Survey of Developments in North Carolina Law, 1979

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SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1979*

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* This Survey discusses significant decisions handed down in 1979 by the North Carolina Supreme Court, the North Carolina Court of Appeals, and federal courts construing North Carolina law, and also discusses legislation passed in 1979.

Provisions of the North Carolina General Statutes are referred to in text as G.S.

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I. Administrative Law

A. Workers' Compensation Law

1. Compensable Injuries

a. Occupational Disease

To recover under the North Carolina Workers' Compensation Act, the claimant must show that an injury or death resulted from either an accident arising out of and in the course of employment or an "occupational disease as defined by the Act." The North Carolina Supreme Court in 1979 broadly construed the occupational disease provisions to make coverage for them more comprehensive.

In Booker v. Duke Medical Center, the supreme court reversed a decision by the court of appeals and upheld an award to the dependents of a laboratory technician who died after contracting serum hepatitis from blood samples he tested in the laboratory. The court of appeals had concluded that because serum hepatitis is a disease caused by a single exposure to a virus rather than one that develops gradually over a long period of time, it is not a compensable occupational disease. In upholding the award to Booker's dependents, the court re-

2. Id. § 97-2(6).
3. Id. § 97-53. G.S. 97-53 contains a list of 27 specific diseases that qualify as compensable occupational diseases and one "catch-all" provision, § 97-53(13), which provides coverage for "[a]ny disease... which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." Id. § 97-53(13).
6. Serum hepatitis is an inflammation of the liver caused by a virus which is transmitted when blood from a person infected with the disease is introduced into the blood of another. 297 N.C. at 462, 256 S.E.2d at 192.
7. Booker worked as a technician in the Clinical Chemistry Laboratory from October 25, 1966, until early July, 1971, during which time he performed various chemical analyses on blood samples that were often infected with serum hepatitis. He ran the tests manually and routinely spilled blood on his fingers. On July 3, 1971, Booker developed symptoms and was diagnosed as suffering from serum hepatitis. After the diagnosis Booker ceased his work with the blood samples and began work in the lab as an electrical engineer, but due to his illness he was unable to continue work at all. On October 15, 1973, his physician certified that he was unable to work. Booker died on January 3, 1974. Id. at 462-63, 256 S.E.2d at 192.
8. 32 N.C. App. at 192, 231 S.E.2d at 192-93.
9. Booker had filed a claim in his own behalf with the Industrial Commission in October, 1973, but because of his death the case was removed from the hearing docket. His dependents then filed a claim for death benefits in December of 1974. Id. at 462, 256 S.E.2d at 192.

The supreme court rejected the conclusion of the court of appeals that the dependents' claim was governed by the statute in effect prior to July 1, 1971, when Booker contracted the disease. Because the dependents' right to compensation is a right separate and distinct from the employee's
jected this reliance on the early definition of "occupational disease,"¹⁰ which stressed the requirement of gradual development, and declared that G.S. 97-53(13)¹¹ "is to be interpreted independently of any prior right and does not become enforceable until after the employee's death, Wray v. Carolina Cotton & Woolen Mills, 205 N.C. 782, 172 S.E. 487 (1934), the dependents' claim should be governed by the law in force on the date of the employee's death. 297 N.C. at 467, 256 S.E.2d at 195.

The court also rejected the argument that Booker's death came too late for compensation. Under G.S. 97-38, compensation for dependents of a deceased employee is allowed only "[if] death results proximately from the accident and within two years thereafter, or while total disability still continues . . . within six years of the accident." N.C. GEN. STAT. § 97-38 (1979). Defendants argued that the date of the "accident" should be construed to mean the date of contracting the disease. The court disagreed, concluding that the date of the "accident" should be construed as the date on which disablement occurs. 297 N.C. at 483, 256 S.E.2d at 204; see IB A. LARSON, WORKMEN'S COMPENSATION LAW § 39.50 (1980). For an elaboration on this construction, see Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); text accompanying notes 22-31 infra. The court then concluded that since Booker was paid his full salary at least through October 1, 1973, that date was the earliest possible date of disablement. 297 N.C. at 483, 256 S.E.2d at 204.

The court criticized the restriction in the statute as "sometimes having the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time." Id. at 483, 256 S.E.2d at 205. Professor Larson also criticizes these types of restrictions. IB A. LARSON, supra, § 41.80.

In another 1979 case, the court of appeals construed a second restriction contained in G.S. 97-38. Section 97-38 on its face limits death benefits to no more than $80 per week. The status of the limitation has been in some doubt since 1973 when the legislature amended another section of the Act, G.S. 97-29, which provides for compensation for total incapacity. Section 97-29 provides that "[i]f death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38." N.C. GEN. STAT. § 97-29 (1979). The 1973 amendment to § 97-29 provides for the amount of compensation under that section to be calculated by means of a formula. The amount of compensation as determined by the formula may exceed $80 and will vary depending on the average weekly wage of the employee. Law of April 3, 1974, ch. 1103, § 1, 1973 N.C. Sess. Laws 234 (codified at N.C. GEN. STAT. § 97-29 (1979)). The question was thereby raised whether this amendment to G.S. 97-29 applied to G.S. 97-38 as well, so as to no longer limit death benefits to $80 per week.

In Andrews v. Nu-Woods, Inc., 43 N.C. App. 591, 259 S.E.2d 306 (1979), an employee was injured in an accident arising out of and in the course of his employment and died as a result of those injuries. The Hearing Commissioner applied the 1973 amendments to G.S. 97-38 and determined that decedent's dependents were entitled to $158 per week for 400 weeks. The court in Andrews affirmed the award over a dissent by Chief Judge Morris and held that the amendment applies to G.S. 97-38 so that the plaintiffs in this case are not limited in their recovery to $80.00 per week. The amendment says it "shall apply to all provisions of this Chapter." This would include G.S. 97-38. To say that G.S. 97-38 is not governed by this amendment would, we believe, be contrary to the will of the General Assembly as expressed in the plain words of the statute. Id. at 592, 306 S.E.2d at 307.¹²

¹⁰. The court of appeals relied on Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951), in which occupational disease is defined as "a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over time. It is the cumulative effect of a series of events that causes the disease." 32 N.C. App. at 192, 231 S.E.2d at 192 (quoting Henry v. Leather Co., 234 N.C. at 130-31, 66 S.E.2d at 697. For similar definitions see Watkins v. Murrow, 253 N.C. 652, 661, 118 S.E.2d 5, 11-12 (1961), and MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 777, 9 S.E.2d 595, 599 (1940).

¹¹. Since serum hepatitis is not among the diseases specifically enumerated in G.S. 97-53, it must fall within the broad provisions of § 97-53(13) to be compensable.
The court recognized that early definitions of occupational disease were often drawn narrowly because the statute at that time generally provided no recovery for such diseases, and thus to classify an injury as an occupational disease was to deny compensation. These definitions, if allowed to persist, would defeat the legislative purpose of the current statute which does provide comprehensive occupational disease coverage.

Having rejected the prior definitions of occupational disease, the court in Booker turned to the interpretation of the language of G.S. 97-53(13). In order to be compensable, an occupational disease must be "characteristic of and peculiar to a particular trade, occupation or employment." The court interpreted a disease to be "characteristic of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question" and rejected the argument that a disease must be unique to an injured employee's profession before it can qualify for coverage. The court

12. 297 N.C. at 472, 256 S.E.2d at 198.
13. Occupational diseases were not even covered by the Act until 1935 and even then, and for more than 30 years thereafter, only a few specified diseases were covered. See generally Note, Development of North Carolina Occupational Disease Coverage, 7 WAKE FOREST L. REV. 341 (1970-71).
14. See 297 N.C. at 471, 256 S.E.2d at 197.
15. As the court in Booker points out, to embrace the older definitions as did the court of appeals would be to repeal part of the current version of G.S. 97-53 since at least three of the diseases specifically listed by the statute as being occupational diseases would not fall within the narrow definition adopted by the lower court. Id. at 471, 256 S.E.2d at 198. Professor Larson also warns against placing too much reliance on the older definitions. See 1B A. LARSON, supra note 9, §§ 41.32, .40 (1979).
17. Id.
18. 297 N.C. at 472, 256 S.E.2d at 198.

The court also rejected defendant's contention that even if serum hepatitis is "characteristic of and peculiar to" Booker's employment, the disease is still not compensable since serum hepatitis is an "ordinary disease of life." See N.C. GEN. STAT. § 97-53(13)(1979). The court agreed that serum hepatitis is an ordinary disease of life in that members of the general public may contract the disease, but noted that the statute only precludes recovery for ordinary diseases of life "to which the general public is generally exposed," id., and that "the public is exposed to the risk of contracting serum hepatitis to a far lesser extent than was Mr. Booker." 297 N.C. at 475, 256 S.E.2d at 200. See also 1B A. LARSON, supra note 9, § 41.33, at 7-376 (1979).
found the necessary link between the job of laboratory technician and the disease serum hepatitis.\textsuperscript{20}

Another issue raised by the statutory expansion of coverage for occupational diseases is which version of the statute applies when an illness extends over a period of several statutory amendments. The North Carolina Supreme Court faced this issue in \textit{Wood v. J.P. Stevens \& Co.}\textsuperscript{21} In \textit{Wood} a cotton mill worker alleged that she contracted byssinosis\textsuperscript{22} prior to July 1, 1958 and became permanently disabled on November 12, 1975.\textsuperscript{23} The Industrial Commission denied compensation on the ground that the case was governed by the 1958 version of G.S.

\begin{footnotesize}
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\textsuperscript{20} & 297 N.C. at 474, 256 S.E.2d at 199. The court noted in summary of the evidence that Booker’s employment required him to manually test blood samples, that while running these tests he routinely spilled blood on his fingers, that he came into contact with blood samples infected with serum hepatitis at least once a day, and that two physicians testified that Booker was exposed to a much greater risk of contracting the disease than the general public or other hospital employees. \textit{Id.} See generally Note, Occupational Diseases and the Hospital Employee—A Survey, 5 Mem. St. U.L. Rev. 368 (1975).\textsuperscript{4}


\textsuperscript{22} & Byssinosis is defined as “Cotton-mill fever, an occupational respiratory disease of cotton, flax, and hemp workers. It is characterized by symptoms (especially wheezing) most severe at the beginning of each work week.” \textit{Stedman’s Medical Dictionary} 207 (4th unabr. lawyer’s ed. 1976).

\textsuperscript{23} & 297 N.C. at 638, 256 S.E.2d at 694.
\end{tabular}
\end{footnotesize}
97-53(13)\textsuperscript{24} and that under that version byssinosis was not a compensable occupational disease.\textsuperscript{25} The court of appeals, with Judge Mitchell dissenting, affirmed the denial of compensation.\textsuperscript{26} Concluding that the Commission and the lower court erred in applying the 1958 version of the statute, the supreme court reversed. The court held that the statute in effect on the date of disability should govern\textsuperscript{27} and remanded to the Industrial Commission for a determination of when plaintiff became disabled.\textsuperscript{28}

The holding that the employee's right to compensation is governed by the statute in effect on the date of disability is, as the court points out, clearly consistent with the statutory scheme of coverage for occup-
pational diseases. 29 G.S. 97-52 provides that "[d]isablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident." 30 Because in North Carolina compensation for accidental injury is determined according to the law in effect at the time of the injury, 31 "it follows that the employee's right to compensation in cases of occupational disease should be governed by the law in effect at the date of disablement." 32 The court recognized that some jurisdictions 33 have refused to adopt this construction where the statute providing compensation did not become effective until after the employee terminated his employment on the grounds that such a construction would allow an impairment of contract. 34 The court, however, said:

[t]he proper question for consideration is not whether the amendment affects some imagined obligation of contract but rather whether it interferes with vested rights and liabilities. . . .

