where a proper stop brings a partially concealed weapon into plain view,
probable cause to arrest and search exists. See, e.g., People v. May, 33 Cal. App. 3d
1969). And where the weapon is not in plain view, but the officer knows from its
appearance exactly what it is, probable cause has been found. See, e.g., Perry v.
skin-tight pants); Robinson v. Commonwealth, 207 Ky. 53, 268 S.W. 840 (1925) (off-
ciler could see imprint of pistol in pocket of tight-fitting overalls well enough to be
able to positively identify object as a gun); cf. Williams v. State, 7 Md. App. 204,
233 A.2d 786 (1969) (suspect, identified by witness as he fled from scene of shooting,
seen several minutes later with large bulge in his pocket; seizure and search of suspect
and removal of weapon as he reached for it in his pocket upheld on both stop and
frisk and probable cause to arrest grounds). See also Commonwealth v. Clarke, 219
pocket as he abruptly hung up phone and hurried away upon seeing police approaching,
held insufficient to establish either probable cause to arrest or grounds to stop).
58. The statutory classification lists weapons as bowie knives, razors, and guns,
and then adds as a catchall, "or other deadly weapons of like kind . . . ." N.C.
the search beyond this point, the court implied that at this time he had probable cause to arrest defendant for possession of burglary tools. That crime requires possession without lawful excuse, and the record shows that defendant's explanation for possessing the tools was that he was en route to a carpentry job he earlier had promised to perform. Screwdrivers as well as the other tools found on the defendant are commonly employed for numerous lawful purposes, including carpentry work, and there is considerable doubt that such tools, singularly or in combination, fall within the meaning of the North Carolina statute. Even if these implements are within the statutory classification, "their discovery cannot be used to authorize a search for a pistol. . . . '[U]nlawful search is not made lawful because of resulting discoveries.'" Probable cause is a practical con-

---

59. 283 N.C. at 208, 195 S.E.2d at 505.
60. See note 4 supra.
61. The majority asserts that defendant stated he was at home prior to 2:45 a.m. and at that time was on his way to do some carpentry work for a friend. 283 N.C. at 206, 195 S.E.2d at 504. The record shows that defendant testified that he and some friends, including Mr. Dixon, had been together at a club. When they prepared to leave at 1:30 a.m. for Dixon's house, Dixon asked defendant to do some carpentry work for him while he was there. Defendant agreed but told him he first would have to get his tools from his home. According to defendant, he retrieved his tools and was en route to Dixon's house when he was stopped. See Brief for the State at 9-10. Defendant's father testified that he was a carpenter-contractor and that his son often worked for him using the latter's tools. The tools they used in their work included screwdrivers, flashlights, and gloves. Defendant's father also testified that the "prybar" was actually a brake tool like that used in service stations. Defendant's father stated that his son also used his (the father's) tools when he did "small jobs" for other people. Finally, defendant's father testified that he had expected his son to work with him on the day of his arrest. Id.
62. See State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966) (small screwdrivers, flashlights, gloves and tire tools not implements of housebreaking within intent and meaning of statute); Brief for State at 9-10. Compare State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943) (evidence of possession of crowbar and hacksaw, with testimony that these were ordinary tools used by carpenters and mechanics, without showing such tools are designed for housebreaking or in combination may not be used for legitimate purposes, held insufficient to go to jury), with State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956) (evidence of possession of bolt clippers, two large screwdrivers, two pairs of gloves, two flashlights, a brace and pliers, without showing said implements were for express purpose of housebreaking and without showing that they were within the implements enumerated in statute, with other evidence that such tools were in common use in lawful and ordinary occupations, held insufficient to support convictions under burglary tools statute). See also State v. Streeter, 283 N.C. 203, 213, 195 S.E.2d 502, 508 (Higgins, J., dissenting). Accordingly, although not raised at trial or on appeal, it is at least arguable that the state failed to prove that defendant actually committed the crime with which he was charged.
ception, but it requires more than good faith or even strong reason to suspect. To allow less would leave people secure from unreasonable searches and seizures only in the discretion of the police.  

If one concedes arguendo that the stop in Streeter was lawful and that prior to the full search of defendant's person there existed probable cause for his arrest, the search was valid, particularly in light of the most recent decisions by the United States Supreme Court involving warrantless searches conducted incident to lawful custodial arrests.  

But even lack of probable cause would not be fatal, given a proper stop, if there existed grounds for a protective frisk. This was the court's alternative ground.

The Frisk. In balancing the governmental interest in protecting an officer who has made a stop against the further intrusion necessary to effectuate this end, the United States Supreme Court emphasized that a stop does not justify a frisk automatically; rather, there remains a need for articulation: "Before he places a hand on the person of a citizen . . . the officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."

Furthermore, the reasonableness of a frisk involved the question not only whether the facts warranted its initiation but also whether it remained reasonably related in scope to the protective purposes which alone justified its inception.


65. See Gustafson v. Florida, 94 S. Ct. 488, 491-92 (1973); United States v. Robinson, 94 S. Ct. 467, 477 (1973). These companion cases involved custodial arrests for minor traffic offenses. In both cases the Court stressed that the valid custodial arrest alone justified the full incidental search of defendant's person—the nature of the offense, the probability that defendant was armed or possessed evidence of the crime, and whether the officer in fact suspected defendant was armed were immaterial factors with regard to the validity of the search.

A search incident to a valid custodial arrest, the Court emphasized, is different in purpose, character, and extent from a limited Terry-type search for weapons; therefore, "Terry . . . affords no basis to carry over to a probable cause arrest the limitations . . . placed on a stop-and-frisk search permissible without probable cause." United States v. Robinson, 94 S. Ct. 467, 473 (1973). The Court thus spoke of Terry only in the context of distinguishing between a search incident to a lawful custodial arrest based on probable cause and the Terry-type frisk on less than probable cause. Clearly the Terry rationale retains the approval of the Court in both its original purposes and its original permissible scope and will still control in the cases to which it is intended to apply—stops and frisks on less than probable cause, where there is no fullblown arrest on probable cause preceding the search. See also Peters v. New York, 392 U.S. 40 (1968).


After acknowledging these requirements as essential to a reasonable frisk, the court in *Streeter* formulated its own rule: "If, after the detention, [the officer's] personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection." Applying its rule, the court found that upon seeing the bulge beneath defendant's shirt under "suspicious circumstances," the officer was justified in immediately frisking him. But what were these "suspicious circumstances," and to what *articulable facts* could the officers point as "confirming their apprehensions" that criminality was afoot and that the defendant was armed and dangerous? The officers did not testify to any acts of the defendant nor to any other facts which could lead one reasonably to conclude that defendant was about to commit a crime of violence likely involving the use of a deadly weapon. Indeed, the defendant's cooperation and the fact that defendant made no furtive movements after he was encountered by the police suggest quite the opposite. Absent such other factors, the mere sight of the bulge did not in itself provide grounds for the belief that the bulge was a weapon or that defendant constituted a present threat to the officer's safety. An officer's unparticularized instincts are not specific and articulable facts.

If it is assumed that sighting the bulge may have furnished grounds to justify a frisk of defendant, was the officer entitled to further intrude into his pocket when he felt the object making the bulge was hard and metallic? Arguably a trained police officer should be able to distinguish between dangerous weapons and more innocuous

---

68. 283 N.C. at 210, 195 S.E.2d at 507.

69. Id.

70. Compare *Terry v. Ohio*, 392 U.S. 1 (1968) (crime suspected: daylight robbery; furtive acts: lack of co-operation with officer and mumbling in response to questions), and *Adams v. Williams*, 407 U.S. 143 (1972) (reliable tip that defendant was armed; rolled down window rather than getting out of car where could be better seen, as requested by officer), and *State v. Stanfield*, 19 N.C. App. 622, 199 S.E.2d 741 (1973) (reliable tip that defendant, known personally by officer to be a violent person, was armed with a loaded pistol in a public place; refusal to co-operate, attempt to evade officer while trying to prevent officer from seeing one side of his coat), with *Sibron v. New York*, 392 U.S. 40 (1968) (suspected crime: narcotics violation; no reason to believe defendant armed or to fear for own or others' safety).

71. The officer testified that he did not know what the bulge was but stated that he "had a reason" to think it might be a weapon. However, he could not articulate what his "reasons" were other than that he thought it was a gun "by instinct." Record at 16. An officer's conclusory statement that he thought there was a weapon does not meet the burden of pointing to specific and articulate facts to justify his intrusion into a defendant's pocket. *People v. Collins*, 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970).
lumps or bulges; if from the weight, shape, or size of the object the officer here should have been able to distinguish between a screwdriver and a gun, he did not act reasonably in removing it from defendant's pocket. If from the weight, shape, or size of the object the officer here should have been able to distinguish between a screwdriver and a gun, he did not act reasonably in removing it from defendant's pocket. Even if this was reasonable, once he ascertained that what he thought was a weapon was only a screwdriver, his fears should have been assuaged. Further suspicions could have been satisfied by continuing the patdown. When instead he conducted a full search of defendant's person, the frisk, even if valid at its inception, became unreasonable due to its intolerable intensity and scope. The sole justification for the frisk was self-protection, and that end had been accomplished.

CONCLUSION

In spite of the language used in Streeter, the North Carolina Supreme Court ignored the spirit and intent of the Terry-Sibron-Adams stop and frisk rationale. The police practices approved in Streeter hardly comport with a narrowly drawn and begrudgingly granted authority. To the contrary, the decision disregards "the careful balance that Terry sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement . . . ." A carefully restricted stop and frisk statute and a lower judiciary which

72. See Cook, supra note 27, at 796. The arresting officer in Streeter thought the bulge underneath defendant's shirt was a gun, 283 N.C. at 205, 208, 195 S.E.2d at 504, 505, and he specifically testified to that fact. Id. at 211, 195 S.E.2d at 507 (Higgins, J., dissenting) ("I thought the object . . . was a gun. I thought it was a gun by instinct."). No mention of any type of weapon other than a gun was made.

73. This is particularly true in light of the fact that the officer was unable to state conclusively whether the object which he saw making a bulge and feared to be a weapon was in fact removed first. Brief for Defendant at 4. He stated he first pulled out the gloves, yet he testified that the object that he touched and feared to be a weapon was the screwdriver. Id. The feel of a glove would hardly warrant a further search, and if the screwdriver in fact felt like a weapon, it should have been easily remembered as the first item reached for and removed.

74. See, e.g., State v. Gannaway, 291 Minn. 391, 191 N.W.2d 555 (1971), in which an officer, feeling a hard lump during a pat-down, reached into defendant's pocket and withdrew a corn cob pipe containing traces of what was later proven to be marijuana. He then expanded the search to other parts of defendant's clothing, which gave no indication of possible concealed weapons, "pulling everything out" of defendant's pockets. The court held the frisk had gone beyond the permissible scope of what was necessary to protect the officer or others; the discovery of the pipe within the permissible area of a lawful protective search afforded no basis for such a "nonprotective search for contraband." See also People v. Britton, 264 Cal. App. 2d 843, 70 Cal. Rptr. 586 (1968); People v. Martinez, 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964); Cook, supra note 27, at 799.


76. See Nakell, supra note 31.
is more cognizant of the purposes of and limitations on the Terry doctrine perhaps will correct the excessive extension of the stop and frisk tool accomplished in Streeter. Yet so long as North Carolina's supreme court continues to disregard the fact that "[l]iberty is equally lost when the citizen is left to the mercy of an over-zealous policeman or a trigger-happy hoodlum," one is forced to agree with Justice Marshall that:

It seems that the delicate balance Terry struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result . . . the balance struck in Terry is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent . . . arbitrary and oppressive police action . . . is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of the police officers who have only the slightest suspicion of improper conduct.

Michael D. West

Evidence—Admissibility of Computer Print-Outs

In State v. Springer the North Carolina Supreme Court for the first time ruled on the admissibility of computer print-outs as evidence in North Carolina courts. In this case defendant was indicted for "willfully and feloniously" withholding a credit card from its owner in violation of North Carolina General Statute section 14-113.9(a)(1). A special investigator, employed by the card's issuer, testified before the jury that when a card was reported lost or stolen, a computer print-out of the account was made to establish when and where the card was issued and to ascertain how many cards were issued to the account. Over defendant's objection he further testified that the original print-out data disclosed the card's date of issue, the account balance on the date that the card was reported to be missing, and the purchases made with the card after that date. Defendant was convicted and appealed.

---


2. Id. at 628, 197 S.E.2d at 532.
The appeal was transferred from the court of appeals to the supreme court for initial appellate review.\(^3\)

The supreme court noted that the General Assembly recently had enacted two statutes governing the admissibility of corporate computer records.\(^4\) These statutes were intended to assure corporations that they could use computers for recordation purposes. Also they established the general prerequisites for admitting print-outs into evidence. Assuming that the legislature had left the task of establishing specific standards of admissibility to the courts, the court in *Springer* stated that computer print-outs were admissible as evidence if:

1. the computerized entries were made in the regular course of business,
2. at or near the time of the transaction involved, and
3. a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, and sources of information, and the time of preparation render such evidence trustworthy.\(^5\)

Since the testimony of the expert in *Springer* also raised a best evidence issue,\(^6\) the court held that it was reversible error to allow oral testimony concerning the contents of the computer record when the special investigator testified that the print-out itself was the “official

---

\(^3\) Id. at 628, 197 S.E.2d at 531.

\(^4\) N.C. Gen. Stat. § 55-37.1 (Supp. 1973) provides:

Form of records.—Any records maintained by a corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such a manner, the cards, tapes, photographs, microphotographs or other information storage device, together with a duly authenticated print-out or translation shall be admissible in evidence and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been.

*Id.* § 55A-27.1 (Supp. 1973) has substantially the same provisions for non-profit corporations.

\(^5\) 283 N.C. at 636, 197 S.E.2d at 536. Note that the testimony by a qualified witness about the methods and sources of information and the time of preparation is referred to as “foundation” testimony.

The “at or near the time” requirement has been imposed by most courts as a criterion for admissibility because the nearer in time to the transaction the entries are made, the more likely it will be that they are trustworthy. This requirement applies to business records generally and is not peculiar to computer records. *See* statutes cited note 12 *infra*.

\(^6\) The best evidence rule requires “in effect, that a writing is the best evidence of its own contents.” The writing must be introduced into evidence or an excuse offered for failure to do so. 1 Stanbury’s North Carolina Evidence § 190 (H. Brandeis rev. 1973).
Hearsay and the Business Records Exception

Computer records are considered hearsay evidence by the commentators since they are made out of court and are not subject to cross-examination. Most hearsay evidence is excluded not because it is inherently untrustworthy but because its reliability is simply undeterminable. In most situations courts are unwilling to allow juries to base their decisions on assertions which cannot be tested by cross-examination. But the exclusion of all hearsay evidence would preclude the admission of some trustworthy evidence, and exceptions to the hearsay doctrine have been created where special justifications for admission exist. Business records have been admitted into evidence because commercial reliance on their accuracy implies that they are fundamentally trustworthy. The reliance factor has always been the basis for the business records exception from the development of the earliest shop-book rules and regular-entries exception to the model

7. 283 N.C. at 636, 197 S.E.2d at 536-37. A second best evidence problem presented by computer print-outs is that they are not original documents. The record is normally a summary of many transactions. For example, in a credit card sale the transaction is initially recorded on a charge slip. This slip is sent to a central location where the information is fed into a computer system. The charge slip is then destroyed or returned to the customer. When information about the sale is needed, a print-out of the account in question is made. This print-out usually represents only a summary of many individual transactions.

Some courts have considered this problem in connection with business records generally and have concluded that if the original documents are destroyed in the regular course of business, account books or summaries are admissible to show facts relating to underlying transactions. Note, Computer Print-outs of Business Records and Their Admissibility in New York, 31 Albany L. Rev. 61, 70 (1967). There is no indication that the rule should be any different for computer records. The court in Springer did not consider this problem and failed to attach significance to the testimony of the special investigator that the print-outs were the “official record” of the credit card transactions. Perhaps the court assumed that the investigator’s testimony overcame this best evidence objection to the admissibility of the print-out.


10. The shop-book rule was a common law exception developed to allow a litigant
The first uniform statute creating a business records exception to the hearsay rule was proposed in 1927. Subsequently three such statutes have been formulated, and many jurisdictions have adopted one of these acts in modified form. In addition, the proposed Federal Rules of Evidence adopt the business records exception.

At the outset, a distinction must be drawn between two different types of statutes. First, general business records statutes establish specific qualifications which any business record must meet before it can be admitted into evidence. These statutes apply to business records to admit his business records into evidence. At common law a party to a suit could not testify on his own behalf, and since his business records were considered equivalent to his own testimony, they were inadmissible. See Note, 1 CAPITAL U.L. REV., supra note 8, at 162. The shopbook rule was construed narrowly and was limited to cases where it was shown that the records themselves were trustworthy and no clerk was available to testify. Note, 55 CORNELL L. REV., supra note 8, at 1037.

When it became apparent that the shop-book rule was cumbersome to apply, various jurisdictions, by statute or judicial decision, developed the regular-entries rule. Since certain business records are routinely kept and relied upon, they are deemed sufficiently trustworthy to be admitted into evidence. However, courts are empowered to admit these records only if they were made at or near the time of the recorded event by a person who was under a duty to do so or who had personal knowledge of the event. See, e.g., Note, 31 ALBANY L. REV., supra note 7, at 64. Many of the uniform and model acts of the twentieth century were based upon the regular-entries rule. The North Carolina business-record rule is a common law exception similar to the statutory exceptions adopted by other jurisdictions. See State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964); Dairy & Ice Cream Supply Co. v. Gastonia Ice Cream Co., 232 N.C. 684, 61 S.E.2d 895 (1950).

12. See MODEL CODE OF EVIDENCE rule 514 (1942); E. MORGAN, THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM 63 (1927); UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2, in 9A UNIFORM L. ANNOT. 506 (1957) (originally proposed 1936) [hereinafter cited as UNIFORM ACT § 2]; NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS & PROCEEDINGS, UNIFORM RULES OF EVIDENCE rule 59(13) (1952) (originally proposed 1936) [hereinafter cited as UNIFORM RULE 59(13)]. For a more recent consideration of the business record problem, see PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES rule 803(6) (rev. draft 1971) [hereinafter cited as FEDERAL RULE 803(6)]. For British treatment of the subject, see Civil Evidence Act 1968, c.64, pt. I, rule 5.

13. See 1 STANSBURY'S NORTH CAROLINA EVIDENCE, supra note 6, § 155.


15. MODEL CODE OF EVIDENCE rule 514 (1942); UNIFORM ACT § 2; UNIFORM RULE 59(13). For a good discussion of the Model Code, Uniform Rules and North Carolina common law, see Comment, Admissibility of Computer Business Records As an Exception to the Hearsay Rule, 48 N.C.L. REV. 687, 690-91 (1970).