An employee has no right to claim compensation in occupational disease cases until disablement occurs; and, until that date, the employer is exposed to no liability. Consequently, applying the law in effect at the time of disablement to a claim arising from that dis-

29. Id. at 644, 256 S.E.2d at 698.
32. 297 N.C. at 644, 256 S.E.2d at 698. Professor Larson also argues that the date of disability should determine which statute governs the compensation of an occupational disease. 4 A. LARSON, supra note 9, § 95.21 (1979). Cf. 1B id. § 39.50 (when it is difficult to fix a specific date for an accident, the date on which disability manifests itself should be used).
34. 297 N.C. at 648, 256 S.E.2d at 700.
ablement does not involve a retroactive application of the law.\textsuperscript{35}

The result reached by the court in \textit{Wood} is another encouraging sign that the North Carolina courts are endeavoring to construe liberally the Workers' Compensation Act so as to provide genuinely comprehensive benefits to employees who are crippled or killed by occupational diseases. The ruling will enable many seriously ill employees, who might have been denied significant benefits under the interpretation adopted by the court of appeals to receive benefits that are more in proportion to the magnitude of their loss.\textsuperscript{36}

\textsuperscript{35} \textit{Id.} at 650, 256 S.E.2d at 701.

\textsuperscript{36} A recent decision by the North Carolina Court of Appeals indicates, however, that the courts are drawing some lines in the area of occupational disease coverage. In Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872, cert. denied, 297 N.C. 301, 254 S.E.2d 921 (1979), plaintiff was a hair stylist who had been employed by defendant for over three years. \textit{Id.} at 30, 251 S.E.2d at 873. She developed contact dermatitis from her exposure to the various chemicals she used in her work and was forced to quit her job. \textit{Id.} Within 30 days her skin had returned completely to normal and she was physically able to return to any work not involving chemicals. \textit{Id.} Plaintiff was unable to find other work, however, and sought disability compensation. \textit{Id.}

The Commission found that plaintiff had suffered a compensable occupational disease under the catch-all language of G.S. 97-53(13) and awarded her temporary disability payments for the 30 days that the contact dermatitis persisted. The Commission concluded, however, that because plaintiff was physically sound after the disease was cured, although unable to find work, she had suffered no compensable disability after that time. \textit{Id.} at 31, 251 S.E.2d at 873.

The court of appeals affirmed the Commissioner’s ruling, stating that “in order to be compensable, plaintiff’s ‘disability’ must result from an occupational disease. In the present case, there is no evidence whatsoever that . . . plaintiff’s incapacity to earn wages was the result of an occupational disease; rather, it was the result of her personal sensitivity to chemicals used in her work.” \textit{Id.} at 32, 251 S.E.2d at 874. The court distinguished Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972), in which claimant was a stonecutter who was forced to quit because he contracted silicosis from his exposure to silica during his employment. The Commission found claimant to be fully incapacitated even though he had only a 40 percent medical disability. The \textit{Sebastian} court noted that in \textit{Mabe} “it was clear that plaintiff’s incapacity to earn wages was the result of his having silicosis, which in turn was a result of his work. Furthermore, there is a radical difference between silicosis and the skin condition of plaintiff in the present case.” 40 N.C. App. at 33, 251 S.E.2d at 875.

While the line drawn by the court is a fine one, it is arguably justified at least on the ground that in \textit{Mabe} the claimant was in fact faced with significant medical disability even after he quit work while claimant in \textit{Sebastian} was perfectly healthy. The argument could be made, however, that even this distinction does not justify the result because “disability” under the Act is defined in terms of wage-earning power and not physical well-being. “The term ‘disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” N.C. GEN. STAT. § 97-2(9) (1979).

Nevertheless, given the wording of the statutory definition of disability, which speaks of incapacity \textit{because of injury} and not incapacity because of susceptibility to conditions in a particular job, \textit{id.}, the court’s interpretation is understandable. Any expansion of occupational disease coverage to encompass a fact situation such as the one in \textit{Sebastian} would better be left to the legislature. For an example of such a statute, see N.Y. WORK. COMP. § 37 (McKinney 1965), in which disability is defined as “the state of being disabled from earning full wages at the work at which the employee was last employed.” \textit{Id.} (emphasis added)
b. By Accident Arising out of and in the Course of Employment

In addition to recovering for an occupational disease, a claimant may recover by showing that an injury resulted from an accident arising out of and in the course of employment. The basic and indispensable ingredient of 'accident' is unexpectedness. In addition, North Carolina, along with a majority of jurisdictions, requires that there be unusual exertion before an injury can be classified as "accidental." In Reams v. Burlington Industries, the North Carolina Court of Appeals illustrated the unworkable nature of this minority rule.

In Reams, plaintiff showed that his normal duties consisted of lifting bales of cloth weighing seventy to eighty pounds onto a measure graft, inspecting them, and then lifting the bales off the graft. Plaintiff normally inspected no more than thirty bales of cloth per day. On one occasion, however, plaintiff was asked to perform an absent employee's duties that consisted of removing the bales of cloth from an inspection table and placing them on a pallet. Plaintiff moved over one hundred bales of cloth in two hours before he was unable to continue due to what was later diagnosed as a ruptured intervertebral disc. The Commission found that plaintiff's injury "did not result from an accident as the word "accident" is defined [in the Act], as there was no interruption of the plaintiff's work routine, and he was merely performing his usual and normal duties in the customary manner.""
The court of appeals affirmed the Commission's ruling that "[plaintiff's] injury was not caused by any particular movement, exceptional weight or other circumstances which could constitute an 'unlooked for and untoward event' or a 'fortuitous cause.'" While there is arguable case support for the court's decision, there is an overwhelming amount of authority in North Carolina that suggests a different result.

The usual/unusual dicotomy that North Carolina continues to stress is of dubious value, as the majority of American jurisdictions have recognized. This becomes even more apparent upon examination of the decisions in the area that point in various directions and cannot be reconciled. As the case law now stands, a court could un-

49. Id. at 57, 255 S.E.2d at 588.
50. The court relied on Russell v. Pharr Yarns, Inc., 18 N.C. App. 249, 196 S.E.2d 571 (1973), in which plaintiff was also denied compensation. Plaintiff in Russell was a "doffer and creeler," a position that required her to hang cones of yarn on defendant's machines. She was reaching down to remove cones of yarn from a box in front of her when she was injured. The two cases are clearly distinguishable: In Russell, plaintiff was doing her usual job in the usual way; in Reams plaintiff was doing a different job, albeit one involving the same bales of cloth. For other cases denying recovery to employees doing their usual jobs in the usual way, see Laurence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Hensley v. Farmers Fed'n Co-op., 246 N.C. 274, 98 S.E.2d 289 (1957); Curtis v. Carolina Mechanical Sys., Inc., 36 N.C. App. 621, 244 S.E.2d 690 (1978); Smith v. Burlington Indus., Inc., 35 N.C. App. 105, 239 S.E.2d 845 (1978).

There is, however, more persuasive authority supporting the court's result. For example, in Rhinehart v. Roberts Super Mkt, Inc., 271 N.C. 586, 157 S.E.2d 1 (1967), a stock boy who usually loaded cases of canned goods onto a "float" by himself was injured when he twisted to hand cases to a fellow employee who was on this occasion helping him load the float. The court held there had been no "accident" and denied compensation.


There is even authority for the proposition that an injury incurred while doing a normal job in a usual way is a compensable accident. See Glace v. Pilot Throwing Co., 239 N.C. 668, 80 S.E.2d 759 (1954).

52. See 1B A. LARSON, supra note 9, § 38.00 (1980).

Professor Larson has three major criticisms of the usual/unusual distinction:

[1] its assumption that the accidental character must be found in the cause rather than the result. . . .

[2] the assumption that whatever is unusual is accidental. This, whether one takes the everyday colloquial meaning or the most technical dictionary meaning, is simply not true. . . .

[3] the unworkability of the . . . distinction in practice. The distinction assumes that there is a quantum of exertion or exposure in any occupation which is usual or normal—an assumption which is questionable at best, and certainly difficult to apply.

Id. §§ 38.61-63, at 7-145, -148, -150.
doubtedly find support for any result it wanted to reach on the “usual/unusual” issue.

In another 1979 case, the supreme court considered the circumstances under which an accident will be deemed to arise “in the course of employment.” In *Martin v. Bonclarken Assembly*, a fifteen-year-old boy drowned in a lake on his employer’s premises during his lunch hour. The young man was swimming in the lake in violation of regulations requiring a swimming test before entering certain areas of the lake and forbidding swimming while the lifeguard was off duty. Reversing an award to the boy’s dependents, the supreme court concluded:

[w]hen deceased jumped into the deep water of the lake during his lunch hour . . . [he] was acting outside the scope of his employment, in contravention of specific instructions from his employer, and . . . he had no reasonable grounds to believe otherwise. . . . The risk of his drowning during the lunch hour in a lake he was forbidden to enter at that time was a risk foreign to his employment.

The result in *Martin* would be easier to understand if the boy was in fact acting in violation of express prohibitions from the employer. It is difficult, however, to find a violation of an express prohibition. The employees received no instructions one way or the other on the availability of the lake for swimming. In addition, a posted sign was silent on the regulation prohibiting swimming when the lifeguard was off duty. Although the sign did set out the regulation prohibiting swimming beyond the chained area without a swimming test, the forbidden areas of the lake were not clearly marked, at least to someone unfamil-


55. A swimming test was required before entering the lake’s deep area, demarcated by a floating chain. The lifeguard was on his lunch break when decedent dove into the lake and drowned. 296 N.C. at 545, 251 S.E.2d at 406.

56. *Id.* at 545-46, 251 S.E.2d at 406.

57. As Professor Larson points out, “[v]iolations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.” 1A A. LARSON, *supra* note 9, § 31 (1979).

58. 296 N.C. at 541, 251 S.E.2d at 404.

59. In any event, the sign indicated that a lifeguard was on duty *all day* until 4:30 p.m. when in fact he was off duty during the noon hour. *See id.* at 542, 251 S.E.2d at 403.
While it is clear that young Martin was in violation of certain regulations regarding the use of the lake by employees, it also seems clear that he received little if any instructions on those regulations. The decision in *Martin*, then, appears to shift from the employer to the employee the burden of responsibility concerning employee knowledge of regulations governing the use of the employer's premises. Consequently, an employee must take care to educate himself as to those regulations and cannot hold his employer responsible for providing that education for him.

2. Sole Proprietors and Partners

The North Carolina General Assembly in 1979 expanded the scope of the Workers' Compensation Act to reach sole proprietors and partners of a business. The statute provides that

Any sole proprietor or partner of a business whose employees are eligible for benefits under the Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

The statutory amendment extends coverage to a significant number of workers whom the courts were generally unwilling to include in the absence of an express statutory provision.

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60. Martin was outside the chained-in area of the lake, but he was apparently within a roped-in area when he drowned. *Id.* Martin had not been seen in the lake before the date of his death. 296 N.C. at 545, 251 S.E.2d at 406.
63. There are two serious obstacles to such an extension of coverage by judicial decision. The first is that a partnership is not, except for a few specific purposes, an entity separate from its members. Therefore, since the partnership is nothing more than the aggregate of the individuals making it up, a partner-employee would also be an employer. The compensation act cannot be supposed to have contemplated any such combination of employer and employee status in one person. . . .

Even if the conceptual difficulty of lack of legal entity in the partnership could be surmounted, there would remain a more stubborn obstacle, which is the fact that in any ordinary partnership each partner has by law an equal share in management, and is therefore in actual possession of the powers of the employer. Unless he has contracted away these powers, which he can theoretically do, he is as much the employer as anyone can be, not as a matter of conceptual reasoning but as a matter of actual functions and rights.
3. Discharge After Compensation

In response to the court of appeals' refusal to recognize the theory of retaliatory discharge, the North Carolina General Assembly enacted a statute designed to protect workers' compensation claimants from discharge or demotion by their employers. The statute states that "[n]o employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding." An employer's violation of the statute will subject him to liability for reasonable damages suffered by the employee as a result of the wrongful discharge and will entitle the wrongfully discharged employee to be reinstated to his former position. The statute also sets out certain affirmative defenses available to the employer and certain actions deemed not to be violations.

The amendment to the Act should ensure that employees who suffer compensable injuries will not forego their statutory remedies for fear of employer retaliation. North Carolina joins a growing number of jurisdictions that have passed legislation to deal with the problem of

1A. Larson, supra note 9, §§ 54.31-32, at 9-197, -202 (1980).

The courts' reluctance to extend coverage to partners and sole proprietors in general should be distinguished from allowing a partner or sole proprietor to recover benefits for himself on the theory of estoppel. Under this theory, which the North Carolina courts have not been reluctant to apply, a workers' compensation insurance carrier can be estopped to deny that an individual is covered by an insurance policy if the carrier represents to that person that he is in fact covered, or if the carrier considered the individual to be an "employee" when computing the employer's insurance premium. See e.g., Aldridge v. Foil Motor Co., 262 N.C. 248, 136 S.E.2d 591 (1964); Pearson v. Newt Pearson, Inc., 222 N.C. 69, 21 S.E.2d 879 (1942); Garrett v. Garrett & Garrett Farms, 39 N.C. App. 210, 249 S.E.2d 808 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).