1974] ADMISSIBILITY OF COMPUTER PRINT-OUTS

as a class and do not deal specifically with computerized records. On the other hand, computer records statutes deal solely with computer data. They assure businesses that they may keep computer records for certain purposes and in certain forms if minimal requirements are met (such as production of written or visually legible outputs). They also specify that these records will be admissible into evidence.

18. For an example of a business record statute consider DEL. CODE ANN. tit. 10, § 4310 (Supp. 1970). Business record statutes as opposed to computer record statutes deal solely with conditions for admission of records as evidence. Such statutes require that the records be kept in regular course of business and be made at or reasonably near the time of the underlying transaction. See statutes cited note 12 supra. Some allow the trial court discretion to deny admission based on other factors in the foundation; see, e.g., UNIFORM ACT § 2. Other statutes require a witness with personal knowledge of the underlying transaction to qualify the records; see, e.g., the Texas adaptation of the Uniform Act: TEX. REV. CIV. STAT. ANN., art. 3757(c), § 1(b) (Cum. Supp. 1973), discussed in Note, The Texas Business Records Act and Computer "Print-Outs", 24 BAYLOR L. REV. 161 (1972).

The statutes also differ in the types of records considered admissible. Compare E. MORGAN, supra note 12 (Model Act limited to records of acts, transactions or events), with MODEL CODE OF EVIDENCE rule 514 (1941) (allows records of acts, events, or conditions) and UNIFORM ACT § 2 (same). More recently, opinions have been included within the scope of the business records rule; see FEDERAL RULE 803(6). In short, the existing statutes, include some common elements but are neither uniform nor complete in their treatment of computer or other business record evidence. The North Carolina business records rule, though of common law origin, is much like those of other states. See 1 STANSBURY'S NORTH CAROLINA EVIDENCE, supra note 6, § 155.

19. Presently, North Carolina and Delaware are the only states that have adopted specific statutes to deal with the problems of computer records. Other states have dealt with such problems by interpretation of a general business records statute. The North Carolina states, N.C. GEN. STAT. §§ 55-37.1, 55A-27.1 (Supp. 1973), are nearly identical to the Delaware statute, DEL. CODE ANN. t.t. 8-9, § 224 (Supp. 1973), which authorize corporations to keep computer records if the following conditions are met: the records must be maintained in the "regular course of business"; and must be maintained in such a manner that they can be converted into a clearly legible written form within a reasonable period of time. Assurance is given to shareholders and other persons entitled to inspect corporate records that their right to inspect corporate records extends to computer records. The computer records statute has developed independently of the business records statutes. Indeed, Delaware has both types of statutes: id. (computer records); id. tit. 10, § 4310 (Supp. 1970) (business records).

An indication that the North Carolina statutes may be inadequate is that Delaware has amended its statute to require use of clearly legible written records when data is to be reproduced for inspection or trial. The original version of the statute merely specified clearly legible records. Id. t.t. 8-9, § 224 (Supp. 1973). Apparently, Delaware felt that ability to inspect print-outs in the form of tapes, cards or video displays, or other non-written forms was insufficient for most purposes and that written output is more usable. Written production of computer records is not required in North Carolina and a party entitled to inspect corporate records may be given tapes or cards, or may be required to read a television screen. This will complicate shareholder inspections and discovery proceedings.

A significant analysis of the original Delaware statute was conducted by a leading expert in the field who concluded that the Delaware statute was dangerously deficient in several areas. Changes proposed by this commentator included production of data in visually legible form rather than in a written or merely legible form; abolition of the regular course of business requirement since some records made for special circum-
The first case to consider the admissibility of computer printouts was *Transport Indemnity Co. v. Seib.*\(^{20}\) The Nebraska Supreme Court held that computer records of insurance premiums due were admissible under the Nebraska business records statute\(^{21}\) and rejected an attack on the print-out based on the best evidence rule.\(^{22}\) Arizona,\(^{23}\) Alabama,\(^{24}\) and Missouri\(^{25}\) have reached similar results under their general business records statutes.\(^{26}\) Federal determination of computer print-out admissibility has paralleled that of the states; two courts of appeals ruled in 1969 that computer evidence was admissible in federal courts.\(^{27}\)

These computer evidence cases can be summarized as follows: first, the decision in each case was based upon a general business rec-


\(^{21}\) Id. at 257-58, 132 N.W.2d at 874, citing Neb. Rev. Stat. § 25-12,109 (1964).

\(^{22}\) 178 Neb. at 260, 132 N.W.2d at 875.


\(^{24}\) See Nelson Weaver Mortgage Co. v. Dover Elevator Co., 283 Ala. 324, 216 So. 2d 716 (1968); Rumage v. Dry Dock Savings Bank, 278 Ala. 526, 179 So. 2d 277 (1965).

\(^{25}\) See Union Elec. Co. v. Mansion House Center North Redevelop., 494 S.W.2d 309 (Mo. 1973).


ord statute or a comparable common law rule, rather than a computer records statute; secondly, the business records statute applied in each case did not specifically cover computer records but was construed to include them; finally, while each case held computer printouts admissible and set general guidelines for their introduction into evidence, each of these cases failed to consider such crucial matters as minimum requirements for a proper foundation, discovery and jury instructions. But in most cases these matters were not before the court.

In contrast, however, is United States v. Russo, the first case to reflect an in-depth study of the problems inherent in computer evidence. In this case a Michigan doctor was indicted for mail fraud because he allegedly made groundless medical service claims. At trial the annual statistical computer run of Blue Shield of Michigan (a print-out record of every claim paid during the year) was introduced into evidence. Upon conviction defendant appealed, claiming that various findings in connection with the computer run were erroneous.

Defendant first argued that general admissibility criteria were not met since the print-out was not a business record within the federal business record act. The court rejected this argument and noted that, although the statutory language failed to provide specifically for computer print-outs, the only fair interpretation of the act would include them if the trial court were satisfied that they were trustworthy. The court stressed the dependence of modern businesses upon computer systems and asserted that reliability and trustworthiness are the sole requirements of admissibility.

Defendant then argued that even if the record was covered by the act, it was inadmissible since it was not made at or near the time of the underlying transactions. The court rejected this contention and held that as long as the input was made close to the occurrence of the underlying events, the statutory requirements were satisfied. A requirement that print-outs be made shortly after each transaction would place too great a burden on the records system.

29. See cases cited notes 23-26 supra.
30. 480 F.2d 1228 (6th Cir. 1973).
32. 480 F.2d at 1239-40.
33. See note 5 supra.
34. 480 F.2d at 1240.
that the print-out was a summary and therefore inadmissible.\textsuperscript{35} The court dismissed this claim because the statistical run was a reproduction of each transaction made during the year and not a recapitulation.

He next claimed that the government's foundation for admission of the annual statistical run was insufficient.\textsuperscript{36} The court disagreed, stressing that the prosecution's witnesses were "qualified experts by training, education and experience" and that "they showed a familiarity with the use of the particular computers in question."\textsuperscript{37} The demonstration of methods and procedures used to ensure accuracy and control errors also impressed the court, which held that the foundation was sufficient to satisfy the trial court of the trustworthiness of the print-outs.\textsuperscript{38}

An attack was then made on the discovery procedures afforded to the defendant. However, because defendant did not use a summary of the statistical run which he had been given, the appellate court concluded that the defendant was not surprised or prejudiced at trial and had foregone his right to discovery. Significantly, the court in dictum suggested that the defendant could have compelled discovery of Blue Shield's entire record-keeping system if he had made a proper request.\textsuperscript{39} Finally, defendant complained that the charge to the jury permitted them to make unwarranted inferences of guilt from the computer records. The court affirmed the trial court's determination that the testimony of the qualifying witness in conjunction with the print-out property gave rise to the inference that defendant had in fact claimed amounts for services which were not performed.\textsuperscript{40}

\textbf{The Computer Records Setting}

Policy determinations in many computer records cases have been too simplistic. The inquiry should involve not only whether records

\textsuperscript{35} Id. at 1240-41. Reproductions of original documents may be admissible if trustworthy, but recapitulations (summaries) are generally inadmissible. Nevertheless, the voluminous record rule establishes an exception. If the print-out is considered a summary, it may be admissible under this rule in many situations. \textit{United States Federal Judicial Center, Manual for Complex and Multidistrict Litigation}, pt. 1, \S\ 2.611 (1970).

\textsuperscript{36} See note 5 supra for an example of the elements of a proper foundation.

\textsuperscript{37} 480 F.2d at 1241.

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 1241-43.

\textsuperscript{40} Id. at 1243.
are admissible but also what safeguards and limitations should be applied. Apart from Russo each court that has considered the admissibility of computer records has adopted only traditional business records safeguards. To determine whether stricter standards are preferable, the needs and expectations of potential litigants must be evaluated.

The demands of business require that any records system be reliable, inexpensive, efficient, and capable of retaining large amounts of data. Moreover, the system must produce records which satisfy the requirements of parties entitled to inspect business records, for instance, shareholders and the Internal Revenue Service, and they must be admissible in court in order to protect the business' legal interests. The recent increase in the use of computer-kept records systems suggests that many businesses feel that these automated systems fulfill the above requirements.

A party against whom computer records are introduced is faced with different but equally important problems. While computer systems have admitted shortcomings, the litigant and his attorney may

41. See, e.g., cases cited notes 23-26 supra.
42. Garland, Computers and the Legal Profession, 1 Hofstra L. Rev. 43, 43-45 (1973) (explains the basis for such growth).
43. However, additional problems exist. See Ault, A Lawyer's Concern with a Computer Installation, 21 Bus. Law. 381, 382 (1966); Bigelow, Counseling the Computer User, 52 A.B.A.J. 461-64 (1966).

A few commentators have considered the problems presented by the foundation requirements for print-out admission. See Mills, Lincoln, & Laughead, Computer Output—Its Admissibility into Evidence, 3 Law & Computer Tech. 14 (1970); 16 Am. Jur., Proof of Facts § 17, at 310-323 (1965). Others have discussed the peculiar discovery needs of a party who must rebut computer evidence; Freed, Evidence, in Computers & the Law, 102, 139 (2d ed. R. Bigelow 1969); United States Federal Judicial Center, supra note 35, pt. 1, §§ 2.6-.617 (1970). An excellent consideration of discovery is found in United States v. Russo, 480 F.2d 1228, 1241-43 (6th Cir. 1973). Note that discovery in the area of computer evidence may be complicated by the fact that the records themselves may contain privileged information such as trade secrets, and also that the systems which store and produce the records may themselves be trade secrets. Again, this problem can be encountered in the general business records context, but the nature of the computer aggravates the problem. For a discussion of the protection of computer software see Note, Computer Software: Beyond the Limits of Existing Proprietary Protection Policy, 40 Brooklyn L. Rev. 116 (1973).
44. It may be useful to note here that the business records exception to the hearsay rule applies equally to criminal and civil cases. Note, 31 Albany L. Rev., supra note 7.
45. Most commentators are familiar with problems inherent in computer systems; see, e.g., Freed, A Lawyer's Guide Through the Computer Maze, 6 Prac. Law. 15, 25 (No. 7, 1960) (programming errors); Kennelly, Commercial Airline Crash: Some Observations Concerning the Admissibility of Findings and Conclusions Derived from Computers, 1971 Trial Lawyer's Guide 527, 626 (susceptibility to tampering and fraud); Note, 55 Cornell L. Rev., supra note 8, at 1034-35 (1970) (absence of internal-step records, physical form of the record is hard to use, systematic destruction of
be ill-prepared to find or to exploit these weaknesses. Nevertheless, a
key to any litigant's rebuttal of his opponent's computer evidence is
discovery, and in this regard several important issues are raised.

First, the determination of the amount of time to be allowed for
discovery is often within the sole discretion of the trial court. A court
should recognize that an investigation of computer records often in-
volves more complex problems than is normally the case with discov-
er of business records. Just as significant is the allocation of the
considerable costs of this discovery. Experts must be retained to ex-
amine computer systems. In addition, computer time must be used to
test programs, and extensive discovery may tie up various service per-
sonnel and interfere with normal business operations. The net result
is that a party faced with computer evidence offered by an opponent
often is effectively denied discovery if he must bear its full cost.

Finally, at trial the party rebutting a computer print-out often re-
quests special instructions to the jury on the weight and credibility to
be given to the computer evidence. Documentary evidence is difficult
to dispute in many instances, especially in a jury trial where the panel
may understand little about how the evidence has evolved.

SUMMARY AND PROPOSAL

The North Carolina computer records statutes and the Springer
decision are steps in the right direction since they permit a corpora-
tion to keep company records on computers and allow such records in
evidence if certain safeguards are met. However, the General Assemb-
ly needs to take further action by expanding the present statutes and
by enacting a computer records statute that will not be limited to com-
puter records maintained by corporations.

These statutes should specify the form in which the data should
be available. Delaware, for example, requires the data to be available

original records). See also, Elmaleh, Evidentiary Concepts in a Computerized Society,
in 3 COMPUTER L. SERV. § 5-4.1, art. 1 (1973); Waller, The Legal Requirements In
Data Processing, 9 COMPUTER BULL. 133 (1966); Note, Admissibility of Computer
Print-Outs as Business Records, 9 WAKE FOREST L. REV. 428, 435-37 (1973); Compu-

46. UNITED STATES FEDERAL JUDICIAL CENTER, supra note 35, pt. 1, §§ 2.6-.617

47. Arguments for and against the requesting party's assumption of the cost bur-
den of discovery are presented by Freed, supra note 43.

in clearly legible written form\textsuperscript{49} since in many instances the inspection of data in the form of tapes, cards, or video display may not be useful to the requestor of the information. However, any agreement between the requestor and provider should be respected. If the parties cannot agree, the court should determine the form record production should take, perhaps with a presumption in favor of the form most useful to the requestor.

The expanded statutes should also deal with discovery costs. Discovery of computer data is so unique that the usual allocations of discovery costs may be inappropriate. Therefore the legislature should establish guidelines to aid the courts in determining who should bear the costs. One possible approach would be to establish a presumption that the record-keeper pay for discovery costs unless he can affirmatively demonstrate that the requestor should assume part or all of the expense.

Although the regular-entries requirement has been broadly interpreted by most courts, the expanded statutes should expressly allow admission of non-regular data if special circumstances so require and if the facts indicate that the record is trustworthy.

The expanded legislation also should set out specific requirements for foundation testimony. A proper foundation would include proof of the following: that any qualifying witness has proper credentials to be an expert witness on computer records; that the physical equipment and systems designs are of reliable origin; that the programs and operating personnel have had a history of overall system accuracy; that error checking and correction procedures have been continually carried out; and that audits made by independent agencies, if available, indicate that the records system is sound and has operated efficiently.

Also, a certain amount of discretion should be given to the trial court to admit records or deny admission if in its opinion fairness so dictates. In either case, the court should be required to state specifically the reasons for its ruling. Finally, because of the complexity of computer evidence, pattern jury instructions should be written and used to inform court and jury of the weight and credibility to be given to this type of evidence.

\textit{Stephen Foreman}

Evidence—Expert Causation Testimony—An Illogical Rule Rejected?

In Mann v. Virginia Dare Transportation Co. the North Carolina Supreme Court considered the proper form of and response to a hypothetical question eliciting an expert's opinion as to the cause of an accident. In phrasing the question, counsel had observed the rule that "[i]f the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition could or might have produced the result in question, not whether it did produce such result." The expert's response also was phrased in subjective terms. Noting that the witness' answer invited a challenge to the sufficiency of the evidence to prove causation, the court stated that "[t]he situation here produced demonstrates the validity of Professor Henry Brandis' comment that an expert should be allowed 'to make a positive assertion of causation when that conforms to his true opinion, reserving "could" or "might" for occasions when he feels less certainty.' Since the court did not explicitly reject the rule and did not discuss prior cases dealing with it, the rule arguably has some continuing vitality. Nevertheless, in view of the manner in which the court disposed of the issue, it is more likely that it was effectively repudiated.

The two plaintiffs in Virginia Dare were injured when the bus in which they were riding left the road and ran into a culvert. Alleging joint and concurring negligence, each plaintiff sued both Virginia Dare

2. 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 137, at 453 (Brandis rev. 1973) [hereinafter cited as BRANDIS]. The rule, referred to as the "could or might" rule of admissibility of expert testimony, was purportedly established in Summerlin v. Carolina & N.W.R.R., 133 N.C. 551, 45 S.E. 898 (1903):
   It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car, and not by a fall from any other elevated place, or in any other way that might just as well have produced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts.
   Id. at 555-56, 45 S.E. at 900.
3. 283 N.C. at 747, 198 S.E.2d at 567.
4. Id. at 748, 198 S.E.2d at 568, quoting BRANDIS § 137, at 455.
5. However, it may be contended that the court dealt with these cases by implication through its citation to BRANDIS.
6. 283 N.C. at 737, 198 S.E.2d at 561.
Transportation Company (Virginia Dare) and Carolina Coach Company (Carolina Coach), the latter having leased the bus to the former. Each defendant alleged the sole negligence of the other and set up cross actions for indemnity or contribution. At the close of the plaintiffs' evidence, the trial judge granted Carolina Coach's motion for a directed verdict since there was no proof that any mechanical defect existed when the bus was delivered to Virginia Dare; however, Virginia Dare's motion for a directed verdict was denied.

The bus driver, testifying for the lessee, denied that he had thrown or attempted to throw a bottle from the bus just prior to the accident as one of the plaintiffs had testified. Further, he asserted that when he approached the curve where the accident occurred, he turned the steering wheel as usual, but the wheels did not respond. Virginia Dare then offered the testimony of an expert damage analyst, Mr. Jeffries, who had inspected the bus' steering mechanism and had examined two bolts removed from it by Carolina Coach. In response to a "could or might" hypothetical question, he testified that in his opinion the nuts securing the bolts had become loose, causing a vital connection in the steering mechanism to break. He concluded that "this severance could or might have caused the steering system to fail when Gibbs [the driver] attempted to steer the bus around the left curve." Additionally, Jeffries was prepared to testify that the faulty bolts "would have been visible to a trained and competent mechanic," but the query seeking this response was excluded upon objection by Carolina Coach.

7. The lease agreement provided that Carolina Coach, an independent contractor, would furnish "sufficient buses to operate three (3) roundtrip schedules daily between Norfolk, Virginia, and Manteo, North Carolina, said buses to be complete with tires, gas, and oil, or diesel fuel, and complete maintenance including repairs for mechanical road failures." Id. The lessee's drivers were required to accept the buses delivered by the lessors and to report any mechanical defects to Carolina Coach. In addition, Virginia Dare agreed to indemnify Carolina Coach against liability due to the former's negligent operation of the leased buses. Id. at 737-38, 198 S.E.2d at 561.