Law of June 1, 1979, ch. 738, § 1, 1979 N.C. Sess. Laws 806 (codified at N.C. GEN. STAT. § 97-6.1 (1979)).

Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of an employer's property; or for failure to meet employer work standards not related to the Workers' Compensation Claim; or malingering; or embezzlement or larceny of employer's property; or for violating specific written company policy of which the employee has been previously warned and for which the action is a stated remedy of such violation.

Id. § 97-6.1(c).

"The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation of this section." Id. § 97-6.1(e).
4. The Powers of the Industrial Commission

The extent of the North Carolina Industrial Commission’s authority to reconsider a decision by a commissioner or deputy commissioner was challenged in *Lynch v. M.B. Kahn Construction Co.* In *Lynch* a deputy commissioner awarded plaintiff permanent partial disability compensation for an injury he found to have been caused by an accident arising out of and in the course of plaintiff's employment. On appeal by defendant, the full Commission, pursuant to G.S. 97-85, ordered on its own motion that the case be remanded to take additional evidence on causation. From that order the defendant petitioned the court of appeals for writ of certiorari to review the Commission's order. Defendant argued that the Commission had exceeded its authority under G.S. 97-85 by ordering that new evidence be taken because no “good ground” to seek new evidence, as required by the statute, had been shown. Therefore, the Commission should have reversed the deputy commissioner's award as being unsupported by the evidence.

The court of appeals, however, refused to place any restrictions on

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72. *Id.* at 128, 254 S.E.2d at 237.

73. If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. N.C. Gen. Stat. § 97-85 (1979).

74. Plaintiff had presented evidence at the initial hearing to show that he had slipped and fallen at work and had struck his hip on a piece of lumber. He did not report the fall to his foreman until four days after the accident because he originally thought that he had not been hurt. He was operated on approximately two weeks later to remove a ruptured disc. The deputy commissioner refused to allow the medical expert at the hearing to testify as to what in his opinion caused plaintiff's injury, but the doctor did go on to testify that the condition could have been caused by factors other than a blow or fall. 41 N.C. App. at 127-28, 254 S.E.2d at 236-37.

75. Defendant's appeal from the order of the Commission was dismissed by the court on the ground that no appeal lies from an interlocutory order of the Commission. *Id.* at 129, 254 S.E.2d at 237. See *Vaughn v. Department of Human Resources*, 37 N.C. App. 86, 245 S.E.2d 892 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979). The court, however, granted defendant's petition for certiorari. 41 N.C. App. at 129, 254 S.E.2d at 237.

76. Defendant argued that plaintiff had failed to present any competent medical evidence of a causal connection between the accident and his ruptured disc and that, therefore, no “good ground” was shown justifying the Commission to receive further evidence. *Id.* at 129-30, 254 S.E.2d at 237-38.
the power of the Commission to review an award by a commissioner or deputy commissioner. The court, going beyond prior decisions construing the scope of the Commissioner's power to hear new evidence, held that the powers granted to the full Commission by G.S. 97-85 "are plenary powers to be exercised in the sound discretion of the Commission" and that decisions of the Commission would not be reviewed on appeal "absent a showing of manifest abuse of discretion." Finding no abuse of discretion in the case at bar, the court affirmed the Commission's order.

B. Environmental Law

1. Toxic and Hazardous Substances

In the wake of the heavily publicized PCB dumping incident in...
North Carolina in 1978, the North Carolina General Assembly acted to toughen state law governing the discharge of toxic substances. The most obvious manifestation of legislative concern was the passage of an act designed specifically to control the disposal of toxic substances. The Act makes it a felony to "deposit, place, dump, discharge, spill, release, burn, incinerate, or otherwise dispose of any toxic substances . . . or radioactive materials . . . into the atmosphere, in the waters, or on land, except where such disposal is conducted pursuant to . . . law." The Act also amended the Oil Pollution and Hazardous Substances Control Act of 1978, designed to protect the state's land and waters from pollution by oil and other hazardous substances and to cover intentional discharges on land whether or not in proximity to waters. Prior to this amendment, the statute covered discharges upon land only if the land was so close to water that the hazardous substance was "reasonably likely to reach the waters." Finally, the new Act seeks to clarify and coordinate the State's response to incidents of hazardous substance discharge by creating a Toxic Substances Task Force. While the Department of Crime Control and Public Safety is to continue to coordinate the initial State response to a "dumping" incident, the Task Force is to coordinate further response.

said tract . . . ." Id. The amendment thus provides more flexibility in dealing with erosion of the construction tract.

82. See, e.g., News and Observer (Raleigh, N.C.), Sept. 1, 1978, at 1, col.3; id., Apr. 3, 1979, at 23, col.6.


84. "Toxic substances" are separated into two categories. In one category are the heavy metals: mercury, plutonium, selenium, thallium and uranium. In the other category are halogenated hydrocarbons: polychlorinated biphenyls (PCBs) and kepone. N.C. GEN. STAT. § 14-284.2(b) (Cum. Supp. 1979).

85. Id. § 14-284.2(a).


89. N.C. GEN. STAT. § 113A-202 (Cum. Supp. 1979). The Task Force is to consist of five persons, with one person designated by each of the following: the Secretary of Administration, the Commissioner of Agriculture, the Secretary of Crime Control and Safety, the Secretary of Human Resources, and the Secretary of Natural Resources and Community Development. Id.

90. Id. § 113A-203(a).

91. Id. § 113A-203(b). The Task Force in performing its coordinating function is to designate one or more agencies to be responsible for subsequent phases of the state's response. Id. The Task Force is authorized to recommend that the Governor create regional or local task forces to respond to an incident and is empowered to study and make recommendations on any issue involving toxic or hazardous substances. Id. § 113A-203(c).
In addition to legislation dealing directly with the dumping of toxic substances, the General Assembly amended the Oil Pollution Control Act of 1973, which regulated only discharges of oil, to expand its coverage to regulate other "hazardous substances" as well. The amendment reflects the recognition that the existing law was simply inadequate to protect the waters and lands of the state from most types of pollution problems. The amendments also plug a loophole in the Act by requiring notice to be given to the Environmental Management Commission in the event of a discharge of oil or a hazardous substance. Prior to the amendment, the Act required a person who owned or controlled the discharged substance to report the discharge only if it was in violation of the Act. The amendment significantly expands the notice requirement to require the reporting of a discharge "in any circumstances other than pursuant to existing regulation," thus assuring that notice will be given even if there has technically not been a violation of the law. Provision is also made for a procedure whereby designated local agencies may be enlisted in clean-up operations and be reimbursed for their expenses. In addition, the procedure for calculating damages owed from violators was amended to allow the state to recover costs of investigating violations, and a new

92. See notes 92-100 and accompanying text supra.
94. "Hazardous substance" is defined as
any substance, other than oil, designated by regulation of the Commission upon a finding that the discharge of the substance in any minimum prescribed quantity into or upon the waters of the State or upon lands in the State presents an imminent and substantial danger to public health or welfare; or to fish, shellfish, wildlife, or vegetation. N.C. GEN. STAT. § 143-215.77(5a) (Cum. Supp. 1979). No substance, however, that has not been designated as a hazardous substance by the federal government shall be so designated by the state. Id. For the current list of substances designated as hazardous by the Environmental Protection Agency, see 40 C.F.R. § 116.4 (1979).
96. The Commission, a division of the Department of Natural Resources and Community Development, has the power "to promulgate rules and regulations to be followed in the protection, preservation, and enhancement of the water and air resources of the State." N.C. GEN. STAT. § 143B-282 (1978). See generally id. §§ 143B-282 to -285.
97. Law of May 16, 1973, ch. 534, § 1, 1973 N.C. Sess. Laws 846 (current version at N.C. GEN. STAT. § 143-215.85 (Cum. Supp. 1979)). Thus, for example, a discharge caused by an act of God would not place the owner of the substance in violation of the Act and would not have had to be reported even though the discharge could have caused serious environmental damage.
100. Id. § 143-215.90(a). The state is entitled to have included in the damage calculation "an amount equal to the cost of all reasonable and necessary investigations made or caused to be made
administrative procedure for collecting damages was established. 101

These two acts are significant improvements of the regulatory scheme governing the discharge of harmful substances within the state. In addition to clarifying the procedures for dealing with incidents of dangerous discharge, they sufficiently broaden the reach of prior legislation to make it more effective in protecting the resources of the state from contamination.

2. Water

The North Carolina General Assembly in 1979 passed the North Carolina Safe Drinking Water Act, 102 the State's first comprehensive water supply legislation. North Carolina drinking water standards had been primarily regulated by the federal Environmental Protection Agency pursuant to the federal Safe Drinking Water Act. 103 The new statute will allow the state to assume primary enforcement responsibility for regulation of water standards, 104 a displacement of federal authority clearly intended by Congress when it enacted the legislation. 105

The North Carolina Act applies to all public water systems 106 in the state, 107 and provides that the Commission for Health Services 108

by the Environmental Management Commission in connection with the violation." 101. Id. § 143-215.90(b). Under the prior version of the section, the only procedure provided for the collection of damages was an action brought by the Attorney General in the name of the state. See Law of May 16, 1973, ch. 534, § 1, 1973 N.C. Sess. Laws 816 (current version at N.C. GEN. STAT. § 143-215.90 (Cum. Supp. 1979)). Under the new version, after the violator is notified by registered mail of the amount of damages, he has 30 days to request an administrative hearing. The violator has the right to pursue an appeal from that hearing under G.S. 143-215.5. The courts will become involved at the outset only if the damages are not paid or a hearing is not requested within 30 days of receipt of the notice. In that case, the Attorney General may bring an action to collect the award. N.C. GEN. STAT. § 143-215.90 (Cum. Supp. 1979).


104. N.C. GEN. STAT. § 130-166.56 (Cum. Supp. 1979); see 42 U.S.C. § 300g-2 (1976 & Supp. I 1977). The Federal Safe Drinking Water Act provides that once a state meets certain conditions, it may assume primary enforcement responsibility for assuring compliance by public water systems within the state with national drinking water regulations. The conditions include the adoption of state regulations at least as stringent as national regulations, of adequate surveillance and enforcement procedures, and of measures to assure that any variances and exemptions allowed are permitted under conditions at least as stringent as those in the federal act. Id.


106. "Public water system" is defined to include any "system for the provision to the public of piped water for human consumption if such a system serves 15 or more service connections or which regularly serves 25 or more individuals." N.C. GEN. STAT. § 130-166.41(12) (Cum. Supp. 1979).

107. Id. § 130-166.42(a). The Act does, however, exclude from its coverage those public water
shall promulgate regulations governing contaminant levels in water systems supplying drinking water to the public. In addition, the Act provides that the Department of Human Resources shall examine water sources that are being used or are planned to be used as sources of public water supply to determine if they are suitable for that purpose. Any person constructing or altering a public water system must give the Department prior notice of such construction and submit plans and specifications therefor so that the Department can determine whether the proposals are in compliance with the Commission's regulations. The Department must approve the plans before construction may begin. The Department is also empowered to promulgate a plan for the provision of drinking water under emergency circumstances. According to the statute, "emergency circumstances shall exist whenever the available supply of drinking water is inadequate." It is not clear whether this power will be activated by a local water emergency or only by a statewide emergency. A fair reading of the statute, however, suggests that any emergency circumstances within the state, whether state or local in character, would trigger the Department's power. This would apparently allow the state to promulgate regulations that would supersede any emergency plan adopted by local authorities.

systems that consist only of distribution and storage facilities, obtain all of their water from a public water system to which the regulations apply, do not sell water to any person and are not carriers that convey passengers in interstate commerce. Id.

110. The Commission for Health Services, a division of the Department of Human Resources, has the power and duty to adopt rules and regulations to be followed in the conduct of public health programs to protect and promote public health. See N.C. GEN. STAT. § 143B-142(1978 & Cum. Supp. 1979).