8. See N.C.R. Civ. P. 13(g).

9. 283 N.C. at 739, 198 S.E.2d at 562. Plaintiffs established a prima facie case of negligence against Virginia Dare by introducing evidence tending to show that they were injured when the bus ran off the highway and struck a culvert without a prior collision or other apparent cause. One plaintiff testified in addition that the driver threw or attempted to throw a bottle out of the window just before the bus left the highway. Id. at 745, 198 S.E.2d at 566.

10. Id. at 746, 198 S.E.2d at 567. One of the plaintiffs corroborated this testimony. Id.

11. Id. at 746-47, 198 S.E.2d at 567.

12. Id. at 747, 198 S.E.2d at 567 (emphasis added).

13. Id. at 749, 198 S.E.2d at 568.
At the close of Virginia Dare’s evidence, Carolina Coach’s motion for directed verdicts on Virginia Dare’s indemnity and contribution claims was granted because Virginia Dare had not proven sufficiently that the defectively secured bolts had caused the accident or that the mechanical defect should have been discovered by the lessor in the exercise of reasonable care. The trial judge then submitted the plaintiffs’ cases against Virginia Dare to the jury who found for the plaintiffs. Virginia Dare, while not appealing from the judgments entered upon these verdicts, did appeal from judgments dismissing its cross actions against the lessor.14 The court of appeals affirmed,15 but because one member of the panel dissented, Virginia Dare appealed to the supreme court as a matter of right.

The sufficiency of the evidence to prove that Carolina Coach’s negligence caused the plaintiffs’ injuries turned on the supreme court’s evaluation of the expert’s opinion that the defect in the steering apparatus could or might have caused the steering system to fail. While the bus driver’s testimony that he had had difficulty steering the bus16 tended to show that some defect existed in the steering mechanism, this testimony did not establish that a defect chargeable to Carolina Coach’s negligence had caused the accident.17 The court recognized the sufficiency problem raised by the expert’s “could or might” response to the hypothetical when it stated that “[t]his form of question clearly invited the argument . . . that could or might have in Jeffries’ answers amounts to nothing more than his speculations as to possibilities.”18 Although Virginia Dare’s evidence was held to be sufficient on the causation issue, the court was constrained to look beyond the expert’s response: “Jeffries had previously testified that should these flanges [connecting the power steering cylinder and the steering arm] become separated there would be no steering power available to

14. Id. at 742-43, 198 S.E.2d at 564.
15. See Mann v. Virginia Dare Transp. Co., 17 N.C. App. 256, 194 S.E.2d 164 (1973). The court did not reach the question of the sufficiency of evidence to prove causation, for it affirmed the directed verdict against Virginia Dare on another ground: “there is no evidence in the record that would put a reasonably prudent person on notice as to any defect in the steering mechanism.” Id. at 262, 194 S.E.2d at 168.
16. See text accompanying note 10 supra.
17. Dean Prosser expressed the concept as follows: “An essential element of the plaintiff’s cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 236 (4th ed. 1971). For an excellent discussion of actual causation see Byrd, Actual Causation in North Carolina Tort Law, 50 N.C.L. REV. 261 (1972).
18. 283 N.C. at 747-48, 198 S.E.2d at 568 (emphasis in original).
the wheel."

In addition to dealing with the difficulties relating to sufficiency, the court leveled a more general attack on the "could or might" hypothetical question:

When a jury's inquiry relates to cause and effect in a field where special knowledge is required to answer the question, the purpose of expert testimony is likely to be thwarted or perverted unless the expert witness is allowed to express a positive opinion (if he has one) on the subject.

In remanding the case, the court instructed the trial court that the traditional hypothetical used by Virginia Dare's counsel should be "more carefully phrased" and that the experts' responses should be "more precise."

It may be questioned whether, with such brief discussion, the court intentionally has overruled the long line of cases requiring the "could or might" hypothetical. The Virginia Dare court did not dis-

19. Id. at 748, 198 S.E.2d at 568; see Record at 146. Jeffries gave this testimony as part of a general explanation of the operation of hydraulic steering systems. See Record at 143-46.

20. 283 N.C. at 748, 198 S.E.2d at 568.

21. The trial court's grant of Carolina Coach's directed verdict was reversed. In addition to the supreme court's finding that the evidence was sufficient to prove causation, the evidence in support of negligence was also held sufficient. Id. at 748-49, 198 S.E.2d at 568-69. The trial court had erroneously excluded Jeffries' testimony that the defect in the steering mechanism "would have been visible to a trained and competent mechanic." Id. at 749, 198 S.E.2d at 568.

22. Id. at 751, 198 S.E.2d at 570.

23. Reversible error was found in the following cases because the hypothetical questions were phrased in terms more certain than "could or might": Keith v. United Cities Gas Co., 266 N.C. 119, 131-32, 146 S.E.2d 7, 16 (1966); J.M. Pace Mule Co. v. Seaboard Air Line Ry., 160 N.C. 252, 254, 75 S.E. 994, 995 (1912); Summerlin v. Carolina & N.W.R.R., 133 N.C. 551, 555-56, 45 S.E. 898, 900 (1903). Admission of unqualified responses to hypothetical questions also has been held to be prejudicial error. See Patrick v. Treadwell, 222 N.C. 1, 4, 21 S.E.2d 818, 820 (1942); Nance v. Norfolk S.R.R., 189 N.C. 638, 639, 127 S.E. 635, 636 (1925); Hill v. Louisville & N.R.R., 186 N.C. 475, 477-78, 119 S.E. 884, 885 (1923).

This rule has created much difficulty for the court and concern among commentators. See BRANDIS § 137, at 455-56 n.97; Brandis, Evidence, Survey of North Carolina Case Law, 45 N.C.L. Rev. 934, 948-49 (1967); Note, Evidence—Expert Medical Testimony on Causation, 43 N.C.L. Rev. 979, 982-88 (1965). It is not, however, an absolute deterrent to the admissibility of unqualified causation evidence. In the vast majority of cases where the propriety of the question to or the response of the expert was in issue, the court has either adopted an exception to the rule, distinguished previous cases on their facts, or found no prejudicial error. See BRANDIS § 137, at 454; Note, 43 N.C.L. Rev., supra, at 980 n.3. The doctrine might not be considered a rule of general applicability were it not for its prevalent use by the bar. The difficulty in rationalizing the cases has led to "a rigid observance of the rule" as "the only safe course for counsel to follow." BRANDIS § 137, at 454-55.

This extreme caution, however, is not completely justifiable because there are sev-
cuss these decisions, nor was the rationale of these cases expressly rejected. On closer analysis, however, it seems that the court recognized the difficulties raised by the rule and expressed a rationale for expert testimony adverse to it.

North Carolina Coach's challenge to the sufficiency of the evidence was logical in light of earlier cases dealing with this issue. In *Maharias v. Weathers Brothers Moving & Storage*, in which an expert testified that a pile of rags "could have caused spontaneous combustion," the supreme court sustained a nonsuit because the evidence raised "a mere conjecture, surmise and speculation as to the cause of the fire." General exceptions to the rule that the court has apparently accepted. First, an expert may testify that an injury was caused by or a condition did result from an accident if such evidence is offered in response to "prodding" cross-examination. See *Apel v. Queen City Coach Co.*, 267 N.C. 25, 29, 147 S.E.2d 566, 568-69 (1966). In addition the court has recognized that "[w]here an expert witness testifies as to facts based upon his personal knowledge, he may testify directly as to his opinion." Cogdell v. North Carolina State Highway Comm'n, 279 N.C. 313, 326, 182 S.E.2d 373, 381 (1971) (stating general rule); see *Apel v. Queen City Coach Co.*, supra at 30, 147 S.E.2d at 569. This exception has been used to obviate the need for the hypothetical in several cases involving expert causation testimony. See *Keith v. Gregg*, 210 N.C. 802, 805-07, 188 S.E. 849, 851-52 (1936) (an expert who had examined a gun after it had exploded was permitted to testify directly as to causation); *Beard v. Railroad*, 143 N.C. 137, 139, 55 S.E. 505, 506 (1906) (a doctor who "had treated plaintiff and knew the conditions with which he was dealing" was allowed to testify that a certain fall would produce a certain mental condition); cf. *Bullin v. Moore*, 256 N.C. 82, 85, 122 S.E.2d 765, 767-78 (1961). Thus, had Virginia Dare's counsel chosen not to use a hypothetical, the crucial, expert testimony, see text accompanying note 12 supra, likely could have been phrased more definitely and thus have avoided the sufficiency problem. Furthermore, the court has not required expert testimony to be in the subjunctive when the response to the hypothetical related a conclusion deducible from common experience. See *Raulf v. Elizabeth City Light & Power Co.*, 176 N.C. 691, 694, 97 S.E. 236, 238 (1918) (per curiam) (contact with high voltage wire would produce death); *Jones v. Warehouse Co.*, 137 N.C. 338, 340-41, 49 S.E. 355, 356 (1904) (plaintiff more likely injured from being thrown against a wall than from falling six inches to the floor). But the most significant exception permits unqualified testimony in response to a hypothetical which eliminates other occurrences as the cause of an injury. For example, if the query assumes that the plaintiff was injured in an accident, the expert will be permitted to testify that the accident caused plaintiff's particular injury. See *Lynch v. Rosemary Mfg. Co.*, 167 N.C. 98, 99-101, 83 S.E. 6, 7 (1914); *Holder v. Giant Lumber Co.*, 161 N.C. 177, 178, 76 S.E. 485, 486 (1912); *Parrish v. High Point, R., A. & S. Ry.*, 146 N.C. 125, 126-27, 59 S.E. 348, 349 (1907); cf. *Summerlin v. Carolina & N.W.R.R.*, supra, at 555-56, 45 S.E. at 900 (Ironically, this decision, credited with having given birth to the "could or might" rule, does not seem inconsistent with this exception.). And even if the hypothetical does not explicitly assume that the plaintiff was injured, the court still has allowed non-subjunctive testimony where there was no serious doubt that the accident had caused some injury to the plaintiff. See *Stathopoulos v. Shook*, 251 N.C. 33, 39, 110 S.E.2d 452, 457 (1959); *Dempster v. Fite*, 203 N.C. 697, 707, 167 S.E. 33, 37-38 (1932); *Raulf v. Elizabeth City Light & Power Co.*, supra, at 694, 97 S.E. at 238; *Beard v. Railroad*, supra.

25. Id. at 767, 127 S.E.2d at 549.
26. Id. at 768, 127 S.E.2d at 549.
 Where "could or might" portrays the actual opinion of the expert, as apparently it did in Maharias, a directed verdict may be rightly granted. Such a holding, however, opened the way for challenge when an expert holds a more definite opinion but is prohibited from so testifying by the "could or might" rule. In another case a physician's testimony that a particular accident "may have had an influence on his [the plaintiff's] condition" was said not to "indicate a reasonable scientific probability that the attack of amnesia resulted from plaintiff's physical injuries." Other evidence was required to cure the defect. And finally, in Apel v. Queen City Coach Co., although the court found that the medical testimony indicated the probability that an injury caused plaintiff's incontinence, the medical experts' "could or might" evidence was "supplemented by the other testimony." Thus, before the Virginia Dare decision, the party with the burden of production faced a dilemma: presentation of expert evidence that was too certain might have resulted in exclusion, but testimony uncertain enough to meet the "could or might" requirement might have resulted in a directed verdict if other proof were not available. In light of its prior discussions of sufficiency, it is not surprising that the court in Virginia Dare, choosing not to draw fine distinctions, adopted the view that an expert should be able "to make a positive assertion of causation when that conforms to his true opinion . . . ."'

Significantly, cases prior to Virginia Dare gave little attention to justifying the "could or might" requirement. Summerlin v. Carolina & Northwestern Railroad stated that the plaintiff's questions "require the witness not to express a scientific opinion upon certain assumed facts, but to invade the province of the jury and to decide the very ques-

27. See Brandis § 137, at 455 n.97.
28. Lockwood v. McCaskill, 262 N.C. 663, 669, 138 S.E.2d 541, 546 (1964). This case curiously required expert evidence to meet a sufficiency test in order to be admissible. Although Lockwood apparently has not been followed, see Brandis § 137, at 456 n.97, it nevertheless sheds light on the court's sufficiency standard; if there is a distinction between may have and could or might have in the degree of certainty expressed, the distinction is not self-evident.
30. Id. at 29, 147 S.E.2d at 569.
31. See text accompanying note 4 supra.
32. 133 N.C. 551, 45 S.E. 898 (1903).
tion in dispute . . .”\textsuperscript{33} Subsequently, this boiler plate language has often been reiterated without further elaboration.\textsuperscript{34} The “jury province” theory, however, has been pointedly attacked by Wigmore:

\[T\]he expert is not trying to usurp that function of [the jury], and could not if he would . . . . \[T\]he jury may still reject his testimony and accept his opponent’s and no legal power, not even the judge’s order, can compel them to accept the witness’ statement against their will. \[T\]here is no hidden danger to the jury system, and no need of invoking rhetoric in its aid . . . .\textsuperscript{35}

In fact, the North Carolina Supreme Court in \textit{Patrick v. Treadwell}\textsuperscript{36} suggested an alternative test for admitting expert causation testimony which, however, has seldom been followed:

\[I\]t would seem that the proper test is whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill in the particular subject, one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances.\textsuperscript{37}

The court in \textit{Virginia Dare} likely had these ideas in mind when it stated that where special knowledge is needed to establish cause and effect, “the purpose of expert testimony is likely to be thwarted . . .” if the witness is not allowed to express his actual opinion.\textsuperscript{38}

Finally, a major criticism of the “could or might” requirement is that it favors the party arguing the negative on the causation issue.\textsuperscript{39} While prohibiting direct assertions in support of causation, the court has allowed the opponent to testify that “the installation [of wires] could not have caused the fire . . . .”\textsuperscript{40} “The imbalance is worse than that caused by allowing ‘did not’ while barring ‘did,’ because ‘could not’ is even more negative than ‘did not.’”\textsuperscript{41} Significantly, \textit{Virginia Dare} likely had these ideas in mind when it stated that where special knowledge is needed to establish cause and effect, “the purpose of expert testimony is likely to be thwarted . . .” if the witness is not allowed to express his actual opinion.\textsuperscript{38}

\textsuperscript{33} \textit{Id.} at 555, 45 S.E. at 900.


\textsuperscript{35} J. WMORE, EVIDENCE § 673, at 793 (1940).

\textsuperscript{36} 222 N.C. 1, 21 S.E.2d 818 (1942).


\textsuperscript{38} 283 N.C. at 748, 198 S.E.2d at 568.

\textsuperscript{39} \textit{See} Brandis, supra note 23, at 947-48.


\textsuperscript{41} Brandis, supra note 23, at 948.
Dare recognized this inequity by citing language in an earlier North Carolina case bemoaning the unfairness to plaintiffs.\(^{42}\)

Rather than adding another quirk to the vagaries of the "could or might" rule, *Virginia Dare* seems to have supplanted it with a more logical approach to the admissibility of expert testimony on causation. A witness will be allowed to state a positive opinion if he has one and if, of course, the court finds the testimony relevant.\(^{43}\) While the decision does not prohibit continued use of the "could or might" hypothetical and response, attorneys should be on notice that the court may not find such evidence alone sufficient to take the case to the jury.

JOSEPH H. STALLINGS

**Indemnity and the Statute of Limitations—Prolonging the Period of Accountability**

On July 3, 1967, Edward Lee Hager was injured when the platform of a material hoist fell at the construction site where he was employed. Hager initiated an action against the Brewer Equipment Company (Brewer), which had leased the hoist to Hager's employer, claiming that Brewer was negligent in leasing a hoist that was not in proper working order. In October 1970 Brewer initiated a third-party cross-action\(^1\) against the John S. MacBryde Company (MacBryde), which had sold Brewer the hoist in March 1967. Brewer alleged that any defect in the hoist would be attributable to the negligence of, or breach of implied warranty by, MacBryde. On that premise Brewer asserted that if it were required to pay Hager any damages for injuries caused by a defect in the hoist, it would be entitled to indemnification.\(^2\)


\(^{43}\) *See* BRANDIS § 137, at 456-57.

\(^1\) A defendant who is only secondarily liable may bring the primary tortfeasor into the action through a cross-action for indemnification. Edwards v. Hamill, 262 N.C. 528, 138 S.E.2d 151 (1964); Wright's Clothing Store, Inc. v. Ellis Stone & Co., 233 N.C. 126, 63 S.E.2d 118 (1951); Bowman v. City of Greensboro, 190 N.C. 611, 130 S.E. 502 (1925).

MacBryde moved for summary judgment on the ground that the third-party action was barred by the applicable three-year statute of limitations. The trial court granted the motion since Brewer had initiated its third-party action more than three years after the purchase of the hoist.

The North Carolina Court of Appeals reversed. The court held that while Brewer’s action was untimely as one for breach of implied warranty, the same statute of limitations did not bar the third-party action in its posture as a claim for indemnity.

The explanation for the difference in the running of the statute of limitations lies in the determination of when the respective actions for breach of implied warranty and indemnity accrue. In general, a cause of action accrues and thereby starts the running of the statute of limitations as soon as the right to institute and maintain a suit arises. When the theory of recovery is negligence or breach of implied warranty, North Carolina courts have repeatedly held that the right to institute an action accrues at the time of the wrongful act or omission. The purchaser of a defective item sustains a nominal injury and realizes a right to institute an action at the date of sale. Subsequent damage, for example personal injury attributable to the defective item, is merely aggravation of the original injury and does not give rise to a separate action. Thus on a theory of negligence or

4. N.C. Gen. Stat. § 1-52(1) (1969) provides that an action "upon a contract, obligation or liability arising out of a contract, expressed or implied except those mentioned in the preceding sections" must be brought within three years. See also note 7 infra.
5. 17 N.C. App. at 490, 195 S.E.2d at 55. Brewer had purchased the elevator in March 1967 and instituted the third-party action on October 22, 1972.
6. Id.
7. N.C. Gen. Stat. § 25-2-725 (1969), which establishes the statute of limitations for actions on breaches of contracts governed by Article 2 of the Uniform Commercial Code, was not applicable to the warranty action. Section 25-10-101 provided that section 25-2-725 would not become effective until July 1, 1967, which was after the sale in question.
8. 17 N.C. App. at 494, 195 S.E.2d at 58.
12. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 82, 194 S.E.2d 817, 819
breach of implied warranty, the dismissal on summary judgment was proper since Brewer had filed its action against MacBryde more than three years after the purchase.\(^\text{13}\)

The quasi-contractual\(^\text{14}\) indemnity action in \textit{Hager v. Brewer Equipment Co.} was subject to the same statute of limitations as the action for breach of warranty;\(^\text{15}\) however, the statute begins to run on an indemnity action at a later date.\(^\text{16}\) The \textit{Hager} court stated the North Carolina rule, implicit in prior North Carolina decisions,\(^\text{17}\) that "the right to sue for indemnity damages resulting from the negligence, misfeasance or malfeasance of another does not accrue until legal payment has been made."\(^\text{18}\) Except in states which have enacted statutes providing otherwise, the vast majority of jurisdictions reflect North Carolina's position and hold that where a party's liability for a tort or breach of warranty is secondary, the statute of limitations does not start running against his right to indemnification from the party primarily liable until the indemnitee has paid damages to the injured party.\(^\text{19}\)


\(^{14}\) N.C. GEN. STAT. § 25-2-725 (1969) did not control. See note 7 supra.

\(^{15}\) See note 7 supra.

\(^{16}\) Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304 (1972).

\(^{17}\) Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304 (1972), explains that N.C. GEN. STAT. § 1-52 (1969) is the controlling statute of limitations for indemnity actions; it was also the applicable statute for the breach of warranty action in the \textit{Hager} case, see note 7 supra. In actions based on contracts originating after July 1, 1967, the statutes of limitations are not the same. Indemnity actions continue to be controlled by section 1-52, Ingram v. Smith, supra at 152, 191 S.E.2d at 394, but section 25-2-725 governs the implied warranty action.

\(^{18}\) 17 N.C. App. at 491, 195 S.E.2d at 56.

\(^{19}\) For an extensive list of cases from other jurisdictions adhering to North Carolina's position, see 17 N.C. App. at 493-94, 195 S.E.2d at 57.
Conceptual consistency and practical considerations justify this distinction. Theoretically, the indemnitee's cause of action cannot accrue until he has been compelled to pay a judgment or settlement since the indemnitee is not “injured” until that time. Unlike the action for breach of implied warranty, no damage, nominal or otherwise, is suffered until a relatively faultless party is compelled to give compensation for a loss attributable to the wrongful act of another.

From a more pragmatic perspective, if the statute of limitations for an indemnity action were to run from the time of the sale, the party primarily responsible for the original plaintiff's injuries would be afforded an unwarranted opportunity to escape liability. In Hager the original plaintiff did not commence the initial action against Brewer until July 1970, more than three years after the sale to Brewer. If the indemnitor (MacBryde) had been allowed to assert that the statute of limitations ran from the time of sale, Brewer's indemnity action against MacBryde would have been barred by the statute of limitations before there would have been any reason to consider a third-party action.

Despite this problem, a minority of states feel that there are compelling reasons for an indemnity action accruing, and, consequently, the statute of limitations beginning to run, at the time the indemnitor commits the wrongful act. The considerations behind the minority position are best illustrated by the following hypothetical:

---


22. At common law the general rule did not allow indemnity between joint tortfeasors. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953). An exception arose where the tortfeasor, who had to pay a judgment to the injured party, was only secondarily negligent. In that situation the courts would employ the legal fiction of an implied contract requiring indemnification by the tortfeasor primarily negligent. Hildreth v. United States Cas. Co., 265 N.C. 565, 144 S.E.2d 641 (1965); Hunsucker v. High Point Bending & Chair Co., supra.

23. In a recent Nevada case the owners of a swimming pool, having been forced to pay a wrongful death judgment, sought indemnification from the installer of their pool's electrical system. The court denied their claim for indemnification since the applicable statute of limitations had run from the time of the completion of the wiring rather than the time of the initial judgment. The court explained that the purpose of the statute was to afford ultimate repose and protection from liability many years after the potential indemnitor had lost contact and supervision of the item in question. Nevada Lakeshore Co. v. Diamond Elec., Inc., 89 Nev. —, 511 P.2d 113 (1973).
Assume that the following events occurred in North Carolina. A buys an elevator for use in his home from B and ten years after the purchase the cable breaks. At the time of the accident, A and his friend C were riding in the elevator. On theories of breach of implied warranty or negligence, A has no remedy. His cause of action against B is barred by the statute of limitations. However, if C decides to sue his host, A will be allowed to bring an action for indemnification against B.

The minority jurisdiction place emphasis on the policies underlying the statute of limitations. "The purpose of a statute of limitations is to afford the defendant security against stale demands" and to insure basic fairness in the sense that one should not have to entertain an accusation of misconduct so long after the time of the alleged misconduct that "evidence has been lost, memories have faded, and witnesses have disappeared." According to the jurisdictions following the minority rule, an action is not any fresher because the underlying legal theory has changed from a claim of negligence or breach of implied warranty to one of indemnification. Although the accrual of the

In Tel-Twelve Shopping Center v. Sterling Garrett Constr. Co., 34 Mich. App. 434, 191 N.W.2d 484 (1971), a shopping center was required to pay a judgment to a neighboring landowner for damage done to his property during the construction of the center. Subsequently, the shopping center brought an action against the construction contractor whose negligence had been primary. The court dismissed the suit stating that the center's cause of action must have arisen prior to the original judgment, and consequently the statute of limitations had been allowed to run. The court labeled this action a form of subrogation arising in equity. Id. at —, 191 N.W.2d at 486-87. The action, however, can also be construed as one for indemnity:

The term "subrogation" is also used in a more limited sense. For example, suppose a defendant negligently injures a man. The man who happens to be working at the time for his employer, requires [the employer] to pay him damages. The employer in such a case may be entitled to recover over against the negligent defendant who caused the injury in the first place. It is possible to think of the employer's claim in such a case as a subrogation. However, it is equally possible to think of such claims as simply claims for damages suffered by the employer, and indeed they are often described as indemnity claims.


25. For the sake of simplicity, assume that the nature of the defect would not place the action under N.C. GEN. STAT. § 1-15(b) (Supp. 1973). This assumption allows section 1-52 to control the negligence action and section 25-2-725 to control the breach of warranty action.


28. Id. at 349.
right to institute an indemnity action may be a product of the more recent past than the underlying wrongful act, the critical evidence necessary to sustain a claim on either theory is the same, for in either case there must be proof of B selling a defective elevator. In the hypothetical, the injury to C occurred, and therefore the indemnitee brought his action, ten years after the indemnitor’s last contact with the elevator. In this situation the indemnitor may be severely hampered in the gathering of critical evidence. Admittedly, the indemnitee would face the same problems of gathering evidence, and the indemnitee bears the burden of proof by the preponderance of the evidence. Nevertheless, attenuated testimony and evidence assembled long after the sale will enhance the chances of creating real or ostensible questions of fact for the jury on whether the accident was due to a defect or to normal wear and tear and on whether the indemnitor exercised due care. The prospect of protracted litigation springing from an indemnity action long after the manufacturer or distributor last had contact with the item in question may have an unfavorable impact on commercial stability.

Under the minority position the protection of the indemnitor from stale indemnity litigation is of paramount importance. For the purchaser to be able to shift the ultimate responsibility to the party primarily liable after the statute of limitations commencing with the date of sale has run, the purchaser must have obtained an express contractual concession from the manufacturer which provides for the latter’s prolonged indemnity liability. This may, however, put the burden of contractual modification upon a party in a less favorable negotiating position.

In contrast, North Carolina adheres to the general rule that the party primarily negligent should be ultimately accountable. If the manufacturer is to avoid prolonged susceptibility to a potential indemnity action, he must obtain a valid contractual limitation of the time for initiating such an action. The indemnity action in North Carolina is based upon a theory of implied or quasi-contract, and "[i]here can

30. A provision in a contract prolonging the period in which the purchaser may institute an indemnity action against the manufacturer or distributor will not run the risk of violating public policy as discussed in text accompanying notes 35-36 infra. Public policy questions the validity of contractual provisions allowing one to avoid accountability for his active negligence, not provisions which insure that accountability.
31. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953); Ingram v. Smith, 16 N.C. App. 147, 152, 191 S.E.2d 390, 394, cert. denied,
be no implied contract where there is an express contract between the parties in reference to the same subject matter. One can, therefore, limit the extent or time of his potential liability to the other contracting party. However, the North Carolina courts will uphold a contractual stipulation against liability for one's own negligence only if the stipulation is not in violation of public policy.

What is contrary to public policy defies lucid definition. A starting point for analysis, however, is the premise that persons should not be unnecessarily restricted in their freedom to contract. Thus before a contract is declared to violate public policy, its purpose or its required manner of performance should present a likelihood of injury to the public or violation of acceptable social norms. Although it might be argued that contractually shifting ultimate liability induces a relaxed vigilance which creates a likelihood of physical injury to the public, public policy should not be deemed violated for this reason alone. Such an argument is inconsistent with the unquestioned validity of liability insurance contracts used by operators of motor vehicles.

Neither do limitations on indemnity actions between contractual parties create a risk of financial injury to the public. The indemnification agreement does not restrict the search for a solvent defendant by a plaintiff who is not a party to the agreement. When a contract contains an exculpatory clause, the stipulation against ultimate liability is between the contractual parties. The contract cannot preclude the initial liability of either the indemnitee or the indemnitor to third par-

33. Within certain limits discussed in the text following note 34 infra, a person may contractually avoid personal liability for his negligence in regard to any potential plaintiff.
34. The majority rule, to which we adhere, is that, subject to certain limitations hereinafter discussed, a person may effectively bargain against liability for harm caused by his negligence in the performing of a legal duty arising out of a contractual relation . . . .
ties. Rather, it determines only whether the party of primary negligence will ultimately have to bear the financial burden of the damages paid to the injured party.

The validity of a contractual provision restricting liability "depends upon the nature and the subject matter of the contract, the relation of the parties, the presence or absence of equality of bargaining power and the attendant circumstances." Contracts by which a public utility or a common carrier attempts to avoid liability for negligence in the regular course of its business are illustrative of exculpatory agreements held to be void because of their subject matter. In Hill v. Carolina Freight Carriers Corp., the North Carolina Supreme Court explained that since a franchise carrier operates on public highways, it has the positive duty to observe the statutory rules of the road and operate its vehicles with due care. The court will not allow a corporation to evade a public duty imposed by law. Thus the provision in defendant's truck-leasing contracts requiring the lessor to bear all loss associated with the negligent operation of the leased trailer was held void. Contracts between employer and employee which exonerate the employer from liability for his or his employees' future negligence are void because of the social relationship of the parties.

In situations factually similar to Hager, the activities of the contracting parties do not have a direct impact upon the public at large. In comparison to a public service corporation, the likelihood of injury to the public resulting from an exculpatory clause in a contract between private corporations negotiating for a private purpose is remote. In the absence of a showing that either party enjoyed a quasi-monopolistic

39. Id. at 710, 71 S.E.2d at 138.
40. RESTATEMENT OF CONTRACTS § 575 (1932) provides in part:
   ILLEGAL BARGAINS FOR EXEMPTION FROM LIABILITY FOR WILFUL OR NEGLIGENT MISCONDUCT.
   (1) A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if
   (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of employment . . . .
41. Public service corporations may also contractually limit their liability when they are engaged in private activities: "[E]ven a public service corporation is protected by such an exculpatory clause when the contract is casual and private, in no way connected with its public service and concerning private property in which the public has no interest." Miller's Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 22, 65 S.E.2d 341, 342 (1951).
position which could force the other party to accept unreasonable terms, the courts rely upon the bargaining of the parties to insure the propriety of liability limitations.\textsuperscript{42}

For example, in \textit{Hall v. Sinclair Refining Co.}\textsuperscript{43} the North Carolina Supreme Court allowed defendant oil distributor to raise as a defense a contract stipulation which cut off his liability for negligence in the installation of defective gasoline storage tanks at the plaintiff's service station. The court in dismissing the plaintiff's action found no showing of inequity of bargaining power and noted that the service station operator "ha[d] effectively bargained against liability for all elements of damage which he alleges . . . were caused by the defendant." \textsuperscript{44} While exculpatory clauses are strictly construed,\textsuperscript{45} their restrictive reading will not foreclose one's ability to limit the extent or duration of his potential liability in an arms-length transaction.\textsuperscript{46}

\textbf{CONCLUSION}

The North Carolina position that the statute of limitations for an indemnity action does not begin to run until a judgment has been paid is in accordance with the vast majority of jurisdictions. The rule is justified by a simple policy consideration: "two wrongs make a legal right." First, one should be held accountable for his wrongful acts.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{42} 2 J. \textsc{Strong}, \textsc{N.C. Index 2d Contracts} \S 10, at 309 (1967).
\item \textsuperscript{43} 242 N.C. 707, 89 S.E.2d 396 (1955).
\item \textsuperscript{44} \textit{Id.} at 711, 89 S.E.2d at 398. For an example of how far some courts are willing to go in allowing contracting parties to realign their liabilities in "private" contracts, consider the following case. In \textit{Fralin v. American Cyanamid Co.}, 239 F. Supp. 178 (W.D. Va. 1965), an explosives manufacturer successfully contracted against liability for negligent supervision of blasting operations. When one of its blasts resulted in damage to buildings in the vicinity, the construction company which had utilized the manufacturer's explosives and supervisory personnel had to repair the neighboring structures. Despite the danger attendant with a blasting operation, the court declared the provision valid and the contractor's indemnity action contractually barred:
\begin{quote}
Defendant owed no duty to the public with regard to this contract, and Plaintiff has offered no facts which would give rise to the alleged superior bargaining strength. . . . [Defendant] is neither a carrier nor a public utility, and there are no rights of third parties involved in this case.
\end{quote}
\textit{Id.} at 180.
\item \textsuperscript{46} Hall v. Sinclair Ref. Co., 242 N.C. 707, 89 S.E.2d 396 (1955).
\item \textsuperscript{47} Technically speaking, to allow the indemnitee to shift the burden of liability to the indemnitor is to allow the \textit{indemnitee} to avoid liability for \textit{his} wrongful act. The explanation for this apparent inconsistency lies in the nature of the wrongful act. Unlike contribution, the wrongfulness of the indemnitee's act is not of the quantum that requires ultimate liability. "The rights of contribution and indemnity are mutually
Secondly, it is wrong for one whose negligence is only secondary to bear the liability for an injury attributable to the primary negligence of another.\textsuperscript{48} The majority position insures an opportunity for the indemnitee to shift the burden of ultimate liability to the party primarily negligent and thereby provides the ultimate accountability of the indemnitee.

If the prolonged susceptibility to an indemnity action is a burden on North Carolina corporations, contractual self-help is available. If there is an arms-length contract for a private purpose, the parties are free to re-allocate the risk of either party's negligence, and "when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld."\textsuperscript{49}

ROBERT DEWITT DEARBORN

Municipal Corporations—Municipal Tort Notice Requirements—Strict Compliance

In Johnson v. City of Winston-Salem\textsuperscript{1} the North Carolina Supreme Court effectively slammed the courthouse door in the face of the plaintiffs by dismissing their tort action against the city. The court held that the plaintiffs had failed to comply with the formal notice requirement in the city charter that a written claim be filed with the board of alderman or mayor within ninety days after the cause of action arises.\textsuperscript{2} Although the city had investigated the claim immediately inconsistent; the former assumes joint fault, the latter only derivative fault." Edwards v. Hamill, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964).


\textsuperscript{1} 282 N.C. 518, 193 S.E.2d 717 (1973).

\textsuperscript{2} Section 115 of the city charter of Winston-Salem is similar to many municipal notice-requirement provisions:

All claims or demands against the City of Winston-Salem arising in tort shall be presented to the board of aldermen of said city or to the mayor, in writing, signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues . . . and, unless the claim is so presented within ninety (90) days after the cause of action accrued and unless suit is brought within twelve (12) months thereafter, any action thereon shall be barred.

after it arose and the facts of the case strongly suggested that the plaintiffs would have prevailed on the merits, the court refused to adopt any of several exceptions to strict compliance with municipal tort notice requirements.

Emanuel L. Johnson returned home at midday of January 4, 1970, and discovered several inches of sewage covering his floor and saturating his rugs, clothing, and furnishings. The reverse flow of sewage apparently was caused by the presence of sand and gravel that had been forced into the sewer line by a road grader. Two city crews worked almost three hours to remove the obstruction and also assisted the plaintiffs in cleaning up. The city's claims investigator observed the flooding and took photographs of the damage. Mr. Johnson delivered a list of the damaged articles to the investigator on February 12, 1970. Subsequently, there was further discussion between the plaintiffs and attorneys for the city, "but no agreement was reached." On October 8, 1970, plaintiffs sent the mayor a letter notifying the city of the damage. When the plaintiffs received no response, the present action was initiated. The North Carolina Supreme Court, agreeing with both the district court and the court of appeals, held that "[a]nything short of a written claim signed by the plaintiff or his attorney and filed with the board of aldermen or the mayor within the ninety days, required a dismissal of the action."

The general rule in North Carolina on municipal tort notice requirements was expressed in *Carter v. City of Greensboro* and was emphatically reaffirmed by the court in *Johnson*:

Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action and nonsuit is proper unless the plaintiff alleges and proves notice. . . . However, there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed.

---

3. 282 N.C. at 519-20, 193 S.E.2d at 719.
4. *Id.* at 525, 193 S.E.2d at 722.
5. *Id.* at 520, 193 S.E.2d at 719.
6. *Id.* at 523, 193 S.E.2d at 721.
Special notice requirements have been justified on the following grounds: (1) to give the public body an early opportunity to investigate facts to oppose unfounded claims, (2) to facilitate out-of-court settlements, (3) to prevent additional accidents by allowing the public entity a chance to take precautionary and corrective measures, and (4) to aid in establishing fiscal planning and budgeting based on potential liabilities. Yet, the requirements “often operate functionally as a trap for the unwary claimant” and become “instrument[s] of harshness and injustice.”

Although the majority in Johnson found that the Winston-Salem notice requirement was “reasonable” and the dissent agreed that the “validity of [such] provisions . . . is unquestionable,” decisions in other jurisdictions have cast some doubt on their constitutionality. For example, in Reich v. State Highway Department the Michigan Supreme Court relied upon an equal protection analysis to hold that the municipal tort notice requirement arbitrarily split the class of tort-feasors into two subclasses: “private tort-feasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed.” Finding that this treatment bore no reasonable relationship to the purpose of the provision, the court held the provision violative of equal protection.

While most jurisdictions have adopted statutory notice requirements, there are exceptions which, if recognized, may permit a claimant to recover without strictly complying with the language of the provisions. These exceptions include substantial compliance, valid excuse such as mental or physical incapacity, estoppel, and waiver. The Johnson court refused to apply any of these exceptions to permit the plaintiffs to proceed on the merits.

While the majority in Johnson did not directly address the issues of waiver and estoppel, they apparently approved the determination of

10. Id.
12. Id. at 522, 193 S.E.2d at 720.
13. Id. at 526, 193 S.E.2d at 723.
15. Id. at 623, 194 N.W.2d at 702.
17. S. Sato & A. Van Alstyne, supra note 9, at 1141.
these issues by the court of appeals.\textsuperscript{18} In reaching its decision, the court of appeals adopted the language from \textit{Pender v. City of Salisbury} that "'town authorities cannot waive [the] statutory requirement that a demand in writing be made . . . .'\textsuperscript{19} The dissent in \textit{Johnson}, however, argued that this language was dictum since a jury had found that the city was not negligent. In addition, the dissent suggested that neither waiver nor estoppel would have been appropriate in \textit{Pender} since the only circumstance in that case justifying their application was the mere fact that the mayor, by happenstance, was one of the first to arrive at the scene of an accident.\textsuperscript{20} In contrast, the facts in \textit{Johnson} presented the court with circumstances that might have justified the application of waiver or estoppel.