108. The Commission for Health Services, a division of the Department of Human Resources, has the power and duty to adopt rules and regulations to be followed in the conduct of public health programs to protect and promote public health. See N.C. GEN. STAT. § 143B-142(1978 & Cum. Supp. 1979).

109. Id. § 130-166.43 (Cum. Supp. 1979). The Commission is also directed to promulgate regulations governing the sanitation of watersheds from which public drinking water supplies are obtained. Id. § 130-166.48.

111. Id. § 130-166.45(c)(5). This section also requires the Department to provide advice to persons constructing a public water system concerning the most appropriate source of water supply and the best method of purifying the water. Id. § 130-166.45(a).

112. Id. § 130-166.51(a).

113. Id. § 130-166.51(b).

114. Other powers of the Department include the power to require disinfection by public water systems, id. § 130-166.46, the power to authorize variances and exemptions from the regulations, id. § 130-166.49, and the power to order elimination of an "imminent hazard," id. § 130-166.50(b). An "imminent hazard" is deemed to exist "when in the judgment of the Secretary [of Human Resources] there exists a present or . . . immediate risk to public health." Id. § 130-166.50(a). The Act also gives all units of local government operating public water systems and all water companies operating under franchise from the state or units of local government the power to acquire by condemnation property interests necessary for the successful operation of their systems. Id. § 130-166.47.
In order to encourage strict compliance with the Drinking Water Act, the legislature has included stringent enforcement provisions. Each day of violation is to be treated as a separate violation and the civil penalty may be up to $5000 for each day the violation continues.115

In addition to enacting the Drinking Water Act, the General Assembly amended the state's water pollution control statutes to make them consistent with the 1977 amendments to the Federal Water Pollution Control Act.116 This will allow the State to continue to control the National Pollutant Discharge System which governs discharges of wastewater into the waters of the State.117 The new legislation empowers the Environmental Management Commission to promulgate "waste treatment management practices" necessary to prevent or reduce the quantity of pollutants that enter the state's waters.118 The Act also empowers the Commission to approve under its permit authority requests by publicly owned pretreatment programs for the control of pollutants that pass through their systems.120 The Commission of course has the authority to require those pretreatment programs to comply with applicable federal legislation.121 Finally, the Act allows the Commission a degree of flexibility in granting variances from the promulgated regulations that it formerly did not enjoy.122

115. Id. § 130-166.54(a).
118. The term "waste treatment management practice" means any method, measure or practice to control plant site runoff, spillage or leaks, sludge or waste disposal and drainage from raw material storage which are associated with, or ancillary to the industrial manufacturing or treatment process of the class or category of point sources to which the management practice is applicable.

122. Under the amendment the Commission can grant a variance for up to 90 days without holding a public hearing, id. § 143-215.3(e); prior to the amendment a public hearing was required.
3. Air Pollution

The legislature adopted several amendments to the Air Pollution Control Law\(^{123}\) that comport with changes made at the federal level by the Clean Air Act Amendments of 1977.\(^{124}\) The amendments to the state law significantly stiffen penalties for noncompliance by treating each day of continuing violation as a separate violation\(^{125}\) and by providing for a fine that includes the amount of money that the violator saved by not having made the expenditures necessary to comply with pollution control requirements.\(^{126}\) It is clear, however, that the General Assembly intends that state regulations go no further than those promulgated at the federal level.\(^{127}\) For example, one major change in the North Carolina Act was the adoption of a provision granting the Environmental Management Commission the authority to develop and

before any variance was granted. See Law of May 23, 1973, ch. 698, § 9, 1973 N.C. Sess. Laws, 1039. In addition, the old version of the statute had as one of its criteria for granting a variance the finding that compliance with the regulation could not be achieved by application of the best available technology economically achievable at the time of application. Id. The new statute only requires compliance to be unachievable after application of the best available technology economically reasonable. N.C. GEN. STAT. § 143-215.3(e)(2) (Cum. Supp. 1979). Presumably, the latter standard is a less stringent one. Although technology may exist that would enable an applicant to comply with regulations, i.e., the technology is “achievable,” a variance may nevertheless be granted if the cost of obtaining that technology would be unreasonable.

Another statute passed by the General Assembly in the water pollution area authorizes the Environmental Management Commission, upon petition by any person subject to water pollution control regulations, to revise applicable water quality standards. Law of June 8, 1979, ch. 929, 1979 N.C. Sess. Laws 1275 (codified at N.C. GEN. STAT. § 143-214.3 (Cum. Supp. 1979)). The revision process is essentially to be one of balancing the possibility of compliance, given the natural or “irretrievable man-induced conditions,” and the cost to petitioner of achieving compliance with the public benefits of compliance. If the costs of compliance would be disproportionately high compared to the benefits achieved, the Commission should revise the standards. Given the lack of specific criteria in the statute, the decision on whether to revise the standards will of necessity be a judgment call rendered by the Commission on a case by case basis.

127. The General Assembly amended G.S. 143-215.107(f) to limit the Environmental Management Commission’s authority in this regard. Law of June 8, 1979, ch. 931, 1979 N.C. Sess. Laws 1276 (codified at N.C. GEN. STAT. § 143-215.107(f) (Cum. Supp. 1979)). The statute is a belated response to a 1975 opinion of the Attorney General of North Carolina that the Commission is not precluded from adopting air quality rules, regulations and procedures covering matters on which there are no corresponding EPA regulations. 45 Op. N.C. ATT’Y GEN. pt. 1, at 170, 171 (1975). It is now clear, however, that the legislature intends that the Commission does not adopt regulations more stringent than existing federal regulations and does not adopt regulations on matters not covered by federal legislation without investigating their economic impact. N.C. GEN. STAT. § 143-215.107(f) (Cum. Supp. 1979). This economic impact analysis must focus on the economic and social costs of compliance to commerce and industry, units of local government, and agriculture, along with the economic and social benefits of compliance. Id.
implement programs for the prevention of "significant deterioration"\textsuperscript{128} and for the attainment of air quality standards in "nonattainment areas,"\textsuperscript{129} but only insofar as such programs are required by federal guidelines.\textsuperscript{130} The Environmental Management Commission is now also authorized "to prohibit any stationary source within the state from emitting any air pollutant in amounts which will prevent attainment or maintenance by any other state of any national ambient air quality standard."\textsuperscript{131}

4. Plant Protection and Conservation Act

The North Carolina General Assembly in 1979 enacted the Plant Protection and Conservation Act,\textsuperscript{132} a comprehensive law designed to protect endangered and threatened species of plants. The Act creates a seven-member Plant Conservation Board within the Department of Agriculture\textsuperscript{133} and gives it a broad range of regulatory powers\textsuperscript{134} including the authority to adopt a list of endangered species,\textsuperscript{135}

\begin{itemize}
  \item \textsuperscript{128} "The term 'prevention of significant deterioration' refers to the statutory and regulatory requirements arising from the Federal Clean Air Act designed to prevent the significant deterioration of air quality in areas with air quality better than required by the national ambient air quality standards." \textit{Id.} § 143-213(29). For the relevant federal amendment, see \textit{Clean Air Act Amendments of 1977}, 42 U.S.C. §§ 7470-7479 (Supp. I 1977). For a discussion of what a state must do to comply with this section, see \textit{H.R. REP. No. 294, 95th Cong., 1st Sess. 8, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1085-86. See also Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972) (memorandum) (Clean Air Act requires prevention of significant deterioration of air quality in clean air areas of country), aff'd sub nom. FRI v. Sierra Club, 412 U.S. 541 (1973) (equally divided Court).
  \item \textsuperscript{134} N.C. GEN. STAT. §§ 106-202.14(a) & (b) (Cum. Supp. 1979).
  \item \textsuperscript{135} "Endangered species' means any species or higher taxon of plant whose continued existence as a viable component of the State's flora is determined to be in jeopardy by the Board; also
threatened species and species of special concern. The Board is to be assisted by a newly created Conservation Scientific Committee comprising botanical experts from other agencies and organizations across the state. The Act also establishes a procedure for placing plants on the protected plant lists, and provides that any North Carolina resident, in addition to the Board and the Scientific Committee, may propose that a plant be added to or removed from a list.

In addition, the Act makes it unlawful to disturb or remove from someone else's land any plant on a protected plant list without written permission from the owner. It is also illegal to "sell, barter, trade, exchange, export . . . or give away for any purpose . . . any plant on a protected plant list, except as authorized by rules and regulations promulgated by the Board." A first offense is punishable by a fine of $100 or more and a subsequent offense by a fine of $500 or more.

In many of the environmental laws passed in 1979, the legislature spoke to the issue of whether warrantless inspections can be used to enforce the statutes. The legislature's inconsistent approaches indicate confusion on the issue of administrative searches and the permissible procedures for conducting them.

In the Plant Protection and Conservation Act, the legislature provided for the warrantless inspection of "any place within the State
where plant materials are being grown, transported or offered for sale . . . after giving notice in writing to the owner . . . of the premises to be entered.\textsuperscript{145} Failure to allow such an inspection could subject the owner to a contempt charge.\textsuperscript{146} The legislature grafted onto the Safe Drinking Water Act\textsuperscript{147} an existing administrative inspection provision that allows warrantless entry "upon any and all parts of the premises of any place in which such entry is necessary to carry out the provisions of this Chapter."\textsuperscript{148} In addition, the 1979 amendments to the Oil Pollution Control Act of 1973 left virtually intact a provision authorizing warrantless inspections of any private or public property in order to determine compliance with the Act.\textsuperscript{149} Despite its insistence in these three instances on adding or retaining warrantless inspection provisions, however, the General Assembly, \textit{deleted} a provision in the Air Pollution Control Law\textsuperscript{150} that authorized warrantless inspections of any premises for the purposes of conducting any investigation provided for in the Act.\textsuperscript{151} The General Assembly clearly needs to rectify this confusion by reexamining existing administrative inspection procedures and amending them to conform with the Supreme Court's guidelines in \textit{Marshall v. Barlow's, Inc. Barlow's},\textsuperscript{152} which held warrantless USHA inspections unconstitutional,\textsuperscript{153} arguably indicates that a warrantless administrative inspection is permissible only when the business is regulated to a degree sufficient to support an implied consent theory\textsuperscript{154} and when no alternative enforcement opportunity to a warrantless inspection exists.\textsuperscript{155} Under this analysis, the warrantless inspection provisions of the Plant Protection and Conservation Act, Safe Drinking

\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} §§ 130-166.39 to .56 \textit{See notes 110-23 and accompanying text supra.}
\textsuperscript{149} \textit{Id.} § 143-215.79.
\textsuperscript{150} \textit{Id.} §§ 143-215.107 to .144. \textit{See text accompanying notes 131-39 supra.}
\textsuperscript{154} \textit{See, e.g., United States v. Biswell, 406 U.S. 311, 315-16 (1972) (regulation of interstate traffic in firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (regulation of liquor industry). \"[B]usinessmen engaged in such federally licensed and regulated enterprises as [alcohol and firearms] accept the burdens as well as the benefits of their trade. . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him.\" Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973).}
\textsuperscript{155} \textit{See Note, supra note 160 at 330.}
Water Act, and Oil Pollution and Hazardous Substances Control Act of 1978 appear vulnerable to constitutional challenge.

5. Nuisance Liability of Agricultural Operations

When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be a nuisance.\(^{156}\)

With this statement of legislative purpose and concern, the North Carolina General Assembly enacted legislation sharply limiting the exposure of agricultural operations\(^{157}\) to nuisance liability.\(^{158}\) The Act further provides that "[a]ny and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural operation . . . a nuisance or providing for abatement thereof as a nuisance . . . are and shall be null and void."\(^{159}\)

Although the problem identified by the legislature is undoubtedly a serious one, the constitutionality of the sweeping legislative remedy is questionable. By depriving surrounding landowners of causes of action for nuisance and thus potentially depriving them of the complete use and enjoyment of their property, the statute arguably violates the state constitutional provision that provides "[n]o person shall be . . . dis-eseized of his freehold . . . but by law of the land."\(^{160}\) The North Carolina Supreme Court has held "law of the land" to be synonymous with "due process" as used in the fifth and fourteenth amendments of the

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No agricultural operation . . . shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that . . . this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation.


\(^{159}\) N.C. GEN. STAT. § 106-701(d). Local governments can, however, still control nuisances resulting from negligent or improper operation of an agricultural operation located within the corporate limits of a city. \textit{Id.}

\(^{160}\) N.C. CONST. art. I, § 19.
Federal Constitution. In addition, the court has held the word "property" to include not only the thing possessed, but also the right of the owner to possess, use, enjoy, and dispose of the possession. Finally, the court has held that in order to constitute a taking, an actual seizure is not necessary; a nuisance that substantially impairs the value of private property is sufficient. There exists, however, no magic formula for determining when an interference with a property interest is substantial enough to be deemed a "taking." Since the determination must be made on an ad hoc basis, it is impossible to predict how the statute would fare in a constitutional challenge.

164. As one commentator has pointed out, "[f]ew legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation." Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 149 (1971-72) (footnotes omitted).
165. See Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The Court in Penn. Central did, however, point to several factors that have particular significance:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. 438 U.S. at 124. See generally Dunham, Griggs v. Allegheny County In Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63; Sax, supra note 172; Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964-65).
166. This statute also raises another constitutional issue but one that would most likely be resolved in favor of its validity. The North Carolina Constitution provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution . . . relating to health, sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24. Since this statute relates to the abatement of nuisances, it is clearly unconstitutional if it is classified as a "local law." It is arguable, however, that this statute should be classified as a general rather than a local law and would thus withstand constitutional scrutiny. As the North Carolina Supreme Court has recently stated,

the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class.

C. Election Laws

1. Voting Challenge Procedure

The North Carolina Supreme Court's recent decision in *Lloyd v. Babb*\(^\text{167}\) brought to light some of the inadequacies of the statutory procedure\(^\text{168}\) for voter challenges and prompted the General Assembly to revise that procedure. In 1977 plaintiffs in *Lloyd*, several registered voters in Orange County, filed petitions with the State Board of Elections complaining that thousands of students at the University of North Carolina at Chapel Hill were registered on the voting rolls of Orange County even though those students were not residents of the county.\(^\text{169}\) The state board, after an informal hearing, refused to grant the relief plaintiffs sought.\(^\text{170}\) Plaintiffs subsequently filed suit in superior court joining as defendants members of the state board and members and officials of the Orange County Board of Elections.\(^\text{171}\) The superior court ordered the county board to purge from the rolls all University students whose most recent enrollment listed their home addresses as being outside Orange County.\(^\text{172}\)

On appeal, the North Carolina Supreme Court\(^\text{173}\) held that judicial purging of the voting rolls was not an available remedy as it was


\(^{169}\) 296 N.C. at 420, 251 S.E.2d at 847.

\(^{170}\) *Id.* at 421, 251 S.E.2d at 848. The petitioners had sought the purging of all students from outside Orange County from the registration books, or alternatively the holding of a completely new registration for the county. *Id.* at 420 n.1, 251 S.E.2d at 847 n.1.

\(^{171}\) *Id.* at 421, 251 S.E.2d at 848.

\(^{172}\) *Id.* at 422, 251 S.E.2d at 848-49. In addition, the lower court ordered the Orange County Board to presume that any student applying to register was domiciled where his parents resided. This presumption could be rebutted by evidence in addition to the student's statement of intention to reside permanently in Orange County. The court also required election officials to use a certain questionnaire when questioning voter applicants. *Id.*

\(^{173}\) The court agreed to hear the case before the court of appeals rendered its decision. *Id.* at 423, 251 S.E.2d at 849. The court rejected defendant's contention that the trial court was without original jurisdiction. Defendants argued that the state board's decision not to pursue the matter was a "final agency decision in a contested case," N.C. GEN. STAT. § 150A-43 (1978), and that G.S. 150A-45 and -46 provide the only basis for review of such a decision. Because plaintiffs did not follow the review procedures set out in G.S. 150A-45 and -46, they could not invoke the original jurisdiction of the superior court. 296 N.C. at 424, 251 S.E.2d at 849-50; see *Ponder v. Joslin*, 262 N.C. 496, 138 S.E.2d 143 (1964); *Axler v. City of Wilmington*, 25 N.C. App. 110, 212 S.E.2d 510 (1975). The court held that the state board's hearing was not a contested case because it did not meet one of the statutory requirements of a contested case—it did not determine the rights of the parties involved. 296 N.C. at 424-25, 251 S.E.2d at 850. See N.C. GEN. STAT. § 150A-2(2) (1976). See also *High Rock Lake Assocs. v. North Carolina Environmental Management Comm'n*, 39 N.C. App. 699, 252 S.E.2d 109 (1979).
The large number of voters involved and the corresponding lengthy process of challenging them did not render the administrative remedy "ineffective" so as to allow it to be bypassed in favor of judicial review.175

In response to the Lloyd decision, the General Assembly revised the procedures for handling voter challenges.176 Under the old version of the procedure, voter challenges made prior to the day of election were governed by G.S. 163-85 to 86 and were to be heard and decided by the county board before election day.177 Challenges could also be made on the day of the election pursuant to G.S. 163-87 to 88, with the decision on the challenge to be made by precinct officials at the poll.178 The legislature amended G.S. 163-86 to provide that "if the [county] board finds that because of the number of challenges, it cannot hold all hearings before the date of the election, it may order the challenges to be heard and decided at the next time the challenged person appears and seeks to vote, as if the challenge had been filed under G.S. 163-87."179 Because challenges filed before election day can now be pursued at the polls under G.S. 163-87 instead of through the more cumbersome process of G.S. 163-86, the legislature has made it easier to challenge the right of a large group of citizens to vote. Other significant amendments to the challenge procedure include a provision for the county board to schedule a preliminary hearing when a challenge is made to determine if there is in fact cause to schedule a full scale hearing on the challenge,180 and a provision for a challenged voter to re-

174. 296 N.C. at 428, 251 S.E.2d at 852. The court did not agree, however, with defendants' contention that the action should be dismissed. The defendants had argued that because plaintiffs had not pursued the voter challenge procedure set out by the statute the trial court should have dismissed the action. The court agreed that when an effective administrative remedy exists, it is exclusive, but held that insofar as the plaintiffs sought relief from alleged registration improprieties by Board officials, they had stated a cause of action for which relief could be granted since the statutory procedure would not provide an effective remedy for that grievance. Id. So while judicial purging of the rolls is not an available remedy, plaintiffs might still be entitled to some relief if on remand they prove their allegations. Id. at 429, 251 S.E.2d 852.

175. Id. The court recognized the impracticality of using the procedure to challenge large numbers of voters but said “there is in this case no other proper course.” Id.


180. Id. § 163-85(d). The challenger has the burden of proof. Id. The Board is authorized to take testimony and receive other evidence to determine if the challenger has shown that there is probable cause to believe the challenged voter is in fact unqualified. Absent such a showing, the challenge should be dismissed. Id.
quest a "challenged ballot." If a challenge is upheld, a voter may still vote on a challenged ballot. The ballot is not immediately counted, but the chairman of the county board must hold it for six months. In the event of a contested election, further hearings may be held to determine which if any of the challenged votes should be counted.

2. Campaign Finance

The North Carolina General Assembly in 1979 significantly ex-

181. *Id.* § 163-88.1.
182. *Id.*
183. The North Carolina General Assembly in 1979 enacted an amendment to G.S. 163-278.43 providing for the audit of the records of any political party or committee that receives funds from the North Carolina Campaign Election Fund or the Presidential Election Year Candidate Fund. Law of June 8, 1979, ch. 926, 1979 N.C. Sess. Laws 1272 (codified at N.C. GEN. STAT. §§ 163-278.43(c) & (d) (Cum. Supp. 1979)). G.S. 163-278.43 requires the state chairman of each political party and the treasurer of each political committee or candidate receiving such funds to maintain full and complete records of their receipt and disbursement. N.C. GEN. STAT. § 163-278.43(a) (Cum. Supp. 1979). In addition, the state chairman is required to file with the State Board of Elections an itemized statement reporting all receipts, expenditures and disbursements of the campaign funds and verifying that all funds received were dispensed in accordance with the election laws. *Id.* § 163-278.43(b).

The 1979 amendment of G.S. 163-278.43 reflects the legislature's concern that the prior version of the statute, with no provision for the examination of records beyond the itemized statement required to be filed, simply did not provide enough protection against potential abuses of campaign funds. Consequently, the amendment makes provision for the appointment by the Legislative Service Commission each year of an independent auditor to examine the financial records of the party, candidate or committee receiving the funds. *Id.* § 163-278.43(c) (Cum. Supp. 1979). Clearly, such an annual independent audit is a much more effective means of ascertaining compliance with the election laws than the examination of a report prepared by the organization receiving the funds. The cost of the audit is to be paid from the funds held by the State Treasurer for disbursement to the audited party, candidate, or committee. *Id.* § 163-278.43(d).

The General Assembly in 1979 also amended Article 22A of the North Carolina General Statutes, which regulates contributions and expenditures in political campaigns, *id.* §§ 163-278.6 to .35 (1976 & Cum. Supp. 1979), to expand its coverage to referendum campaigns. Law of June 8, 1979, ch. 1073, 1979 N.C. Sess. Laws 1383 (codified in scattered sections of N.C. GEN. STAT. § 163-278 (Cum. Supp. 1979)). "Referendum" is defined as "any question, issue, or act referred to a vote of the people of the entire State by the General Assembly and includes constitutional amendments and State bond issues." N.C. GEN. STAT. § 163-278.6(18a) (Cum. Supp. 1979). "Referendum committee" is defined to be "a combination of two or more individuals or any business entity, corporation, insurance company, labor union, professional association, committee, association, or organization, the primary or incidental purpose of which is to support or oppose the passage of any referendum on the ballot, or to influence or attempt to influence the result of a referendum, or which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the outcome of any referendum." *Id.* § 163-278.6(18b). Referendum committees, by virtue of the amendment, are now required to comply with the provisions of Article 22A. These provisions include the requirement to appoint a treasurer, *id.* § 163-278.8, to file an organizational, pre-referendum, final, and annual report, *id.* § 163-278.9A, and to file a treasurer's statement that includes lists of all contributions, expenditures, and loans. *Id.* § 163-278.11. In addition, referendum committees must comply with the disclosure provisions of the Article before soliciting contributions. *Id.* § 163-278.20. Any business entity, corporation, insurance company, labor union or professional association may lawfully contribute to a referendum committee, *id.* § 163-278.19A, but the committee is precluded from making any
panded the scope of permissible corporate participation in political campaigns by amending the statute that places limits on such participation.**184** G.S. 163-278.19 provides that

it shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly

(1) to make any contribution or expenditure . . . in aid or in behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever

(2) to pay or use or offer, consent or agree to pay or use any of its money or property for or in aid of or in opposition to any candidate or political committee.**185**

The amendment, however, adds a new subsection to the statute that authorizes a corporation, business entity, labor union, professional association or insurance company that has organized a political committee to provide the committee with "reasonable administrative support."**186** Such support may include, but is not limited to, "record keeping, computer services, billings, mailings to members of the committee, and such other support as is reasonably necessary for the administration of the committee."**187** The approximate cost of such administrative support is to be included in the political committee's final report in its list of "contributions."**188**

Given that the purpose of G.S. 163-278.19 is to protect the public from undue influence by corporations and to insure the responsiveness of elected officials to the public at large,**189** the amendment is somewhat startling. It is apparently now permissible for a corporation to "donate" thousands of dollars worth of administrative support to a particular candidate even though a direct donation of $1 is not allowed.

**D. State and Local Government**

In a continuing effort to increase state employee productivity,**190** the General Assembly enacted a statute to award pay incentives to state

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**185.** N.C. GEN. STAT. § 163-278.19(a) (1976).

**186.** Id. § 163-278.19(e) (Cum. Supp. 1979).

**187.** Id.

**188.** Id.


employees who show demonstrable gains in efficiency in their work.\(^{191}\) The statute creates a committee to oversee the pay incentive program,\(^{192}\) provides for an application procedure,\(^{193}\) and sets out the qualifications for and methods of determining when a pay incentive has been earned. It grants an award not in excess of twenty-five percent of the savings to the State generated by a governmental unit’s increased efficiency, to be divided equally among the unit’s employees.\(^{194}\) In addition, the statute disallows an award when any savings result from a lowering in the level or quality of services rendered by the unit.\(^{195}\) The thrust of the statute is to encourage savings through better communication methods and the elimination of unnecessary travel, advertising, and membership dues, printing and mailing, overtime, consultants’ fees, and budgeted positions.\(^{196}\) The new pay incentive statute is an obvious response to increasing public dissatisfaction with government spending. It complements last year’s merit pay increase statute,\(^{197}\) which abolished automatic pay increases for government employees and tied salary raises to performance.