The Florida Supreme Court has adopted a flexible approach to waiver of the notice requirement:

[W]hen responsible agents or officials of a city have actual knowledge of the occurrence which causes injury and they pursue an investigation which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then the filing of such a notice may be said to be waived.\textsuperscript{21}

Although North Carolina courts have consistently held that a waiver is the voluntary relinquishment of a known right,\textsuperscript{22} the North Carolina Supreme Court in \textit{Johnson} could have used the Florida approach to find that the conduct of the city's agents amounted to a constructive or implied relinquishment.

The plaintiffs also argued that the doctrine of equitable estoppel should be applied to excuse noncompliance. This doctrine "is designed to aid the law in the administration of justice when without its aid injustice would result."\textsuperscript{23} Before the doctrine will be applied,

there must exist a false representation or concealment of material fact, with a knowledge . . . of the truth [and] the other party must have been without such knowledge . . . . It must have

\begin{thebibliography}{9}
\bibitem{18} "Nothing need be added to the opinion of the Court of Appeals on other questions discussed in the brief." 282 N.C. at 523, 193 S.E.2d at 721.
\bibitem{20} 282 N.C. at 529, 193 S.E.2d at 725.
\bibitem{21} Rabinowitz \textit{v. Town of Bay Harbor Islands}, 178 So. 2d 9, 12-13 (Fla. 1965).
\end{thebibliography}
been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice.\textsuperscript{24} As the dissent in \textit{Johnson} pointed out, "[I]t is not necessary that the conduct of the defendant be with fraudulent intent."\textsuperscript{25} It would be difficult to find a "false representation or concealment of material facts" in \textit{Johnson}, but the dissent suggested it was sufficient that plaintiffs were lulled by the city's agents into reasonably believing that their claim was being processed.\textsuperscript{26}

Equitable estoppel has been applied under somewhat similar facts in \textit{Brooks v. City of Miami}.\textsuperscript{27} In that case the plaintiff sent a letter to the appropriate city official notifying the city of her claim. Plaintiff's letter was acknowledged, and she was informed that the matter was being processed. When the plaintiff later brought a tort action, the city attorney alleged that he had not received a written notice of the claim. The Florida court found that the plaintiff was misled by the conduct of the city's agent and could have reasonably believed that she had done all that was necessary.\textsuperscript{28} In a later case, the Florida Supreme Court indicated that when a city's investigation discloses all the facts that the notice provision requires and the conduct of the agents of the municipality reasonably leads the claimant to conclude that further notice is unnecessary, an estoppel may arise if the claimant in good faith relies on that conduct to his detriment.\textsuperscript{29} The North Carolina Court of Appeals, however, found "no authority in North Carolina to support the plaintiffs' contention that the defendant municipality may be estopped to deny notice when some employees had knowledge of the injury . . . ."\textsuperscript{30} Nevertheless, it seems clear in \textit{Johnson} that there was more than mere knowledge of the injury. There was subsequent conduct by the city's agents sufficient to lead the claimants to reason-

\begin{thebibliography}{9}
\bibitem{26} 282 N.C. at 529, 193 S.E.2d at 724.
\bibitem{27} 161 So. 2d 675 (Fla. Dist. Ct. App. 1964).
\bibitem{28} \textit{Id.} at 677.
\bibitem{29} Rabinowitz v. Town of Bay Harbor Islands, 178 So. 2d 9, 12-13 (Fla. 1965). The alleged difference in Florida between "estoppel" and "waiver", see text accompanying note 21 \textit{supra}, is that estoppel involves the additional element of conduct on the part of the municipality which causes the claimant to act or fail to act to his disadvantage. \textit{See, e.g.}, City of Jacksonville v. Hinson, 202 So. 2d 806, 808-09 (Fla. Dist. Ct. App. 1967).
\bibitem{30} 15 N.C. App. at 405, 190 S.E.2d at 345.
\end{thebibliography}
ably believe that they had properly notified the responsible agency.

An additional problem in North Carolina is that the doctrine of equitable estoppel does not apply to municipalities in their governmental, public, or sovereign capacity. The court of appeals in Johnson concluded that the particular municipal function involved was the consideration of tort claims, which the court was inclined to believe, without actually so holding, was a governmental function. The dissent in the supreme court felt the function at issue was the operation of a sewer system—"a proprietary function for the negligent exercise of which the municipality is subject to liability." The logical consequence of the court of appeals' "inclination" is that the doctrine of equitable estoppel would never apply to municipal torts since the consideration of such claims would always be a governmental function. It would appear, then, that the function which caused the existence of the claim should be controlling—the operation of the sewer system.

While the doctrines of waiver and estoppel have not been applied in North Carolina to excuse strict compliance, two exceptions have been recognized under which the court could have excused plaintiffs' failure to meet the notice requirements. In Graham v. City of Charlotte, the court recognized a substantial compliance exception. The plaintiff had filed notice within the statutory period, but the city argued that the notice failed fully to inform the city on how the injury occurred. The court held that since the letter gave ample notice of the cause of injury and did not mislead the city as to the basis of the claim, the notice substantially complied with the statute.

The substantial compliance exception was applied again in Perry v. City of High Point where the plaintiff addressed the notice to the mayor and city council but delivered it to the city manager. The court, declaring that the purpose of the statutory provision was to put the municipality in possession of the facts of the claim so it may investigate and possibly adjust the claim without litigation, indicated that "where an effort to comply with such requirements has been made and the notice, statement, or presentation . . . is such as to accomplish the object of the statute, it should be regarded as sufficient." While the factual situ-

32. 15 N.C. App. at 405, 190 S.E.2d at 345.
33. 282 N.C. at 529, 193 S.E.2d at 724.
34. 186 N.C. 649, 120 S.E. 466 (1923).
35. Id. at 658, 120 S.E. at 470.
36. 218 N.C. 714, 12 S.E.2d 275 (1940).
37. Id. at 717, 12 S.E.2d at 278, quoting 43 C.J. Municipal Corporations § 1962 (1927).
ation in *Johnson* does not fit squarely within the facts of either *Graham* or *Perry*, it does appear that the objectives of the statute were more than adequately fulfilled.

In *Galbreath v. City of Indianapolis*, the Indiana Supreme Court considered a situation where the notice consisted of various telephone and written communications between the plaintiff and the defendant's legal department. Noting the complexity of today's city governments and the average citizen's unfamiliarity with city ordinances, the Indiana Supreme Court determined that the plaintiff had "attempted to fully apprise the city of the accident and surrounding circumstances." The court held, therefore, that since the basic purposes of the notice requirement were fulfilled, the plaintiff had substantially complied with the requirement. The majority in *Johnson* recognized that the city's claim agent and attorney had first hand knowledge of the accident, but held that this knowledge was not sufficient to meet the technical requirement that the claim be filed with the mayor or board of aldermen. This view ignores the purpose of the requirement. When all of the underlying reasons for the statute are met, to allow the city to rely "on the literal terms of the statute . . . penalizes unwitting claimants and grants special immunity to the city for no reason." Although adoption of the Indiana court's reasoning would expand the doctrine of substantial compliance in North Carolina, this result seems desirable since all the underlying purposes of the notice requirement would be fulfilled.

The other exception in North Carolina for noncompliance with the notice requirement is a valid excuse. Thus far only mental and physical incapacities have been recognized as valid excuses for late notice. The North Carolina court would have expanded the parameters of "valid excuse" if it had brought *Johnson* within this exception. As the dissent suggested, however,

It would be difficult to find a more valid excuse . . . than the plaintiffs had in this case under the circumstances disclosed by this record. . . . [To permit the city to escape all responsibil-

---

39. *Id.* at 479, 255 N.E.2d at 229.
40. *Id.* at 479-80, 255 N.E.2d at 229-30.
41. 282 N.C. at 523, 193 S.E.2d at 721.
ity . . . for the sole reason that the plaintiff did not send to the
mayor a written communication until some seven months later, is
to convert the statutory shield into an instrument of harshness and
injustice . . . \(^4\)

Under the facts of the *Johnson* case it would seem desirable that
one without fault should not have to bear the loss caused by the negli-
genca of the municipality. The North Carolina Supreme Court’s decision,
however, seems all too clear. The claimant in North Carolina must do
more than make a reasonable attempt to notify the municipality, and
he must do more than fulfill the purposes of the notice requirement.
He must strictly adhere to the precise language of the city charter.
The only exceptions to strict compliance currently recognized by
North Carolina are mental or physical incapacity and a limited form of
substantial compliance. The court has expressed a clear intent to
maintain the stability of prior decisions rather than adopt a flexible,
just approach based on the purposes of the notice requirement.

H. Dwight Bartlett

**Property—Trusts: Deviation from the Express Terms of a Trust Instrument**

It is well settled in both North Carolina and other jurisdictions
that a court, in the exercise of its equity jurisdiction over the adminis-
tration of trusts, may authorize deviation from the express terms of
a trust when changed circumstances, which were not foreseen by the
settlor, threaten to destroy the trust corpus or defeat the purpose of the
trust.\(^1\) That the time may have come for a more liberal rule is sug-
gested by the opinion of the North Carolina Supreme Court in *Davi-
son v. Duke University*.\(^2\) In that case the trustees of the Duke
Endowment successfully sought authority to modify certain provi-
sions of the trust dealing with permissible investments.\(^3\)

---

\(^4\) 282 N.C. at 528-29, 193 S.E.2d at 724.

1. *See generally* H. A. Scott, *The Law of Trusts*, § 167 (3d ed. 1967); *Resta-
statement (Second) of Trusts* § 167 (1955); *Annot.*, 170 A.L.R. 1219 (1947).
3. The trustees also received authority to distribute corpus to the extent neces-
sary to comply with the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487
(codified in scattered sections of 26 U.S.C.). The provisions pertinent to this Note
The Duke Endowment was established by James B. Duke in 1924 as an inter-vivos charitable trust of perpetual duration. At the time he created the trust, the settlor transferred to it assets valued at some forty million dollars; an additional ten million dollars was placed in the trust under the will of Duke, who died in 1925. Beneficiaries were four institutions of higher education (including Duke University), hospitals and orphanges in the states of North and South Carolina, Methodist churches in North Carolina, and retired Methodist ministers. The largest portion of the assets originally transferred was common stock in the Duke Power Company, a corporation founded by the settlor and engaged in the production of electric power in the Carolinas.

The trust indenture clearly indicated the intent of the settlor to provide for the various charitable purposes associated with the activities of the beneficiaries; it is also plain from the instrument that Duke saw the development of hydroelectric power as a socially useful activity as well as a wise investment of capital. He transferred sufficient stock to give the trustees of the Endowment control of Duke Power and charged them with the responsibility of ensuring that the management of the corporation was always in capable hands. Moreover, he indicated that securities of the company were to be the primary investment of the Endowment and that this investment could be changed only "in response to the most urgent and extraordinary necessity."

Other terms of the agreement provided that certain amounts of income were to be accumulated and added to the corpus and that this accumulated income was to be invested only in securities of Duke Power Company or in certain federal or state bonds. By 1973 the value of the Duke Power Company securities thus added to the corpus was over three hundred million dollars. The trustees could sell these securities, but they could invest the proceeds only in government bonds.

Act of 1969). They unsuccessfully sought an interpretation of the trust terms which would have permitted them to review certain decisions which they had made in prior years as to the distribution of income.
4. 282 N.C. at 678-79, 194 S.E.2d at 763.
6. 282 N.C. at 681, 194 S.E.2d at 764.
7. Id. at 679, 194 S.E.2d at 763.
8. Id. at 680, 194 S.E.2d at 764.
9. Id.
10. Id.
11. Id. at 689-90, 194 S.E.2d at 769-70.
12. Id. at 690, 194 S.E.2d at 770. At the time Duke executed the indenture cre-
In summary, the trust terms evidenced Duke's intention that income from the Endowment be sufficiently large to accomplish several charitable purposes and that the corpus be prudently invested. It is also clear that the settlor believed that investment in Duke Power Company securities was a sound investment and one which would benefit the Carolinas.

In 1963 the trustees of the Endowment unsuccessfully sought modification of the terms restricting investment of the income that was accumulated and added to the corpus. In *Cocke v. Duke University* the North Carolina Supreme Court recognized the power of a court to modify trust terms but held that the trustees had not made out a sufficient case for the application of the rule. The trustees there argued that economic conditions had changed to the extent that the trust scheme was no longer practical. They contended that it was no longer considered prudent investment practice for a trust so to concentrate its holdings and that the permissible alternatives under the trust were no longer attractive investments because the purchasing power of their fixed, relatively low returns was constantly being eroded by unprecedented inflation. Further, they argued that the Duke Power stock was not producing the rate of return envisioned by the settlor because the company had reached maturity. Conversely, the needs of the beneficiaries were growing because of increased costs, and increased income from the Endowment was necessary to meet these needs.

Four propositions were established in *Cocke* and interpreted by the court in *Davison*.

First, the trust terms provided that the trust was to be governed by the laws of the State of New Jersey. *Cocke* held that this provision was adopted with recognition of the fact that the relevant laws of New Jersey and North Carolina "are in substantial accord." The court, nevertheless, cited the law of its own jurisdiction several times in both *Cocke* and *Davison*.

| 14. | *Id.* at 21, 131 S.E.2d at 922. |
| 15. | 282 N.C. at 690-92, 194 S.E.2d at 770-71. |
| 16. | The language in the text is the *Davison* court's interpretation of the trust terms, and it is demonstrably at variance with the actual holding of *Cocke*. In *Cocke* the court explicitly held that the language in the trust indenture stating that the settlor intended for the laws of the State of New Jersey to bind the trustees in their administration of the trust was not determinative of the law to be applied by a North Carolina... |
Secondly, the power of the court to authorize a trustee to ignore express trust terms was recognized but was held to be appropriate only "in cases of emergency or to preserve the trust estate." 17

Thirdly, the court announced it would modify express trust terms only where "the condition or emergency asserted [was] one not contemplated by the [settlor], and which, had it been anticipated, would undoubtedly have been provided for ...." 18 In fashioning relief the court stated it should attempt to place itself in the position of the settlor and act as he would had he anticipated the conditions. 19

Finally, the court stated that in order to displace or circumvent express trust terms, one must "do more than show change of economic conditions." 20

In Cocke the court found that adherence to the trust terms had "promoted the economic as well as the social welfare" 21 of the two Carolinas and held that the evidence failed to establish a case for modification. 22

The trustees evidently profited from their earlier experience and came into court with a much better case in Davison. In addition to essentially the same arguments they had made in Cocke, they had stronger evidence of the impracticality of the trust scheme in light of changed conditions. They pointed to a very poor cumulative investment performance for the years 1967 through 1969, the poorest among all the largest foundations in the nation. This performance had re-

court exercising jurisdiction over the trust. 260 N.C. at 8-9, 131 S.E.2d at 913, quoting RESTATEMENT OF CONFLICT OF LAWS § 297 & comment a (1939). The court did acknowledge that it was plain "what law the donor intended the trustee to obey" and noted the fact that the law of the two states was in accord on relevant points. 260 N.C. at 9, 131 S.E.2d at 914.

17. 260 N.C. at 15, 131 S.E.2d at 918, quoting Penick v. Bank of Wadesboro, 218 N.C. 686, 690, 12 S.E.2d 253, 256 (1940). Both Davison and Cocke cited a New Jersey statute which recognized the power of a court to modify trust terms; it reads in pertinent part: "In all cases where by reason of a change in conditions which occurs, or which may be reasonably foreseen, the objects of any trust . . . might be defeated in whole or in part by the investment . . . [of trust assets according to the terms of the trust, an action may be brought to secure modification of the terms]." 260 N.C. at 16, 131 S.E.2d at 918-19; 286 N.C. at 691, 194 S.E.2d at 770-71, quoting N.J. STAT. ANN. § 3A:15-15 (1951) (emphasis by the Davison court).

The New Jersey courts have interpreted this statute as merely codifying prior law; the importance of this statute and the emphasis on the italicized words is discussed at text accompanying notes 34-38 infra.


19. Id.

20. 260 N.C. at 20, 131 S.E.2d at 921.

21. Id. at 21, 131 S.E.2d at 922.

22. Id.
resulted in the reduction in relative size of the endowment from third to fifth in those years.\textsuperscript{23}

Next, the trustees presented additional evidence of the continued effects of inflation on both the trust and the operating expenses of the beneficiaries. The Endowment was producing a declining income, in terms of real purchasing power, at a time when the beneficiaries' costs of operation were sharply increasing.\textsuperscript{24}

In addition, the trustees asserted that the factors which had prompted Duke to favor the securities of Duke Power Company as investments for the Endowment were no longer operative because of circumstances unanticipated by the settlor. The company no longer produced power primarily by hydroelectric generators; it had produced ninety percent of its power output by such means in 1929 but only four percent in 1973.\textsuperscript{25} Thus the company, relying on steam-generated and nuclear power-generated energy, was no longer extensively developing the natural resources of the Carolinas as it once had done. In addition, an executive of the company testified that the capital needs of the company were now far too large to be supplied by the Endowment and that it scarcely mattered to the company whether the Endowment bought Duke Power stock or not.\textsuperscript{26}

Finally, the trustees pointed to the Tax Reform Act of 1969, a factor which obviously could not have been anticipated by Duke.\textsuperscript{27} Pertinent provisions of this act were designed to prevent control of a business corporation by a tax-exempt organization. The court found that the act would have the effects of (1) preventing the Endowment from purchasing any more Duke Power Company stock, (2), requiring a reduction of the holdings of the Endowment from 43.15 percent of the outstanding stock of Duke Power Company in 1973 to not more than 25 percent by 1979, and (3) requiring the Endowment to dispose of any Duke Power Company stock it might acquire from the Doris Duke Trust.\textsuperscript{28} Two results inexorably followed. The Endowment would no longer control the management of Duke Power Company in a manner contemplated by Duke, and the only investments permitted by the terms of the trust in lieu of Duke Power securities would be fixed, relatively low-yield government bonds.

\textsuperscript{23} 282 N.C. at 695, 194 S.E.2d at 773.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 698, 194 S.E.2d at 775.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 699, 194 S.E.2d at 775.
\textsuperscript{28} Id.
The court had little trouble agreeing with the findings of the trial court that contemporary conditions, "both existing and reasonably foreseeable, have created an emergency which threatens to defeat, in whole or in part, the purposes and objects of the Duke Endowment," and the court stated that it "must determine the intent of the settlor in order to fashion the proper remedy."