While the incentive pay act encourages greater efficiency in government administration, it is important to ensure that savings are not at the expense of the quality and effectiveness of government programs. The value of savings could be outweighed by diminished quality of government services. Although annual measurements of program quality will be difficult to make and evaluate, they should help maintain acceptable service levels.

The 1979 General Assembly enacted other legislation affecting state and local government employees. The General Assembly created an Employees Liability Insurance Committee to negotiate group liability insurance plans on behalf of law enforcement officers and county


\(^{192}\) The Committee is made up of the Secretary of Administration, the State Auditor, the State Budget Officer, and the State Personnel Director. Id. § 2 (to be codified at N.C. Gen. Stat. § 126-46). The Governor, Lieutenant Governor, and Speaker of the House of Representatives must each appoint one person, who has experience administering incentives in industry, to the Committee. Id. (to be codified at N.C. Gen. Stat. § 126-47).

\(^{193}\) All units within the General Assembly and within the Governor’s, Lieutenant Governor’s, and State Auditor’s offices are expressly excluded from the program. Id. (to be codified at N.C. Gen. Stat. § 126-47).

\(^{194}\) Id. (to be codified at N.C. Gen. Stat. § 126-49).

\(^{195}\) Id. (to be codified at N.C. Gen. Stat. § 126-48).

\(^{196}\) Id.

\(^{197}\) Id. (to be codified at N.C. Gen. Stat. § 126-7).
and city employees. Local governments are not required to participate, but may elect to have the Committee negotiate insurance plans for some or all of their employees on a departmental basis.

Another act requires all state employees who owe money to the State to make full restitution of the debt within a reasonable time as a condition of continued employment. An employee who owes money to the State is entitled to written notice that his job will be terminated unless he begins repayment within a reasonable time. Additionally, an indebted employee who can establish that there is a genuine dispute regarding the existence of the debt, its amount, or potential insurance coverage will not be dismissed so long as he is pursuing administrative or judicial remedies to settle the dispute.

The North Carolina courts decided two cases in 1979 that significantly limited the authority of the State Personnel Commission. In Reed v. Byrd, the court of appeals held that the Commission exceeded its statutory authority by ordering the reinstatement of a discharged employee without first finding that his discharge had been wrongful. Plaintiff, an employee of the Department of Corrections, was demoted and transferred for failing to assist in an investigation by the Division of Prisons. Plaintiff was given a hearing before the Commission and claimed that he had been wrongfully demoted. The Commission, without making any conclusions regarding the facts relied upon by the Department of Corrections in finding that Byrd failed to assist the investigation, ordered plaintiff reinstated to his former rank and pay. On appeal by the Department of Corrections, the superior court affirmed the Commission’s actions.

The court of appeals reversed, holding that the Commission has authority to provide relief only when it finds that an employee has been

200. Law of June 8, 1979, ch. 864, 1979 N.C. Sess. Laws 1185 (to be codified at N.C. GEN. STAT. §§ 143-540 to -550, 115-142, 120-102). Special provisions are made for debtors who are public officials, id. (to be codified at §§ 143-543 to -545, or legislators, id. (to be codified at §§ 143-546 to -547).
201. The statute specifically provides that an employee may meet the reasonable time requirement by permitting not less than 10% of his net earnings to be withheld each pay period until the debt is repaid. Id. § 1 (to be codified at N.C. GEN. STAT. § 143-541(c)).
202. Id. (to be codified at N.C. GEN. STAT. § 143-541(b)).
204. Id. at 626, 255 S.E.2d at 607.
205. Id. at 627, 255 S.E.2d at 608.
demoted or discharged wrongfully or without just cause.\textsuperscript{206} In construing the statute that created the State Personnel Commission, the court focused primarily on the statute's frequent use of the just cause standard. In particular, the majority relied on G.S. 126-35, which provides that "[n]o permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause."\textsuperscript{207} The court did recognize the broader language of G.S. 126-37: "The State Personnel Commission is hereby authorized to reinstate any employee to the position from which he has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongly denied. . . ."\textsuperscript{208} Nevertheless, the court held that all sections in Chapter 126 must be read together to determine legislative intent.\textsuperscript{209} The court found that the General Assembly had not "intended that the State Personnel Commission would have the power to restore a State employee to a position from which he had been demoted without some finding that the employee had been treated wrongfully."\textsuperscript{210}

In a second action involving the State Personnel Commission's authority, the court of appeals held that the Commission may not exercise discretion in choosing among available remedies;\textsuperscript{211} the Commission must return a wrongfully dismissed state employee to substantially the same rank and pay he would have had but for the dismissal.

In\textit{ Jones v. Department of Human Resources} plaintiff was dismissed from his job as a boiler room operator for poor performance of his work. He appealed the dismissal through proper grievance procedures on the grounds that he was dismissed without just cause and that he had not been given adequate warnings that his job performance was unsatisfactory.\textsuperscript{212} After conducting a full investigation,\textsuperscript{213} the State Personnel Commission's hearing officer found that plaintiff and been wrongfully dismissed and recommended that plaintiff be reinstated, re-

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} at 629, 255 S.E.2d at 609.
\item \textsuperscript{207} N.C. GEN. STAT. § 126-35 (Cum. Supp. 1979) (quoted in 41 N.C. App. at 628, 255 S.E.2d at 608-09).
\item \textsuperscript{208} \textit{Id.} & § 126-37 (quoted in 41 N.C. App. at 628-29, 255 S.E.2d at 608-09).
\item \textsuperscript{209} 41 N.C. App. at 629, 255 S.E.2d at 609.
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979).
\item \textsuperscript{212} \textit{Id.} at 117, 260 S.E.2d at 654.
\item \textsuperscript{213} In his finding of facts, the Commission's hearing officer found that while plaintiff had been given oral warnings, he had not received a final written warning as prescribed by the NORTH CAROLINA STATE PERSONNEL POLICY MANUAL, DISCIPLINARY ACTION, SUSPENSION AND DISMISSAL 5-2 to -3 ("Personal Conduct"). \textit{Id.} at 118-19, 260 S.E.2d at 657.
\end{itemize}
imbursed for wages lost during his discharge, restored all lost benefits, and paid his attorney's fees. The full Commission reviewed the action and agreed that plaintiff had been wrongfully discharged, but limited his recovery to mere reinstatement. Plaintiff appealed to the superior court, which reversed the Commission insofar as it had overturned recovery for net pecuniary loss. Defendant, the Department of Human Resources, appealed to the court of appeals, arguing that the remedies afforded a wrongfully discharged employee under the State Personnel Act are discretionary and the Commission is not required to give all the remedies available under G.S. 126-37.

In upholding the trial court's decision, the court of appeals reasoned that the policy underlying the State Personnel Act is to return, as nearly as possible, a wrongfully discharged employee to his predischarge position. The Commission's failure to do so was arbitrary, inconsistent with its own findings, and, therefore, clearly erroneous. The court focused on the unequivocal language of G.S. 126-35, which provides that no permanent employee shall be discharged except for just cause. The court reasoned that to construe the statute to give the Commission discretionary power over a discharged employee's remedies would "serve to defeat or impair the object of the statute." Instead, the statutory remedies must be provided to the extent necessary to correct wrongs done to an employee by the State and to return him to his prior position without detriment. In response to defendant's argument that the powers of the Commission should be discretionary, Judge Martin stated:

If . . . these remedies are merely discretionary with the Commission and the Commission is not under any obligation to order effective remedies for wrongs committed by State employers upon subject employees after having determined that such wrongs were in fact committed, then there is no reason at all for the Personnel Commission to exist, and its creation by the Legislature was no more than a meaningless gesture which conveys no benefits upon anyone and affords no protection to any State employee from unfair or discriminatory

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214. 44 N.C. App. at 119, 260 S.E.2d at 657.
215. When the Department was ordered to reinstate plaintiff, it wrote him a letter informing him of the Commission's decision and notifying him that his services would no longer be needed as of the date of his reinstatement. Although plaintiff did not challenge this later dismissal, it is clear that this second termination had some influence on the superior court and the court of appeals decisions. Id. at 120, 260 S.E.2d at 657.
216. Id. at 123, 260 S.E.2d at 659.
217. Id. at 122-23, 260 S.E.2d at 659.
218. Id. at 125, 260 S.E.2d at 660. See also State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975) (criminal statutes should not be construed to defeat or impair their purpose).
actions by any State employing agency.\textsuperscript{219}

In \textit{Reed} and \textit{Jones} the court of appeals clarified its view that the only function of the State Personnel Commission is to determine if discharged employees have been wrongfully dismissed and, if so, to provide remedies to the fullest extent necessary to return them to their rightful place. Relying on these purposes of the State Personnel Act, the court limited the general language of the statute and restricted the discretionary authority of the State Personnel Commission. By construing the statute to grant more narrow decision-making powers to the Commission, the court has taken a firm and consistent position that focuses on protecting state employees and insures that legislatively mandated review procedures are strictly followed.

The court of appeals decided another issue concerning government authority in \textit{James v. Hunt},\textsuperscript{220} in which the court upheld the authority of the Governor to suspend from duty a political appointee pending a final determination of cause for removal. Defendant, the Governor of North Carolina, requested that plaintiff, an attorney and member of the State Cemetery Commission, resign from his post for alleged conflicts of interest that, if proven, would constitute just cause for removal.\textsuperscript{221} The plaintiff refused to resign, and the Governor suspended him pending a final resolution of the matter. On appeal from a lower court decision\textsuperscript{222} denying plaintiff's request for reinstatement, the court of appeals held that when the Governor has been granted the power to remove a state official for cause, the power to temporarily suspend is an implicit and necessary element of that power. Relying on a policy rationale, the court noted:

The safety of the state, which is the highest law, imperatively re-

\textsuperscript{219} 44 N.C. App. at 123, 260 S.E.2d at 659. Judge Martin went on to confirm:

\begin{quote}
We are unwilling to assume that the legislative intent in enacting the subject legislation was to create a hollow procedural facade which would serve to identify and adjudicate wrongful acts by State agency employing units and yet which would house no remedies of right to redress the employees who suffered thereby.
\end{quote}

\textit{Id.} at 124, 260 S.E.2d at 660.

\textsuperscript{220} 43 N.C. App. 109, 258 S.E.2d 481 (1979).

\textsuperscript{221} The Governor claimed that plaintiff's "legal representation of thirteen . . . cemeteries and Cemetery Funds of North Carolina, Inc. erodes the public's confidence in the ability of the Cemetery Commission to represent the people in matters which the Commission considers." \textit{Id.} at 110, 258 S.E.2d at 482.

\textsuperscript{222} Plaintiff brought suit against the Governor seeking 1) an order restraining the hearing scheduled by the Governor, 2) a declaratory judgment that the Governor had no authority to suspend him, 3) a declaratory judgment that prior to his removal from office he is entitled to a hearing and opportunity to be heard, and 4) an order directing the Governor to reinstate him pending a decision by a hearing officer appointed pursuant to the Administrative Procedures Act. \textit{Id.}
quires the suspension, pending his trial, of a public officer,—especially a custodian of public funds,—charged with malfeasance or nonfeasance in office. *Suspension does not remove the officer, but merely prevents him, for the time being, from performing the functions of his office.* . . . 223

Plaintiff also challenged the procedures for removal employed by the Governor, arguing that the procedures set out in the Administrative Procedures Act224 should have been followed. Plaintiff argued specifically that a hearing on the merits prior to his suspension from office was required by the Act. The court found, however, that because the statute creating the Cemetery Commission made no reference to the Act, the Act was not applicable. The court said:

[W]e find no cause nor indication by any court that the courts should bind the Governor to any statutory procedure unless the Constitution of the State or the statutory provision giving him the power of removal specify a specific procedure therefor. Hence, G.S. 65-50 gives the Governor the power to remove a member of the Cemetery Commission for cause. . . . [but] there is no reference to the Administrative Procedures Act.225

In short, the court held that the Administrative Procedure Act only applies to removals by the Governor when specifically required by the statute giving him authority to remove for cause.