The court referred to the language of Cocke which stated that modification of a trust instrument requires more than a change of economic conditions. However it stated, "We have some doubt as to the efficacy of that statement where it is shown that the ravages of inflation and other economic pressures threaten to destroy the dominant purposes of a trust." The court noted that Cocke recognized the authority of the trustees to invest in Duke Power Company stock and and thereby counterbalance the effects of inflation and concluded that in the absence of this alternative, Duke would have broadened the trustees’ investment authority. On this point the judgment of the trial court was affirmed.

On the facts presented, the result in Davison is consistent with other cases. Although there was ample evidence of all the necessary elements for establishing the need for modification, the case did raise several interesting points.

The language that conditions "both existing and reasonably foreseeable have created an emergency" is clearly from section 3A:15-15 of the New Jersey Statutes, cited by the court. On its face the language of the statute goes substantially beyond the emergency jurisdiction ordinarily exercised by equity courts in protection of trust funds. The statute authorizes courts to modify trust terms merely on a showing that a change in circumstances which might defeat the purposes of the trust in whole or in part is now reasonably foreseeable. However, the New Jersey courts have interpreted the statute as merely codifying prior case law and have not ruled on the broader implications.

29. Id. at 700, 194 S.E.2d at 776. The language is that of the court, but its similarity to the language of N.J. STAT. ANN. § 3A:15-15 (1951) is apparent; for some possible implications of this fact, see text accompanying notes 34-38 infra.
30. 282 N.C. at 700, 194 S.E.2d at 776.
31. Id. at 701, 194 S.E.2d at 776.
32. Id. at 702, 194 S.E.2d at 777.
33. See authorities cited note 1 supra.
34. 282 N.C. at 700, 194 S.E.2d at 776 (emphasis added).
36. See id.; Morris Community Chest v. Wilentz, 124 N.J. Eq. 580, 3 A.2d 808 (Ch. 1939).
tion of the statute. Apparently there exists no case in any jurisdiction which has authorized modification absent an existing substantial change in circumstances, and the language of the court in Davison may be the strongest support available for an argument that in order to modify trust terms an existing change is not required under either the New Jersey statute or common law.

Another question raised by Davison is the present validity of the statement in Cocke that modification of trust terms requires more than a change of economic conditions. The court did not expressly overrule that portion of Cocke, but arguably little weight need be given to it by courts in future cases.

A more interesting question is whether Davison represents a trend toward greater liberality in applying the modification doctrine to specific facts. An examination of the cases, while not conclusive, seems to indicate that there may be such a trend. The authority of courts to modify or add to trust provisions is based on two broad doctrines. The first is the cy pres doctrine which is recognized in most jurisdictions. This doctrine is applied where a charitable trust would fail because the charitable purpose is either illegal, impossible, impracticable, or so vaguely stated as to cause the trust instrument to be unenforceable. The intent of the settlor is not followed where cy pres is applied, but where the settlor has evinced a broad charitable purpose, a purpose as nearly as possible to his intention is established by the court, and the trust is applied to that purpose.

The rule applied in Davison is different from cy pres but has been seen as analogous. Applied to both private and charitable trusts, it devolves from the traditional equity jurisdiction of courts over

38. The statement of the court that New Jersey law is substantially in accord with that of North Carolina, coupled with the emphasis placed on the language of the New Jersey statute, indicates that the court did not overlook the implications of the words "reasonably foreseeable." Moreover, the court did cite id. The court however, should have stated explicitly whether it intended to adopt a position which may be on the frontier of the law in this area.
39. Except for the effects of the Tax Reform Act of 1969, the evidence presented by the trustees was all indicative of economic change; quaere whether the case could have been decided differently had some economic conditions had the same effect as did the Tax Reform Act.
40. See generally IV A. Scott, supra note 1, § 399. Cy Pres is Anglo-French and is translated "as near"; the term is a shortening of "cy pres comme possible"—"as nearly as possible." For a history of the doctrine in North Carolina see Note, Trusts—Cy Pres Enacted in North Carolina, 46 N.C.L. Rev. 1020 (1968).
41. IV A. Scott, supra note 1, § 399.
the administration of trusts and has been stated as being necessary to
effectuate the intent of the settlor in cases where "slavish adherence to
the administrative limitations in the trust instrument"\textsuperscript{43} would defeat
that intent.

Several types of cases seem to call for an almost automatic ap-
plication of the rule.\textsuperscript{44} In other cases relief is granted by interpreting
the trust instrument in such a way to make modification unnecessary.\textsuperscript{46}
Relief will be denied in cases where it is impossible to determine that
the intent of the settlor is actually threatened, as when two primary pur-
poses are stated and only one is shown to be affected.\textsuperscript{46}

Where the provisions in question involve restrictions on the in-
vestment or alienability of trust property, there is little consistency in
the cases, but several factors may operate to allow modification.
Where real property is transferred in trust with provisions that it be
used only for specific purposes, it frequently becomes impractical or
impossible to use the property. Restrictions on alienability of real
property in a private trust may be held void as contrary to public pol-
icy.\textsuperscript{47} Even in cases dealing with charitable trusts the courts are
often influenced by the strong social interest in avoiding such re-
straints and seem to allow modification of such provisions on a show-
ing that the property cannot efficiently be used according to the trust

\textsuperscript{43} 150 Cal. App. 2d at 769, 310 P.2d at 1015.
\textsuperscript{44} One example is where investments specified in the instrument are impossible
to acquire; see \textit{In re} Flanagan's Estate, 199 Misc. 842, 107 N.Y.S.2d 5 (Sur. Ct. 1951).

Challenges to the validity of a will sometimes threaten testamentary trusts, and
the courts will allow modification of the terms of such trusts to permit out-of-court
settlement of the challenge and to protect the trust; see Sigmund Sternberger Foun-
dation, Inc. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); Redwine v. Clod-
felter, 226 N.C. 366, 38 S.E.2d 203 (1946). It is fairly apparent that a testator might
not anticipate such a challenge, and this is clearly a circumstance which threatens the
trust.

\textsuperscript{45} A typical example occurs where real property is transferred in trust with no
express power in the trustees to convey it to a third party. The courts will often find
power to convey implicit in the trust instrument where the purpose of the trust so re-
quires. \textit{See} II A. Scott, \textit{supra} note 1, § 167, at 1268 n.1.

\textsuperscript{46} Where the terms of the testamentary trust provided that income go to certain
beneficiaries and the corpus, on termination, to residuary legatees under the will of
the testator, it was held insufficient to show that changed conditions had reduced the
income. The court held that it was impossible to show that any specific level of in-
come was essential to the purposes of the testator and refused to allow investments
not sanctioned by the trust instrument. Hanover Bank v. Lamm, 21 Conn. Supp. 23,
142 A.2d 528 (Super. Ct. 1957); cf. Troost Ave. Cemetery Co. v. First Nat'l Bank,
409 S.W.2d 632 (Mo. 1966); Toledo Trust Co. v. Toledo Hosp., 174 Ohio St. 124,

\textsuperscript{47} \textit{See} Wachovia Bank & Trust Co. v. John Thomasson Const. Co., 275 N.C,
When the property involved is realty, it is also likely that economic factors make it easier to show that adherence to such terms will threaten essential trust purposes. If real property is kept at less than its most productive use under the terms of the trust, property taxes, maintenance, insurance, and other expenses may require a substantial portion of the income the property produces and may even jeopardize title to the property if the trust does not have the funds to pay the expenses. Finally, it is probable that changes in patterns of land use are more likely to be recognized by the courts as circumstances which the settlor had no reason to foresee and which, had he foreseen them, would have influenced the terms of the trust.

Where the subject of the trust is personalty, however, the courts have been reluctant to modify provisions regarding permissible investments. Provisions limiting the trustees' discretion with respect to investments, for example, often manifest the popular conception of an earlier era that common stocks were highly speculative investments and that fixed-yield bonds, mortgages, and other securities were the proper investments of a fund intended to produce a safe, steady income over many years. However, continuing inflation since World War II has eroded the value of these fixed-income investments, and the stock market is presently recognized as a much less speculative source of investments than it was before the advent of government regulations. The courts have shown a reluctance, however, to find that these economic changes were not contemplated by the settlor when he created the trust. Because most settlors have been successful in the business world and have had the advantage of expert invest-


50. In Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951), the court permitted a church to sell property which had been conveyed with instructions that it be used as a church site. The court found that the land could not be "advantageously" put to such use due to its shape and location. This case could have been decided under the *cy pres* doctrine except that at that time the doctrine was not recognized in North Carolina. See Note, 46 N.C.L. Rev., *supra* note 40, at 1022; cf. Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941).

51. See Carlick v. Keiler, 375 S.W.2d 397 (Ky. 1964); In re Mayo, 259 Minn. 91, 105 N.W.2d 900 (1960).

52. See 282 N.C. at 696-97, 194 S.E.2d at 774. See also cases cited note 51 *supra*; II A. Scott, *supra* note 1, § 167, at 1272.

53. In re Mayo, 259 Minn. 91, 97, 105 N.W.2d 900, 905 (1960). Several states define by statute permissible trust investments; the effect of these statutes is discussed in II A. Scott, *supra* note 1, § 167; Annot., 170 A.L.R. 1219 (1947).
ment advice and legal counsel, courts are reluctant to substitute their judgment for that of the settlor. This reluctance is evident in *Cocke.* However, as inflation continues at an unprecedented rate and over an increasing duration, the courts are less hesitant to agree that the settlor had no reason to foresee its effects.

A more difficult problem is the reluctance of the courts to find that the dominant purposes of the settlor are threatened by a lower rate of return than he anticipated or by over-concentration—by modern standards of trust management—of the trust funds in certain types of assets. Personality may continue to produce significant income even if it is kept from its most efficient use and even if the returns are eroded by inflation. Here too the courts may be beginning to focus more on the dominant intent of the settlor and to recognize that his purposes best can be given effect if the primary emphasis is placed on the income and security of the investment which he expected to provide rather than on the scheme by which those purposes were to be achieved.

If courts adopt the position that plaintiffs may be granted modification of trust terms on a showing that changes which are a reasonably foreseeable threat to essential trust purposes, there may be some reduction in the social costs which arise when trust terms remain in

---


55. *In re Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960), the court heard evidence that the settlor had lived through post-World War I inflation, the 1929 stock market crash, and the Great Depression without exercising a lifetime power to change the terms of trusts he created in 1917 and 1919. The court found, in spite of this evidence, that the settlor could not have anticipated the effects of the inflation of the post-World War II era.

56. This is particularly true of fixed-income bonds.


58. In our economic system maximum efficiency of capital allocation is achieved when money flows from a use which offers a low rate of return to one which offers a higher rate. The value of a particular investment is a function of the price society is willing to pay for the goods or services which result from the use of that capital by those in whose hands it is placed. Correspondingly, any restrictions of the free flow of capital result in misallocation of resources and a lower than optimum level of production.

Thus administrative provisions regarding the investment of trust corpus affect not only those who have an interest in the trust but also in a more indirect manner the entire economy. Courts have not focused, to any great extent, on the broader economic effects of these provisions, but considerations of public policy would seem to demand that these effects be a factor in the promulgation of rules of law which govern the investment of economic resources.

In England the beneficiaries of a private trust may terminate it at any time. This
effect after they have become impractical. The courts could then act in advance of actual harm to the beneficiaries or reduction of the corpus.

Continued willingness by the courts to find circumstances which even the most perceptive of individuals could not have anticipated some years ago will also allow more trusts to be administered efficiently. Increased recognition of the primary purpose of settlors and a willingness to modify terms which are now counterproductive will probably result in more cases in which the terms are altered to reflect modern conditions.

Social policies which produced the Rule Against Perpetuities and limitations on the enforceability of restraints on the alienability of real property support a rule which would permit the courts to modify terms on a showing that they are no longer practical or that they no longer have the effect which the settlor intended, even if the essential purposes of the trust are not threatened. 59

The Rule Against Perpetuities is stated as a rule against remote vesting of interests in property 60 although some statutes have stated the Rule in terms of a limitation on the duration of restraints on alienability of property. 61 In any case, the Rule actually serves two purposes. It not only places a limit upon the length of time in which the directions of a decedent or grantor may control the ownership of property, but it also limits the length of time in which his directions as to the use of the property may be given effect. Thus because an interest must vest within the period of the Rule, the ancillary restrictions on the use of the property must also terminate at some point. 62

In the case of provisions directing accumulation of trust income, there have been attempts to persuade the courts to recognize the dual function of the Rule and to apply to the duration of accumulations a

rule obviates the need for courts to alter trust terms in many cases where they have become detrimental to the interests of the beneficiaries, see IV A. Scott, supra note 1, § 337.

59. Such a rule might be expressed in terms of a maximum duration within which such terms would be given effect. A better rule would permit the court to modify such terms on a showing that they no longer bear a reasonable relationship to the primary purposes of the settlor as expressed in the trust instrument.


61. See I A. Scott, supra note 1, § 62.10.

62. This assumes that the interest vests in a natural person and not in a legal entity having indefinite duration.
different period from that required by the Rule.\textsuperscript{58} So far these arguments have not been successful,\textsuperscript{64} but in view of the fact that social, political, and economic changes are occurring at a vastly accelerated rate, the courts may have to recognize that the right of a person to provide for the prudent management of his property may be of less importance than his right to decide who should receive the beneficial use of the property. Therefore the courts may have to apply a different rule to limit the time during which obviously obsolete administrative provisions are given effect.

Where the Rule Against Perpetuities does not operate there is an even more compelling argument for recognizing the need for limiting the duration of administrative provisions in trusts. Charitable use of property has been defined as use so beneficial to society that the law gives it perpetual effect.\textsuperscript{65} However, the benefits which accrue to society from charities do not require that administrative provisions of charitable trusts permanently be given effect. The courts do recognize that restrictions on administration in an instrument which creates a charitable trust may be void as against public policy where there are unreasonable periods of accumulation of income.\textsuperscript{10} The language of one case indicates that it is the impossibility of any person's being able adequately to provide for the use of his property at a point in the distant future which brings the rule into operation and not any policy against postponement of charitable use of property per se.\textsuperscript{67}

\textsuperscript{63.} See Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941), cert. denied, 315 U.S. 824 (1942).

\textsuperscript{64.} Id. However, several states have had statutes which applied a different period; see 6 AMERICAN LAW OF PROPERTY §§ 25.100-.118 (A.J. Casner ed. 1952); L. Simes & A. Smith, THE LAW OF FUTURE INTERESTS § 1466 (2d ed. 1956). There has been a wholesale abandonment of these statutes; see J. Ritchie, N. Alford & R. Efland, DECEDES ESTATES AND TRUSTS ch. 16, § 5 (4th ed. 1971). In England any directions to accumulate income for any period are not binding; IV A. Scott, supra note 1, § 401.9.

\textsuperscript{65.} See IV A. Scott, supra note 1, § 368.

\textsuperscript{66.} See Estate of James, 414 Pa. 80, 199 A.2d 275 (1964) (accumulation for a period of four hundred years held unreasonable and void as against public policy). \textit{But cf.} Penick v. Bank of Wadesboro, 218 N.C. 686, 12 S.E.2d 253 (1940) (ninety-nine year period of accumulation sustained).

By statute in New York, accumulations are subject to a court determination of "reasonableness, amount, and duration"; see N.Y. EST., POWERS & TRUST LAW § 8-1.1(e) (McKinney 1967). \textit{See also} Glasser, Trusts, Perpetuities, Accumulations, and \textit{Powers Under the Estates, Powers and Trusts Law}, 33 BROOKLYN L. REV. 551 (1967). Social policy considerations favoring limitation on accumulations are also evident in the Tax Reform Act of 1969.

\textsuperscript{67.} Estate of James, 414 Pa. 80, 190 A.2d 275 (1964). That North Carolina courts may be ready to accept the contention that modern society cannot continue to allow traditional rules to operate where they result in restricting the use of property
CONCLUSION

While few courts will be willing to change the long-established rule regarding the modification of trust terms, more frequent changes in economic conditions will probably dictate that it be more liberally applied. However, the rule itself may be too restrictive, and a new rule may be required which gives greater weight to economic efficiency and the interests of beneficiaries than to the judgment of a long dead settlor.

STEVEN KROPELNICKI, JR.

Property—Wills—The Resurrection of Revocation by Subsequent Marriage

In 1967 the General Assembly amended section 31-5.3 of the North Carolina General Statutes and significantly altered the effect of a testator’s marriage on a previously executed will. Since 1844 the law had provided that a marriage revoked all prior wills, but under the present provision no revocation occurs. In the case of In re Will of Mitchell, 19 N.C. App. 236, 238, 198 S.E.2d 233, 234 (1973), the law was modified to allow the surviving spouse to dissent from a will made prior to marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage.

2. Act of Jan. 9, 1845, ch. 88, § 10, [1844] N.C. Sess. Laws 128. Prior to the enactment of the Act of April 29, 1953, ch. 1098, § 5, [1953] N.C. Sess. Laws 1025, this provision was designated N.C. GEN. STAT. § 31.6. The statute as it existed before 1967 provided for two exceptions to its requirement for revocation: (1) if the will was executed in contemplation of marriage; (2) if the will was made under a power of appointment. Neither of these exceptions is applicable to the Mitchell case, In re Will of Mitchell, 19 N.C. App. 236, 238, 198 S.E.2d 233, 234 (1973).
3. N.C. GEN. STAT. § 31-5.3 (Supp. 1973). The language of the statute as amended is as follows: Will not revoked by marriage; dissent from will made prior to marriage. —A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may dissent from such will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage.
Mitchell, the North Carolina Court of Appeals was presented with its first opportunity to construe the new law, and in so doing the court breathed new life into the old statute which had supposedly been laid to rest by the legislature.

Levi Mitchell executed a will in January 1963 which devised his entire estate to his seven children by his second wife. After Mitchell's death in 1972 the trial court, relying on section 31-5.3 as amended, admitted the will to probate, but the court of appeals reversed, ruling that the will had been revoked immediately upon the testator's marriage in November 1963 to his third spouse.

On its face, this decision seems to be in direct conflict with the clear intent of the legislature as expressed in the 1967 amendment. The amendment specifically states that the law is applicable to the wills of all persons dying after October 1, 1967. Although a majority of jurisdictions recognize a presumption that a statute does not apply retroactively to prior wills, this presumption is overcome if a contrary legislative intent is evident. Wording identical to that used in the 1967 amendment has been previously interpreted to indicate the required legislative intent to permit retroactive operation. In view of this expressed intent as well as the general principle that wills are ambulatory and assume significance only at death, it appears that the validity of the Mitchell will should have been controlled by the amended version of section 31-5.3. However, in order to analyze properly the Mitchell decision, one must examine not only this par-

5. Id. at 238-39, 198 S.E.2d at 234-35.
6. Id. at 237, 198 S.E.2d at 233.
7. Id. at 238, 198 S.E.2d at 234.
8. Id. at 240, 198 S.E.2d at 235.
11. 1 W. BowE & D. PARKER, supra note 10, at § 3.4; see Mordecai v. Boylan, 59 N.C. 365 (1863).
12. In re Spain's Estate, 327 Pa. 226, 193 A. 262 (1937). This court construes the language "shall apply to the wills of all persons dying on or after" said day as legislative direction that the act shall have retroactive effect.
13. E.g., In re Bennett, 180 N.C. 5, 11, 103 S.E. 917, 920 (1920).
15. It is interesting to note however that N.C. GEN. STAT. § 31-46 (1966) states, "A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator." No cases have been found interpreting the application of this statute to situations in which the applicable laws were different.
icular statute, but also North Carolina's basic policy concerning will revocation and revival.

The North Carolina law on revival of a revoked will is set out in section 31-5.8 of the North Carolina General Statutes. The statute provides that after a will is revoked "in any manner," it may be revived only by an additional written instrument executed with the same formalities required for execution of a will. Furthermore, the section contains no limitation as to the type of revocation to which it applies, and therefore it controls the revival of a will revoked by operation of law in the same manner as it controls a will revoked by an affirmative act of the testator. Although section 31-5.8 was not adopted until 1953, the North Carolina Supreme Court had set forth the requirement for revival of a will revoked by operation of law as early as 1859. In Sawyer v. Sawyer the court declared, "[A] holograph will revoked by the marriage of the testator, can only be revived and republished by a written instrument setting forth his intention . . . ."

Arguably, a jurisdiction which permits revival by revocation of the revoking instrument should also allow revival by revocation of the revoking law, but the North Carolina courts have refused to accept the former method of revocation, and therefore the analogy in favor of the latter method does not apply. Thus it seems clear in North Carolina that an act of revocation is complete at the instant the event causing revocation occurs. See N.C. Gen. Stat. § 31-5.1 (1966).

17. Id.
18. Id.
19. In re Will of Mitchell, 19 N.C. App. 236, 239, 198 S.E.2d 233, 235 (1973); accord, In re Estate of Berger, 198 Cal. 103, 110, 243 P. 862, 865 (1926) in which the court stated: "The rules of law applicable to the reviving of wills revoked by the act of the makers are equally applicable to the reviving of wills revoked by act of law . . . for in either case the will . . . is of no effect until new life is given to it." Affirmative acts of the testator which effect revocation include physical destruction, execution of an inconsistent subsequent will, and express revocation by written instrument. See N.C. Gen. Stat. § 31-5.1 (1966).
22. Id.
23. Id. at 139-40.
vocation occurs, and accordingly the will is thereafter in all respects void unless and until revival is accomplished in accordance with section 31-5.8.

Although the issue presented in *Mitchell* was one of first impression in North Carolina other states have made identical decisions on similar facts. In *Wilson v. Francis*, the Virginia Supreme Court aptly stated the position adopted in *Mitchell* as follows:

> [T]he fact that a will is ambulatory and speaks as of the maker's death does not preclude the General Assembly from enacting laws which revoke and declare a nullity an existing will upon the occurrence of a specified event such as marriage. After such a revocation, unless the will is revived in a manner prescribed by law, the will never speaks.

The Illinois Supreme Court, reviewing a similar statutory amendment, stated that even if the final section of the law indicated a legislative intent to make the law apply retroactively, it could not be interpreted to revive non-existing, that is, void instruments. This view had previously been adopted by the North Carolina Supreme Court with respect to a statutory change that might have revived an expired deed of gift. In refusing to give validity to the deed, the court determined that void instruments could not be revived by curative acts of the legislature.

A few decisions in other jurisdictions have held wills valid when there has been a subsequent marriage as well as a change in the law in favor of the will's validity. However, in these cases the prior statutory provisions had specified a conditional revocation only, which did

---


27. 208 Va. 83, 155 S.E.2d 49 (1967). It is interesting to note that the Virginia court refused to permit revival by revocation of the revoking law even though it had previously accepted revival by revocation of the revoking instrument. *See note 24 supra* and accompanying text.

28. 208 Va. at 87, 155 S.E.2d at 51.


31. Id. at 466, 20 S.E.2d at 377.

not actually become effective at the date of the marriage.\textsuperscript{88} For example, in \textit{In re Derrauau's Estate},\textsuperscript{34} the prior law required the wife to survive the testator before revocation occurred.\textsuperscript{86} Thus since this law was not in effect at the testator's death, no revocation had been effected.\textsuperscript{86} The North Carolina Supreme Court has taken similar action in constructing a pretermitted heir statute.\textsuperscript{37} The court applied the law in effect at the testator's death,\textsuperscript{38} but again the prior statute had not specified revocation but rather ensured a share of the estate for the after born child before testamentary distribution began.\textsuperscript{39} These cases stand for the proposition that a will is ambulatory, but they deal with instances in which no absolute revocation had occurred and are therefore clearly distinguishable from the \textit{Mitchell} situation.

Although the revival statute and legal precedent appear to dictate the result achieved in \textit{Mitchell}, it is necessary to consider whether the decision accomplished the basic objective of will interpretation—to carry out the intent of the testator.\textsuperscript{40} The facts in \textit{Mitchell} indicate that the only affirmative statement of the testator's intent was the 1963 will. In cases in which revocation has occurred by physical act or written instrument, the revocation represents an additional manifestation of intent by the testator, and section 31-5.8 is designed to ensure that the second and most recent expression of intent is not supplanted by the discarded will as a result of accident or mistake.\textsuperscript{41} To secure

\begin{itemize}
\item \textsuperscript{33} See cases cited note 32 supra. It must be noted here that in \textit{Redmond} and in \textit{Holmes} the revocation provided for in the prior statute was not conditional but absolute. However, these cases were decided by a surrogate's court in reliance on the \textit{Gaffken} decision, without distinguishing the basic difference between them. For a discussion of these cases see 20 U. Va. L. Rev. 242 (1933-34).
\item \textsuperscript{34} 133 Cal. App. 769, 24 P.2d 865 (1933).
\item \textsuperscript{35} \textit{Id.} at —, 24 P.2d at 865. The amended statute in this case provided that the prior will was revoked only to the extent necessary to protect the surviving spouse. \textit{Id.} However, the North Carolina Supreme Court has ruled that a subsequent marriage revokes a prior will \textit{in toto}. Thus in North Carolina there seems to be no possible argument that such a will retained validity after a marriage occurring before Oct. 1, 1967. \textit{In re Will of Tenner}, 248 N.C. 72, 102 S.E.2d 391 (1958).
\item \textsuperscript{36} 133 Cal. App. at —, 24 P.2d at 865.
\item \textsuperscript{37} Wachovia Bank & Trust Co. v. McKee, 260 N.C. 416, 132 S.E.2d 762 (1963).
\item \textsuperscript{38} \textit{Id.} at 418, 132 S.E.2d at 764.
\item \textsuperscript{39} The statute applied by the court is N.C. GEN. STAT. § 31-5.5 (1966). This statute was designated § 31-45 prior to 1953. The entire chapter was revised in that year. \textit{See} Act of April 29, 1953, ch. 1098, § 7, [1953] N.C. Sess. Laws 1026.
\item \textsuperscript{40} “This Court has repeatedly held that the intent of the testator is the polar star that must guide the courts in the interpretation of a will.” McCain v. Womble, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965); \textit{see} 7 J. STRONG, N.C. INDEX 2d \textit{Wills} § 28 (1968).
\item \textsuperscript{41} \textit{See} Rudisill's Ex'r v. Rodes, 70 Va. (29 Gratt.) 147, 150 (1877). This case interprets the original English Statute of Wills and the Virginia revival statute which is similar to the North Carolina provision.
\end{itemize}
this objective the statute requires a formal written instrument to revive the previously revoked will. Since revocation by subsequent marriage occurs by operation of law, there is no second manifestation of the testator's intent. Furthermore, revocation by operation of law is simply a legislative judgment which carries out what the legislature believes to be expectations of the average person as well as a legislative desire to provide for the financial security of surviving spouses. The second of these objectives is accomplished by other statutory measures, and therefore it does not justifiably thwart the testator's intent. With respect to the first objective, the legislature has now altered its opinion of the expectations of the layman by the amended statute. Therefore a rigid application of section 31-5.8 to a revocation by operation of a law, now set aside, protects neither an affirmative expression of the testator's intent nor a current legislative judgment of that intent. On the contrary, the only existing expression of intent is rendered void.

However, it is possible to argue that the knowledge that his will was revoked by his marriage should be imputed to the testator, and therefore since he did not take the opportunity to re-execute the will, he must have intended that the will remain void. However, this position is untenable because if the testator is charged with knowledge of the prior provision, one must also assume that he was aware of the amendment and reasonably believed that as a result of it, his will would be valid at his death. Both of these suppositions are highly speculative, and thus it is not surprising that such considerations were not articulated in the Mitchell opinion.

The Mitchell decision does have long range significance since the holding effectively rules out the application of the present section 31-5.3 to the wills of persons who hereafter die with testamentary instruments executed under circumstances similar to those of Levi Mitchell. To be specific, the will had to be executed prior to October 1, 1967, a marriage of the testator had to occur after the execution of the will

42. N.C. GEN. STAT. § 31-5.8 (1966).
46. Id. § 31-5.3 (Supp. 1973).
47. The court however has declared that there is a presumption that a testator did not intend to die intestate. E.g., Quickel v. Quickel, 261 N.C. 696, 700, 136 S.E.2d 52, 55 (1964).
but before October 1, 1967, and the testator must die after October 1, 1967. Under these circumstances the will is not admissible to probate, and without a change to section 31-5.8 or an additional provision which addresses this particular problem, it is not foreseeable that the court will alter its position.

Two factors militate against any legislative action to change the result: first, the facts are so narrowly defined that it is unlikely that the issue will be raised with any frequency; secondly, persons who might be injured by the result and whose financial protection warrants legislative concern are otherwise protected by the statutory provision for intestate succession.48

In conclusion, even though the Mitchell decision fails to carry out the best existing expression of the testator's intent, it appears that the court of appeals was required to act as it did because of the statutory requisites for revival of wills and the legal precedent requiring rigid adherence to these requirements. In the early decision of Sawyer v. Sawyer49 the North Carolina Supreme Court ruled that revocation is not ambulatory, and in In re Will of Mitchell, the court of appeals has wholeheartedly affirmed this principle.50

IRVIN WHITE HANKINS III

Torts—Wrongful Death—The Courts Begin Interpretation of the New Statute1

In 1969 the North Carolina General Assembly enacted a new wrongful death statute that apparently was intended to expand the measure of recoverable damages for wrongful death.2 In 1973 the

48. N.C. Gen. Stat. § 29 (1966). This provision ensures that close relatives (particularly children) will receive some share of the estate and will thus not be excluded completely even if the will is deemed invalid.
49. 52 N.C. 134, 138 (1859); see In re Estate of Crohn, 8 Ore. App. 284, —, 494 P.2d 258, 259 (1972); 2 W. Bowe & D. Parker, supra note 10, at § 21.87.
50. 19 N.C. App. at 239, 198 S.E.2d at 235.

North Carolina appellate courts in two separate cases began what will certainly be a long and arduous process of interpreting the statute and resolving its inconsistencies. The North Carolina Supreme Court in *Bowen v. Constructors Equipment Rental Co.* examined the extent to which the life expectancies of beneficiaries limit the recovery of damages. The court in dicta also commented on the conjectural elements of determining recovery, the definition of net income, double recovery under the state's wrongful death and survival actions, the continued vitality of the state's survival action, and the plight of decedent's creditors. The North Carolina Court of Appeals in *Forsyth County v. Barneycastle* held that the new wrongful death statute had effectively repealed the survival statute, and thus it denied decedent's creditors access to any substantial share of the awarded damages—a decision diametrically opposed to the dicta in *Bowen* that intimated that the legislature probably did not intend such a result.

*Bowen* and *Barneycastle* do not purport to fully interpret the new statute, but they seem to offer some insights into the more controversial aspects of the statute.

(a) Damages recoverable for death by wrongful act include:

1. Expenses for care, treatment and hospitalization incident to the injury resulting in death;
2. Compensation for pain and suffering of the decedent;
3. The reasonable funeral expenses of the decedent;
4. The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
   i. Net income of the decedent,
   ii. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
   iii. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to persons entitled to the damages recovered;
5. Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
6. Nominal damages when the jury so finds.
(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

5. 283 N.C. at 421, 196 S.E.2d at 807.
THE CASES

Howard Bowen, Jr., age seventeen, was electrocuted at a construction site while helping to move large sections of pipe. The administrator sued for wrongful death and sought damages pursuant to sections 28-173 and 28-174 of the North Carolina General Statutes. Proof of the age of the victim and the beneficiaries (the victim's mother and father) was offered at trial. In accordance with section 28-174(a)(4), the judge instructed the jury that recovery for loss of the "present monetary value" of the decedent was limited to the monetary value of net income, services, and companionship that the persons entitled to the recoverable damages (i.e., victim's mother and father) could have reasonably expected to receive from the decedent. The court gave instructions on the decedent's life and work-life expectancy but never specifically mentioned that the computation of damages was also limited by the life expectations of the beneficiaries. After the verdict was rendered, the trial court, recognizing that the failure to instruct on the beneficiaries' life expectancies was reversible error, granted a new trial on damages. The plaintiff appealed, and the court of appeals affirmed. The supreme court also affirmed, holding, as have the majority of jurisdictions using the "loss to the beneficiaries" measure of damages, that recovery of the "present monetary value" of the decedent (no matter how measured) is determined by using the life expectancy of the decedent or the last surviving beneficiary, whichever is shorter.

The court also commented in dicta on three aspects of the new statute. First, despite the overlap of items recoverable under the sur-

---

8. 283 N.C. at 396, 196 S.E.2d at 791.
9. This is the most troublesome of the new subsections because it defines recovery in terms of what the beneficiaries reasonably could have expected to receive.
10. The same language appears in N.C. GEN. STAT. § 28-174(a)(4) (Supp. 1973) and includes net income, services, protection, care and assistance, society, companionship, comfort, guidance and kindly offices, and advice.
11. 283 N.C. at 404, 196 S.E.2d at 796.
13. Damages in wrongful death actions fall generally into two categories—"loss to the estate" and "loss to the beneficiaries." Until the statute was revised in 1969, North Carolina was a "loss-to-the-estate" jurisdiction. Thus the life expectancies and reasonable expectations of the beneficiaries were irrelevant. For excellent general discussions of the different types of statutes, see Comment, Wrongful Death Damages in North Carolina, 44 N.C.L. REV. 402 (1966).
15. 283 N.C. at 420, 196 S.E.2d at 806.
vival and wrongful death statutes16 "a defendant may not be required to pay these elements of damage twice."17 Secondly, the two actions should be consolidated for trial with separate issues submitted to the jury.18 Finally, although the wrongful death statute clearly exempts all recoveries except funeral and five hundred dollars of medical expenses from decedent's creditors, the General Assembly did not intend to deprive creditors of access to wrongful death damages where those damages overlapped with damages recoverable in survival actions.19 The court thereby implied that the survival statute would continue in full effect—an intimation which the court of appeals overlooked twenty-six days later when it apparently repealed the survival statute in Forsyth County v. Barneycastle.20

In Barneycastle an elderly woman, who was afflicted with terminal cancer and whose only source of income was public assistance from Forsyth County, was killed in a car accident and died nine days later. Decedent's only beneficiary under the laws of intestate succession was her married daughter who resided hundreds of miles away and who seldom saw her mother. Decedent's administrator filed suit, and an 18,000 dollar settlement was reached with the driver's insuror. Forsyth County claimed the settlement should be treated as a recovery under the survival statute,21 and thus subject to the county public welfare assistance lien. The administrator resisted, claiming that the recovery was completely within the new wrongful death statute and thus was not subject to the lien but rather deliverable intact to the sole beneficiary, less funeral and limited hospital expenses.22 Since section 2 of the 1969 bill23 revising the wrongful death statute provided for repeal of any conflicting laws, the Barneycastle court held that the wrongful death statute, as strictly construed, had repealed the survival action, and it declined to search for legislative intent to the

16. Medical expenses, pain and suffering, and punitive damages, absent the decision in Barneycastle, would appear to be recoverable in either a survival or wrongful death action. See N.C. GEN. STAT. § 28-172 (1966); id. § 28-174(a)(1), (2), (5) (Supp. 1973).
17. 283 N.C. at 421, 196 S.E.2d at 807.
18. Id.
19. Id.
22. Five hundred dollars of hospital and medical expense recovery is subject to the claims of those creditors. Id. § 28-173 (Supp. 1973). This section was not amended in 1969.
The supreme court surprisingly denied certiorari. The results in this case were first to deny a creditor's claim against the recovery in order to deliver an arguable "windfall" to the beneficiary and, secondly, to eliminate the thorny problem of apportioning the settlements previously recoverable only under the survival statute (e.g., medical expenses and pain and suffering) and those recoverable under the wrongful death statute (e.g., loss of income, services, and companionship to the beneficiary) as was required prior to the new statute.

CONJECTURE, RECOVERY FOR COMPANIONSHIP, AND THE BURDEN OF PROOF

Traditionally, wrongful death damages have been limited to pecuniary loss (whether to the estate or to the beneficiaries). The modern trend, however, is to allow recovery for non-pecuniary losses despite the speculation and conjecture involved in valuing loss of companionship and services. Until 1969 North Carolina was a strict pecuniary-loss-to-the-estate jurisdiction. Recovery was usually denied for the wrongful death of young minors, housewives, the handicapped, and the elderly either because they generated no "net income" or pecuniary worth or because their projected earnings were too speculative. Immediately after the 1969 law there was justified concern that the courts would continue to disallow recovery for non-pecuniary loss. Nevertheless, it appears the supreme court will allow re-

24. 18 N.C. App. at 516-17, 197 S.E.2d at 578-79.
25. 283 N.C. 752, 198 S.E.2d 722 (1973). In Bowen, the supreme court said they would decide the issue of repeal when squarely faced with it but then surprisingly rejected the chance in Barneycastle.
26. Before Barneycastle, commentators had seen apportionment of overlapping damages between the two causes of action as a major obstacle in reconciling future effects of the two statutes. Note, 48 N.C.L. Rev., supra note 1, at 602.
28. Dobbs § 8.4, at 558; Prosser 3d ed. 930-31; Comment, 44 N.C.L. Rev., supra note 13, at 597. This trend is a predictable one, especially in the South where a number of states allow mental anguish recoveries in other tort suits. Dobbs, supra.
32. The court could have disallowed such recovery on any of three theories: (1) that loss of society was really beneficiaries' mental anguish—a disfavored type of deriv-
covery for services and companionship, as have the majority of loss-to-the-beneficiary jurisdictions.

Closely tied to this "conjecture" problem is a second "conjecture" problem—the plaintiff's burden of proving how much of the benefit generated by the decedent (whether pecuniary or non-pecuniary) would have actually reached the beneficiaries. Under the old statute the plaintiff needed to prove only the pecuniary loss to the estate, which was computed by subtracting reasonable and ordinary living expenses from the projected earnings of the decedent had he not been wrongfully killed. Under the new statute the plaintiff must prove how much of this "net income" would have found its way into the hands of the beneficiaries. Commentators have differed on whether this requirement would increase the plaintiff's burden of proof.