E. Mental Health: Involuntary Commitment

In 1979 the legislature amended the involuntary commitment statute226 in an attempt to expedite commitment of the mentally ill to the

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223. *Id.* at 122, 258 S.E.2d at 489 *(quoting State ex rel. Clapp v. Peterson, 50 Minn. 239, 244, 52 N.W. 655, 656 (1892)) (emphasis in original).*

224. N.C. GEN. STAT. § 150A-1 TO -64 (1978).

225. 43 N.C. App. at 120, 258 S.E.2d at 488. As additional support for the governor's power of removal pending a final hearing, the court quoted by analogy from a case upholding the routine practice of suspending police officers pending disciplinary investigations, the rationale being that the suspension is only temporary and designed to protect the public. *Id.* at 121-22, 258 S.E.2d at 489.

226. Law of June 8, 1979, ch. 915, 1979 N.C. Sess. Laws, 1st Sess. 1260 (codified at N.C. GEN. STAT. §§ 122-58.1 to .26 (Cum. Supp. 1979)). The involuntary commitment procedure allows a person with knowledge of the facts to appear before a superior court clerk or district court magistrate to execute an affidavit and petition for a custody order. N.C. GEN. STAT. § 122-58.3(a) (Cum. Supp. 1979). If the clerk or magistrate is satisfied that there are reasonable grounds to believe that the facts in the affidavit are true and that the respondent meets the substantive commitment standard, *see note 237 infra*, he must issue a custody order for an examination by a qualified physician. *Id.* § 122-58.3(b). The respondent must be taken into custody within 24 hours after the order is signed and transferred to a qualified mental health center or physician for an examination. A physician must examine the respondent within 24 hours after his arrival. *Id.* § 122-58.4(a), (c). If the physician finds that the respondent meets the substantive commitment standard, he is then taken to a qualified mental health facility pending a hearing. *Id.* § 122-58.4(c). Within 24 hours after his arrival at this facility, he must be examined again by a “quali-
state’s mental health facilities. The purpose of the amended statute is to insure that those who are mentally ill and in “desperate need” will be kept under close supervision and given the necessary treatment to protect themselves and the general public.

The most significant change toward this end was the replacement of the “imminently dangerous” standard for commitment by a simpler and expanded “dangerous” standard. Under the old standard,
an individual had to be "imminently dangerous to himself or others," suggesting the potential for causing immediate harm. Under the amended version the court need only find "that the respondent is mentally ill or inebriate, and is dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others. . . ." A showing that (1) a person is unable to care for himself or to exercise self-control, and (2) that his behavior is "grossly irrational," or "grossly inappropriate," or there is "evidence of severely impaired insight and judgment," gives rise to a prima facie inference that he is unable to care for himself and, thus is "dangerous to himself."

Another change in the statute permits the committing judge to order outpatient treatment for a person in lieu of hospitalization. The statute implies the necessity of some finding that the terms of the less restrictive outpatient treatment would be appropriate to and understood by the particular respondent.

Despite this greater discretion to commit the mentally ill to both inpatient and outpatient treatment, some officials feel that the changes really will not stop the "revolving door of commitment and release of mentally ill patients." The real problem is not difficulty of commitment, but loose procedures that allow dangerous patients to be released. Until procedures for release are tightened these officials fear that patients in genuine need of treatment to protect themselves and the
public will be more readily committed, but will be released from the state's mental facilities while still in need of treatment, just as they were under the old statute.

F. Education

The 1979 General Assembly divested the State of much of its control over private education, particularly parochial primary and secondary schools. Under the new legislation, the state generally retains only two controls: it can require private schools to keep attendance and immunization records and to administer annual aptitude tests. The most significant aspect of the new law is the virtual exemption of private schools from the 1977 High School Competency Testing Act, which requires all seniors to pass a standardized test as a prerequisite to high school graduation. The new statute merely requires that each private school administer a standardized test of its own choice to graduating seniors; the school is given wide leeway to select its own minimum passing score on the test it chooses. This partial testing exemption could substantially undermine the policy behind the Competency Testing Act; because the new law permits each school to choose its own minimum passing score, private school administrators could insure that all their students pass. Thus, students who do not possess the minimum skills necessary to function effectively in society could receive high school diplomas.


238. Id. § 115-257.8, .21. The private school is free to select the test it desires. The test must be given to students in grades 1, 2, 3, 6, and 9 and must measure achievement in English grammar, reading, spelling, and mathematics. Id.

239. Id. §§ 115-320.6 to .13 (1978). The new statute effectively repealed G.S. 115-320.13 which authorized the application of the North Carolina competency test for graduation to non-public schools. See id. §§ 115-257.13, .26 (Cum. Supp. 1979) (qualified schools that comply with these new statutory requirements are exempt from most other education laws).


241. Several education associations have announced an intention to challenge the lesser graduation requirement as a denial of equal protection. In addition, the United States Attorney for the Middle District of North Carolina has asked the United States Department of Justice to review the constitutionality of the private school exemption. X SCH. L. BULL. 7-8 (1979).
Another key problem with the new law, raised when the bill was in committee, was not addressed in the final draft. Because the statute fails to clarify what is meant by a parochial school, the state is likely to receive many applications for religious home education that will technically comply with the vague statutory requirements for parochial schools and thus be protected from state control and regulation.

The General Assembly clarified North Carolina's General Compulsory Attendance Law. For the first time, a school principal must notify parents in writing when their child has five consecutive or ten accumulated days of unexcused absence from school in one academic year. This notification must also alert parents that they may be criminally prosecuted under the attendance law if they are unable to justify the child's absences. If the absences total thirty days or more, the principal must notify the state prosecutor. Finally, if the prosecutor can establish that the parents of a child who has accumulated thirty absences without excuse were notified and did nothing to remedy the situation, then a prima facie case that the parents are responsible is established.

Prior to the 1979 amendment, the principal had wide discretion in deciding when, if ever, to take action to enforce the attendance laws. No statutory procedure for notice to parents existed, nor did the statute clarify what the State had to establish to penalize parents who kept or discouraged their children from attending school. The new amendment, therefore, not only clarifies the Compulsory Attendance Law, but also limits the principal's discretion in handling student absenteeism.

The statute governing suspension and dismissal of students was

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242. More specifically, the statute fails to define fully a school organized or operated "as part of a religious ministry." N.C. GEN. STAT. § 115-257.13 (Cum. Supp. 1979).


246. Id. § 115-169 provides in pertinent part that "[a]ny parent, guardian or other person violating the provisions of [the attendance law] shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days, or both . . . ."

247. Id. § 115-166.

248. Id.

completely rewritten in 1979.\textsuperscript{250} Although the statute gives school officials greater authority to remove disruptive students through suspension and permanent expulsion, it also codifies judicially-created due process protections for suspended and expelled students.\textsuperscript{251} Like the old statute, the new one gives the principal authority to suspend a student for ten days or less without further approval and still requires the principal to secure his superintendant’s approval for any suspension lasting longer than ten days.\textsuperscript{252} For the first time, however, the local school board may expel any student “convicted of a felony . . . whose continued presence in school constitutes a clear threat to the safety and health of other students or employees.”\textsuperscript{253} The new statute also provides that a student suspended for less than ten days be given an opportunity to take all exams he missed during the suspension period.\textsuperscript{254} If suspended for more than ten days a student may appeal to the school board.\textsuperscript{255} A suspension for over ten days that is subsequently upheld by a school board, as well as an expulsion, are subject to judicial review.\textsuperscript{256} Finally, the new legislation requires that all policies governing the conduct of students and all procedures for their suspension or expulsion adopted by a local school board must be published and made available to parents and students at the beginning of each academic year.\textsuperscript{257}

The General Assembly also broadened the scope of a teacher’s responsibilities to give medical care to students.\textsuperscript{258} Under the new statute, a North Carolina teacher, if given authority by the local board of education, may administer prescribed medication to a student at the written request of the student’s parents, may give reasonable emergency medical care and may perform any first aid or lifesaving techniques in which he has been trained.\textsuperscript{259} To protect teachers from civil liability in their performance of these new responsibilities, the statute provides for a legal defense at state expense if the teacher gives prompt,

\textsuperscript{252} Id. § 115-147(b), (c).
\textsuperscript{253} Id. § 115-147(d).
\textsuperscript{254} Id. § 115-147(b).
\textsuperscript{255} Id. § 115-147(e).
\textsuperscript{256} Id. § 115-147(f).
\textsuperscript{257} Id. § 115-147(a).
\textsuperscript{258} Law of June 8, 1979, ch. 971, 1979 N.C. Sess. Laws 1306 (codified at N.C. GEN. STAT. §§ 115-146.1, -143-300.13 to .18 (Cum. Supp. 1979)).
written notice to the Attorney General’s office.\textsuperscript{260} Any judgment or settlement made on behalf of the teacher will be paid out of appropriations for State tort claims.\textsuperscript{261} The new statute gives teachers additional protection when providing further care for students and encourages teachers to learn and use lifesaving and first aid techniques.

The supreme court in 1979 also decided two questions that will significantly affect the rights and liabilities of school officials and non-tenured school employees who have been dismissed from their jobs.\textsuperscript{262} In \textit{Presnell v. Pell}\textsuperscript{263} plaintiff, a school cafeteria manager, was fired by defendants, the school principal and board of education, for allegedly bringing liquor onto school premises and dispensing it to other employees. No notice or opportunity to be heard on the charges was given to the plaintiff before her dismissal. After telling plaintiff she was fired, the principal also told plaintiff’s co-workers and revealed to them the reasons for her dismissal. Plaintiff brought suit alleging wrongful dismissal and defamation.\textsuperscript{264} In addition, plaintiff alleged that her wrongful dismissal without prior notice and hearing and the accompanying slander denied her vested liberty interest in violation of the due process clause of the fourteenth amendment.\textsuperscript{265}

Although the trial court dismissed the complaint because plaintiff failed to exhaust her administrative remedies, the court of appeals pointed out that exhaustion is not required when plaintiff is not offered an effective administrative remedy. The court found that plaintiff made a good faith allegation that she had been wrongfully discharged without a prior hearing, that the statements made by the principal upon
which her discharge was based were false and that publication of the false charges constituted a slander reflecting unfavorably on her good name, character, and reputation related to her employment. Because the defendant dismissed plaintiff for alleged job misconduct and, without cause, published the reasons for her dismissal, the court found that plaintiff made out a colorable claim that protection of her liberty interest had been denied. 266

On appeal, the North Carolina Supreme Court held that plaintiff had stated a good claim for defamation against the principal but that this claim could not extend to the school board or its members individually. The court noted that the complaint failed to allege any involvement of the individual board members in the publication of the alleged slander and that the corporate school board had not waived its governmental immunity by consenting to be sued. 267

Further, the court held that plaintiff should have exhausted her administrative remedies before resorting to the courts. 268 Even though a liberty interest was involved, the court held that “[d]ue process is satisfied under these circumstances by providing plaintiff an opportunity to clear her name in a hearing of record either before her discharge or within a reasonable time thereafter.” 269

The differences between the supreme court and court of appeals decisions hinge on their diverse interpretations of the United States Supreme Court’s holdings in Board of Regents v. Roth 270 and Bishop v. Wood. 271 Both the supreme court and court of appeals found that plaintiff had a liberty interest at stake by virtue of being dismissed for reasons that were false and published to others as true; the court of appeals, however, understood Roth and Bishop to require a pretermination hearing 272 while the supreme court understood them only to require that some opportunity be afforded plaintiff to clear her

267. 298 N.C. at 720-21, 260 S.E.2d at 614-15. The court of appeals had denied defendants’ motion for summary judgment on the ground that plaintiff had in fact stated a claim for slander against the principal and the school board. 39 N.C. App. at 541-42, 251 S.E.2d at 695.
268. 298 N.C. at 722-23, 260 S.E.2d at 616.
269. Id. at 724, 260 S.E.2d at 617 (emphasis in original).
270. 408 U.S. 564 (1972) (employee discharge without prior hearing does not violate due process because nonrenewal of employment contract not based on charge that could damage employee’s reputation).
271. 426 U.S. 341 (1976) (employee discharge does not violate due process because employee’s job was terminable at will and there was no public disclosure of reasons for discharge).
272. 39 N.C. App. at 545-47, 251 S.E.2d at 696-97.
name either before or after the dismissal. In Roth and Bishop the Supreme Court discussed in dicta the ramifications of a situation in which the property or liberty interests of public employees had been infringed by their dismissals. Neither case, however, definitively established what is required when a liberty interest is at stake other than that plaintiff is entitled to notice, a hearing, and other due process protections.