Proof of the amount of benefits, whether pecuniary or non-pecuniary, that would have reached the beneficiaries depends on the closeness of the relationship between the decedent and the beneficiaries. At least in the case of a "normal" seventeen-year-old decedent with a "normal" family relationship, the proof offered to establish both types of benefits would be identical. As a practical matter, the

ative suit; (2) that plaintiff will always fail to prove the value of these nebulous qualities to the beneficiaries; (3) that historically courts have feared recovery for such immeasurable losses because they have little way of testing excessiveness of damages. Lauerman, supra note 1, at 234. See also DOBBS § 8.4, at 557-58; PROSSER 3d ed. 930; SPEISER § 3:19, at 132-33.

33. In endorsing the recovery of non-pecuniary loss the court said: No rule is prescribed for the measurement or ascertainment of the damages recoverable under paragraph (4). It would be difficult, if not impossible, to formulate a rule of general application for the measurement of such damages. Recovery for these items will vary from case to case according to the age of the deceased and the age of the person entitled to receive the damages recovered and their relationship with the deceased. Since the persons entitled to the damages recovered may have suffered substantial losses on account of these items of damage, we cannot say there can be no recovery for these items of damages because no yardstick for ascertaining the amount thereof has been provided. Damages recoverable under paragraph (4) would be as capable of exact ascertainment as damages for pain and suffering and mental anguish in a personal injury action ....

283 N.C. at 419-20, 196 S.E.2d at 805-06.

34. SPEISER § 3:42 and cases cited therein.


37. This refers to the hypothetical raw "units" of benefits found to pass to the beneficiaries. Valuing these "units" (whether income, services, or companionship) is the entirely different problem of conjecture mentioned above.

38. The proof of income flow to the beneficiary may be different than proof of non-pecuniary benefits in certain cases—e.g., an invalid whom the decedent supported but never contacted.

39. Generally, these would be relative ages, association between parties, physical
general family relationship may be established as routinely as was the future income potential of the decedent under the former wrongful death act. Therefore since Bowen involved a "normal" seventeen-year-old decedent and family and since the flows of pecuniary and non-pecuniary benefits through the family relationship were apparently identical, it would be expected that the plaintiff would meet or fall short of meeting his burden of proof on both issues equally. The Bowen opinion disagrees.

The court postulates that since the decedent could have married and since in that case the parents would probably have received little of decedent's net income, they should receive no damages under the pecuniary loss section. Obviously, the plaintiff cannot prove this would not have happened, and therefore he will fail to meet the burden of proof on pecuniary loss. The court, however, was quick to point out that with the very same offers of proof the plaintiff could meet the burden as to nonpecuniary losses by proving that the deceased and beneficiaries enjoyed more than a casual and infrequent association.

Therefore the court admits that under the new statute the plaintiff will get the "services and companionship" issues to the jury in the case of a minor decedent and meet his burden of persuasion with a minimum of proof and often receive a substantial recovery while recovery for "loss of net income" may fail for lack of proof. This may appear to be an anomalous result since it seems difficult as a matter of policy to justify discouraging recovery under section 28-174(a)(4) proximity, health, family history, and individual habits. This requirement certainly could not be considered over-burdensome and has been met rather systematically in other jurisdictions. See Speiser §§ 3:25-:31, :42-:44.

40. 283 N.C. at 420, 196 S.E.2d at 806. 41. Much has been written about the types and methods of proof in this area. Although a discussion of these factors is beyond the scope of this note, the subject is covered in Speiser § 3; Page, Damages for Wrongful Death—Broadening View of Pecuniary Loss, 30 NACCA L.J. 217 (1964), in 1 Damages in Personal Injury and Wrongful Death Cases 383 (S. Schreider ed. 1965).

42. 283 N.C. at 420, 196 S.E.2d at 806. The intimation in Bowen, frowning upon such speculative recovery of net income, conflicts with the general climate of more relaxed requirements of proof in this area. See Speiser § 3:24. The great weight of authority allows substantial damages despite their speculative nature. See, e.g., Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96 (1961); Speiser § 4:17, at 325 n.9.

43. In Bowen, the plaintiff proved the decedent's age, educational future, health, appearance, and relationship with his family.


45. Of course, where the situation justifies it, both pecuniary and non-pecuniary loss will be recoverable (e.g., the wrongful death of a middle-aged father supporting a family).
(i) (net income) because the beneficiaries' receipt of any of the net income of a minor is purely speculative, while recovery for lost services and companionship, a far more speculative element, is encouraged. Nevertheless, this anomaly may be explained since by a "preponderance of probabilities" it is more likely that the average, healthy minor will marry, have children, and pass little of his earnings on to his parents than it is that the minor will cease his contact and "society" with them. Other jurisdictions have been less willing to foreclose recovery for net income merely on grounds of probability.46

By discouraging attempts to recover under the net income measure, courts would "force" the plaintiff to seek a significant recovery for loss of companionship. This may be undesirable, however, since the courts do not have clear standards by which to determine whether such recoveries would be excessive.47 Therefore even though the factual probabilities may weigh heavily against net income recovery in certain cases, the North Carolina courts as a matter of policy may not want to discourage the net income avenue. Other courts have found it easier to justify invalidating a net earnings recovery as excessive since there is a mathematical facade of reasonable lifetime earnings on which to rest the decision.48 This approach is more acceptable than merely saying that the companionship "just was not worth that much."

It bears repeating here that the Bowen court only offers its opinion as to the failure of proof on the net income issue and clearly limited this opinion to the case of a minor.49 The court may well revise its apparent encouragement of society and companionship recoveries after tangling with the excessive award issue. In any case, it seems clear that a plaintiff who cannot mathematically prove a loss of income should now expect a chance for a substantial recovery without an overbearing burden of proof, whether it be called net-income loss or companionship loss.50

46. See generally Dobbs § 8.4, at 561-62.
47. See generally id. § 8.3, at 557.
48. Id. § 8.4, at 561; Prosser 3d ed. 931.
49. If the decedent were an adult with a steady income and life-style, the burden of proof on the net income issue could be met easily. See Speiser §§ 4:1, :12-:15.
50. If the plaintiff can prove actual loss of income, the mathematical parameters of his proof may insure a substantial award, while substantial recovery for loss of companionship will rest almost totally with the whims of the jury. So even though there is a very fundamental distinction between net income and loss of companionship recoveries in terms of the probability of recovery, a plaintiff who cannot prove loss of income mathematically (as in Bowen) will still have a chance at substantial recovery based on the whims of the jury.
NET INCOME DEFINED

Prior to the 1969 Act the measure of “net pecuniary worth” was probable gross earnings of the deceased for the remainder of his life, had he not been killed, minus his personal expenses. Until Bowen the courts had not defined “net income” in section (a)(4)(i) of the new statute. Commentators pointed out there was no necessity for equating net income with net pecuniary worth especially since there were at least two other definitions of net income (future accumulations and gross earnings) in use in other jurisdictions.

However, the Bowen court implied in dicta that net income will be equated with net pecuniary loss. The determination of how much of this net income would have reached the beneficiaries is, of course, a new problem for the courts, and the North Carolina Supreme Court recognizes that this determination must be made on a case-by-case basis since no mathematical answer is available.

LIFE EXPECTANCIES—LIMITS OF RECOVERY

As mentioned above, the only holding in Bowen was the limitation of the recovery under section (a)(4) to the shorter of either the decedent’s normal life expectancy or that of the last surviving beneficiary. Although the decision was one of first impression in North Carolina, the great majority of jurisdictions using the “loss-to-the-beneficiaries” measure of damages have imposed such a limit. In Bowen this limit would drastically impair recovery under the net income section because the beneficiaries (parents) were much older than the seventeen-year-old deceased.

52. Note, 48 N.C.L. Rev., supra note 1, at 956. For a discussion of the other possible definitions (future accumulations and gross earnings), see Speiser § 3:53.
53. 283 N.C. at 420, 196 S.E.2d at 805-06.
54. Id.; see note 42 supra.
55. 23 N.C. at 420, 196 S.E.2d at 806. The court in Bowen also decided that a jury instruction was required on the beneficiary life expectancy limitation. The plaintiff had argued that the limitation was obvious from the mere reading of section (a)(4) to the jury and required no separate instruction. An analysis of the sufficiency of such instructions is beyond the scope of this note. For surveys of the relevant elements of proof and elicitation thereof, see 4 Am. Jur., Proof of Facts 71 (1960); Speiser § 3:43.
The life expectancy limit applies to lost services and companionship as well as net income. However, its application to lost income and services may be circumvented since the jury will ultimately be fairly free to value lost companionship no matter how short the period of loss.

**Double Recovery**

The 1969 Act permits recovery for two elements of damages that previously were covered only by the survival statute: "expenses for care, treatment, and hospitalization incident to the injury resulting in death" and "compensation for pain and suffering of the decedent." Since the case law prior to *Barneycastle* had held that the survival and wrongful death statutes grant two distinct causes of action and that damages must be pleaded and determined separately, double recovery had seemed possible. The court in *Bowen* flatly states that there will be no double recovery. The court implies that in the future the two causes of action will have to be either joined in one complaint or consolidated for trial with separate issues submitted to the jury. This can be accomplished by joinder of suits under Rule 19 of the North Carolina Rules of Civil Procedure or perhaps by applying the merger principle in which the personal representative must bring his entire action in a single suit or have the remainder merged with the original judgment.

---

57. Since the new statute was intended to expand recoveries rather than contract them, the inability to recover for net income loss of a minor in *Bowen* under the new statute (an element clearly recoverable under the old wrongful death statute) is a rather harsh and ironic result. See Byrd, supra note 1, at 804.

58. See text accompanying notes 46-48 supra.

59. Actually, this is another application of the "two-level approach" of denying recovery at the front door by short beneficiary life expectancies but allowing substantial recovery through the back door by juries' freedom to value companionship. See generally Dobbs, § 8.4, at 561.


63. No matter which procedural method is selected, the North Carolina Supreme Court has made it clear that as a matter of policy there will be no double recovery due to overlapping elements of damages. 283 N.C. at 421, 196 S.E.2d at 807. Practitioners should be forewarned that procedural and theoretical arguments (e.g., about the two distinct causes of action), once viable, see, e.g., Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969), probably will carry little weight with the court when double recovery is possible.

64. Cf. Gaither Corp. v. Skinner, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955);
Another solution to the problem of double recovery is to give full effect to section 2 of the 1969 Act which states: "All laws and clauses of laws in conflict with this act are hereby repealed." This approach was adopted by the court of appeals in Barneycastle. The Barneycastle decision is not based on policy grounds but rather on what the court termed the clear and unambiguous language of the statute.

If Barneycastle is interpreted to repeal fully the survival action, the decision will have several major effects. First, it will prevent decedent's creditors from reaching the recovery other than for reasonable funeral expenses and up to five hundred dollars of medical expenses since wrongful death recoveries are property of the beneficiaries and not decedent's estate as in the survival action.

Secondly, the statute of limitations on what were historically elements of recovery under survival actions will be substantially extended. Thirdly, since the beneficiaries under the two statutes may be different, the intestate heirs will now receive the damages that

Allison v. Steele, 220 N.C. 318, 326, 17 S.E.2d 339, 344 (1941); Bruton v. Carolina Power & Light Co., 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1940); Blume, Required Joinder of Claims, 45 Mich. L. Rev. 797 (1947). However, merger was held not to apply in Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946), because a judgment on one cause of action does not merge into a separate cause of action. But since that decision was based partly on the premise that damages did not overlap, and since damages now do overlap, one basis for that denial of merger arguably has disappeared. See Comment, 48 N.C.L. Rev., supra note 1, at 601 (first espoused the merger theory).

67. Certain language in the opinion could be read to limit the repeal to only those elements of the survival action that were recoverable in the Barneycastle case. Even by so limiting the opinion, the only survival element remaining would be income lost between the injury and death. 18 N.C. App. at 516, 197 S.E.2d at 577-78.
68. Byrd, supra note 1, at 802-03; Note, 48 N.C.L. Rev., supra note 1, at 601.
70. The statute of limitations begins to run when the cause of action accrues. Causey v. Seaboard Air Line Ry., 166 N.C. 5, 81 S.E. 917 (1914); N.C. Gen. Stat. § 1-15 (Supp. 1973). Since the wrongful death action accrues at the time of death, unlike the survival action which accrues at the time of the death-causing injury, the elements of damages once recoverable only in a survival action would be recoverable under the longer statute of limitations of the wrongful death action. Absent the Barneycastle decision, overlapping elements of recovery may have required apportionment between the survival and wrongful death actions, thereby creating a serious problem in applying the statutes of limitations.
71. Survival recoveries become assets of the estate while wrongful death recoveries go to the decedent's intestate heirs and next of kin. See Dobbs § 8.2, at 552-53.
previously had gone to the beneficiaries of the estate. Finally, since damages for wrongful death do not include earnings lost before death and injuries that did not cause death, these elements, previously recoverable in a survival action, will be unrecoverable.72

The issue of whether a wrongful death statute has repealed a survival statute appears to be one of first impression,74 and it is unlikely that its final disposition will turn on whether the supreme court should strictly construe the statute (thereby practically eliminating the survival action) or begin a dubious search for legislative intent. These methods of decision generally conceal underlying policy determinations.75 Thus a number of considerations must be examined by the court.

First, other jurisdictions have denied creditors a share of the recovery.76 Secondly, prospective business creditors77 recognize the possibility of a wrongful death of the debtor just as they do the possibility of his accidental death. It is a factor creditors might consider in choosing debtors and setting charges. Previously such creditors set prices with the knowledge that damages in a survival action were accessible to creditors. If creditors know they cannot reach such recoveries, they will merely adjust their charges or rates accordingly. Thus there is no reason to allow the administrator to prosecute what amounts to a derivative suit for the benefit of creditors, which forces the tortfeasor to

73. See p. 960 supra.
74. This commentator has been unable to locate such a problem in other jurisdictions in either statutory or decisional law, and the briefs in Barneycastle cited no precedent for the decision.
75. The court easily can go either way on the question of strict construction versus legislative intent (after deciding those policy issues) by relying on the court of appeals citations, 18 N.C. App. at 517, 197 S.E.2d at 578-79, for the first proposition, or United States v. Missouri Pac. R.R., 278 U.S. 269 (1929), for the second. That decision reads in part: "[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Id. at 278 (emphasis added). The court could state simply that the statute does lead to "impractical consequences" and thereby avoid strict construction.
77. North Carolina's "net income" measure of pecuniary loss in survival and wrongful death actions has always prevented the beneficiaries from receiving funds the decedent would have paid to his non-business creditors because "net income" is the decedent's projected gross earnings less such creditors' claim (ordinary living expenses). See Note, Damages—Wrongful Death—Evidence of Improvident Attitude of Decedent, 28 N.C.L. Rev. 106, 107 (1949).
subsidize part of the creditors' costs of doing business. Thirdly, the beneficiaries' recovery may not include any of the business creditors funds at all. If the decedent had lived, the funds reaching the beneficiaries would have been net income less the amounts the decedent would have paid business creditors. Since the statute allows recovery of only the amounts that would have reached the beneficiaries, the tortfeasor rather than the beneficiaries may be "holding" the creditors' funds. Therefore business creditors should be barred from sharing in the beneficiaries' recovery because the measure of damages does not include the value of business creditors' claims. Fourthly, pain and suffering often compose a large part of the survival recovery. Since this element of recovery and the purposes it serves have been criticized, it is questionable whether payment of creditors' claims should depend upon the generosity of the jury. Lastly, no matter how large the recovery in a wrongful death case, if the tortfeasor can not pay the total damages, the beneficiaries will suffer to the extent of the uncollected amount. The barring of creditors' claims prevents the collected award from further depletion before it reaches the beneficiaries and thereby minimizes their loss due to the tortfeasor's weak financial position.

Repeal of the survival action would be a consistent application of the policy of preserving the recovery for the beneficiaries. The limited resources of the tortfeasor would be allocated to the beneficiaries, while the "loss" would fall first upon the creditors who can treat the "loss" as an increased cost of doing business. Although the resolution of these issues is more a legislative than a judicial function, legislative inaction may force the North Carolina Supreme Court to consider them. Neither Bowen nor Barneycastle conclusively decide the fate of the survival statute and creditors' claims under it. Nevertheless, these cases should put creditors and administrators on fair notice of the uncertainty in this area of the law.

78. The governmental creditor in Barneycastle had no choice in "extending credit" to the victim. However, since there was no lost income, pain and suffering would be the main element of survival recovery and arguably whether the government or tortfeasor should carry the financial burden should not turn on proof of pain and suffering.


80. See generally id. § 8.1, at 544-45, 550.

81. This same result will accrue if the tortfeasor with insufficient resources is forced to pay part of a survival action recovery rather than funneling all his resources into the wrongful death damages.

82. The "loss" in this case would be the lesser of the amount of creditors' claims and the amount of the tortfeasor's deficiency.
The last element of damages in a survival action, loss of income between date of injury and date of death, is not recoverable in an action for wrongful death. The facts in Barneycastle did not involve this measure of damages since the decedent was elderly, and the court arguably did not decide whether the survival action would remain as to that item of recovery. Therefore such lost income, as well as damages for injuries not causing death, may still be recoverable in a survival action and thus subject to creditors because neither element conflicts with the damage elements of the new wrongful death statute.

The best solution is neither the repeal or partial repeal of the survival statute, nor a futile search for legislative intent, but rather legislative revision.

**LEGISLATIVE REVISION**

The North Carolina Supreme Court, the court of appeals, and several commentators have called for legislative revision of the statute. The status of the survival action should be determined by the legislature without passing the "bungled buck" to the judiciary through a neat repealer clause. The inequity of allowing "uninjured" beneficiaries to share in recoveries should be corrected by amending section 28-173 to limit distribution of recoveries to only the "damaged" beneficiaries. The position of creditors should be clearly delineated, and if the legislative intent is to exclude creditors, this can easily be accomplished by legislative repeal of section 28-172 and addition of the last remaining survival element to the list of wrongful death damages. The supreme court seems reluctant to act and justifiably so; it is clearly a legislative matter. Without such legislative attention, the "generosity" of the 1969 General Assembly in attempting to do equity may well have been in vain.

ROBERT SHERWOOD LILIEN

---


84. If a father, supporting two sons and having a third son with whom he never associates, is wrongfully killed with the current statute in effect, the two supported sons ("injured" beneficiaries) must share a recovery based upon their loss with the third son ("uninjured" beneficiary) since all three sons are equal intestate takers.

85. This may be inferred from the denial of certiorari in Barneycastle, 283 N.C. 752, 198 S.E.2d 722 (1973).

86. Lauerman, supra note 1, at 234.