The North Carolina Supreme Court decision is basically sound: plaintiff does have reasonable and effective procedures for notice and hearing to clear her name by proving that the charges causing her dismissal were false. The emphasis in the supreme court's decision, however, should be on insuring that the hearing be held "within a reasonable time" after dismissal. Even when a dismissed employee is able to disprove the charges against him, if he must bear the stigma of the false accusations for a long period of time, his ability to find other employment during the interim could be significantly hindered.

Finally, in a major decision affecting control over special education, the North Carolina Supreme Court ruled that the General Assembly and the North Carolina Constitution dictate that state and local boards of education, and not county governments, have the sole authority to make policy and budget decisions regarding special education. In Hughey v. Cloninger, the Court enjoined the Gaston County Board of Commissioners from disbursing any funds to the Dyslexia School of North Carolina, a nonprofit corporation that operates "exclusively for educational purposes and to furnish programs of instruction for children with dyslexia."

The Board of Commissioners relied on the statute that gives them authority to appropriate revenues "to a sheltered workshop or other private, nonprofit, charitable organization offering work or train-

273. 298 N.C. at 724-25, 260 S.E.2d at 617. The supreme court also relied on language from Arnett v. Kennedy, 416 U.S. 134 (1974): "[I]t is clear that 'a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.'" 298 N.C. at 724-25, 260 S.E.2d at 617 (quoting Arnett v. Kennedy, 416 U.S. at 157).

274. Both Roth and Bishop held that no property or liberty interest was infringed. 408 U.S. at 572-78; 426 U.S. at 348.

275. For a more complete understanding of Supreme Court cases on employee due process rights, Arnett should be read in conjunction with Roth and Bishop.

276. 298 N.C. at 724, 260 S.E.2d at 617 (emphasis added).


278. Id. at 87, 253 S.E.2d at 899.

ing activities to the physically or mentally handicapped . . .”280 and argued that the Dyslexia School qualified under the statute. The majority held that the Dyslexia School did not qualify based on a very narrow interpretation of “sheltered workshop.” The court reasoned that the General Assembly intended the term “sheltered workshop” to mean an organization that attempts to rehabilitate handicapped patients rather than one that seeks to treat the underlying causes of the physical or mental disability.281

The therapeutic philosophy of a sheltered workshop is to rehabilitate the handicapped patients rather than to treat the underlying causes of their physical or mental disability. Treatment represents a direct attack on the disabilities of the patient, while [rehabilitation] represents an effort to identify and exploit the patient’s assets to the end of providing the best possible community role.282

The court sought to support this narrow construction by pointing out that the General Assembly, in G.S. 115-315.7, had provided for dyslexic children by delegating responsibility for educating learning-disabled children to the state and local boards of education;283 under a well-established rule of statutory construction, when two statutes are under consideration, the one that deals specifically with the issue controls over the more general one.284

In a second and perhaps more significant line of reasoning, the court pointed out that the North Carolina Constitution, in requiring that the General Assembly provide for “a general and uniform system of free public schools,”285 does not support a delegation of authority to boards of commissioners. The court reasoned that the Constitution gives the legislature the duty to establish a general and uniform system, and the legislature has delegated the control and supervision of all public education to county and city boards of education.286 Thus, the court held, only local boards of education are authorized to initiate educa-

280. Id. § 153A-248(a)(2).
281. 297 N.C. at 89-90, 253 S.E.2d at 900.
282. Id.
283. N.C. GEN. STAT. § 115-315.7 (1978) sets forth the legislative policy regarding education expense grants for exceptional children. The court noted that the General Assembly has specifically authorized direct subsidies by state and local boards to private schools for exceptional children. 297 N.C. at 91-92, 253 S.E.2d at 901-02.
285. N.C. CONST. art. 9, § 2(1).
286. 297 N.C. at 93-94, 253 S.E.2d at 903. See also Coggins v. Board of Educ., 223 N.C. 763, 28 S.E.2d 527 (1944) (establishment and operation of North Carolina public schools under legislature’s control).
tional funding proposals. County commissioners have no constitutional or statutory authority to initiate public education proposals and are only empowered to study the proposals, to levy taxes to create the funds, and to distribute the funds in accordance with the education boards' desires.

In dissent, Justice Exum argued that these two statutes were complementary. He criticized the majority for creating such a "supposed difference" between rehabilitation and treatment. Even if there is a proper distinction, he argued, the restrictive definition of "sheltered workshop" should still not exclude the Dyslexia School from falling under the statute's broader category of "other private, nonprofit, charitable organizations."

Justice Exum's challenge to the majority on statutory construction grounds is well-warranted. Seeking a broader base for potential financial support for education, Justice Exum more liberally interpreted the General Assembly's efforts to provide quality education for all North Carolina students. While the majority is more concerned with strict lines of authority and delegation of appropriation power, the dissent correctly places greater weight on the strong public policies underlying the state's educational programs.

G. Insurance

1. Ratemaking

In 1977, the General Assembly changed the statutory method of ratemaking to a "file and use" system. Under this system, proposed rates become effective on a date specified in the rate filing despite disapproval by the Commissioner of Insurance, with challenged amounts placed in escrow and made subject to refund. As originally enacted, the 1977 amendments had an expiration date of September 1, 1980. The 1979 General Assembly, however, removed the expiration date from the 1977 ratemaking statute, thereby permanently retaining the

287. 297 N.C. at 98, 253 S.E.2d at 905 (Exum, J., dissenting).
288. Id. at 97, 253 S.E.2d at 904-05.
file and use system. In addition, both the 1979 legislature and the court of appeals resolved some of the questions raised by the 1977 ratemaking amendments.

Under a 1979 amendment to the statutory ratemaking scheme, the Commissioner must consider the amount of investment income earned by insurance companies in deciding whether a proposed rate increase is justified. The former version of the ratemaking statute was silent on this issue, but in 1979 the court of appeals in State ex rel Commissioner of Insurance v. North Carolina Rate Bureau interpreted the earlier version as allowing the Commissioner to consider investment income in determining the reasonableness of the underwriting profit, another of the factors he must consider. Although the court's hold-

294. Both the legislature and the court of appeals considered the Commissioner's powers in the ratemaking process. Under a provision of the 1977 ratemaking statute still in effect, the Rate Bureau is directed to establish a classification plan that separates automobile insurance risks on the basis of use and a subclassification plan that further divides the risk. N.C. GEN. STAT. § 58-30.4 (Cum. Supp. 1979).
In State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 259 S.E.2d 922, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979), the court of appeals held that the Commissioner has no authority to put his own or the insurance department's classification plan into effect under the guise of a modification of the Rate Bureau's plan. Prior to 1977, the statute allowed the Commissioner to direct that "classifications or classification assignments be altered or revised." N.C. GEN. STAT. § 58-248.1 (repealed by Law of June 30, 1977, ch. 828, § 1, 1977 N.C. Sess. Laws 1119); the 1977 statute, however, limits the Commissioner's authority, after conducting a hearing, to issuing an "order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter . . . after which such filing shall no longer be effective." N.C. GEN. STAT. § 58-124.21(a) (Cum. Supp. 1979). The court found in this statutory change a legislative intent to exclude classification from the powers of the Commissioner. 43 N.C. App. at 720, 259 S.E.2d at 925.
In a further clarification of the 1977 ratemaking amendments, the court of appeals held that the Commissioner's failure to specify his reasons for disapproval of a rate increase will cause a rate filing to be "deemed" approved. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 96, 252 S.E.2d 811, 819 (1979), cert. denied, 297 N.C. 452, 256 S.E.2d 805 (1980). The court also discussed at length the burdens of proof of the Commissioner and the Rate Bureau. Id. at 96-97, 252 S.E.2d at 819. See also State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 312-13, 255 S.E.2d 557, 559-60 (1979) (discussing burden of proof).
ing apparently authorized the Commissioner to consider investment income from all sources, the new statute specifies that "[d]ue consideration shall be given to . . . investment income earned or realised by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State." The new statute appears to preclude consideration of investment income from other sources, such as capital, and the court of appeals so held in 1979.

Even if the statute obviates the court's holding on the types of investment income to be considered, the decision continues to have significance for its holding that investment income must be calculated for ratemaking purposes at the actual rate of return rather than the higher risk-free rate. The court held that use of a risk-free rate of return

298. 40 N.C. App. at 107-08, 252 S.E.2d at 825-26. Although the court spoke of investment income in general terms, the case dealt with investment income from unearned premium and loss reserves. Id. at 91, 105. 252 S.E.2d at 816, 824. In a subsequent case the court held that the Commissioner could properly consider earnings from invested capital. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 318, 255 S.E.2d 557, 563 (1979). Although the latter case was decided after the amendment was enacted, it was decided prior to the June 30, 1979 effective date.


300. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 206-07, 261 S.E.2d 671, 680-81 (1979). In addition, the court held that there was no substantial evidence to support the Commissioner's finding that unaudited data was not reliable for ratemaking purposes. Id. at 199, 261 S.E.2d at 671. See note 319 infra. The Rate Bureau presented uncontradicted expert testimony that its unaudited data was reliable and that any error in data would not materially affect the reasonableness of rates. Id. at 202-03, 261 S.E.2d at 678. The court rejected the testimony of the certified public accountant offered by the insurance department on the ground that he was not competent to determine whether the Rate Bureau's methods would discover any errors in the source data. Id. at 202, 261 S.E.2d at 678. Moreover, the insurance department's witness failed to testify that source data errors would materially affect the reasonableness of rates. Id. Finally, the court held that "the action of the Commissioner in requiring audited data in this case was arbitrary and capricious, violated principles of due process and contravened the spirit if not the letter of the North Carolina Administrative Procedure Act." Id. at 204, 261 S.E.2d at 681. The Commissioner's disapproval order required the Rate Bureau to use audited data on the ground that prior orders in separate rate filings had required the use of audited data. Id. at 204-05, 261 S.E.2d at 679. The court held, however, that the Commissioner's disapproval notice and order "was made upon an unlawful procedure," id. at 204, 261 S.E.2d at 679, by treating the prior orders as a rule without complying with the procedural requirements for rulemaking in the Administrative Procedure Act. Id. at 205, 261 S.E.2d at 680. In addition, the Commissioner's order was held to be unreasonably vague and burdensome by requiring the Rate Bureau to audit past records. Id. at 205-06, 261 S.E.2d at 680. The court concluded that "[t]he overall manner in which the Commissioner has handled the issue of auditing offends traditional notions of substantial justice and fairness and thus deprives the Bureau of the quintessential elements of due process." Id. at 206, 261 S.E.2d at 680.

301. 40 N.C. App. at 108, 252 S.E.2d at 826.

would deter insurance companies from making investments that might earn less income than the amount of income on which their rates are based.\textsuperscript{302} Because the legislature permits insurance companies to invest in many opportunities that are not risk-free,\textsuperscript{303} use of a risk-free rate of return in ratemaking would contravene legislative intent.\textsuperscript{304}

The 1979 legislature also amended the ratemaking statutes to provide for greater emphasis on North Carolina data in determining whether a proposed rate increase complies with statutory standards.\textsuperscript{305} The Rate Bureau's reliance on nationwide data has been an issue in many ratemaking cases\textsuperscript{306} and will continue to be contested under the new statute. The former statute provided that "countrywide data shall be considered where credible North Carolina experience or data is not available."\textsuperscript{307} Under the new statute, however, nationwide data may now be considered only where credible statewide data is unavailable.\textsuperscript{308} The implications of the new statute are unclear. Both the old and new statutes require the absence of credible North Carolina data as a prerequisite to the consideration of nationwide data.\textsuperscript{309} Use of nationwide data, however, is now permissive rather than mandatory. If the Rate Bureau can decide whether to consider nationwide data, then the change in wording is insignificant because the Bureau will almost invariably choose to rely on the higher expense and loss experience re-

\begin{itemize}
\item \textsuperscript{302} 40 N.C. App. at 107-08, 252 S.E.2d at 826.
\item \textsuperscript{303} N.C. GEN. STAT. § 58-79 (Cum. Supp. 1979) provides a wide range of investments for fire, casualty and miscellaneous lines of insurance.
\item \textsuperscript{304} 40 N.C. App. at 107-08, 252 S.E.2d at 826.
\item \textsuperscript{306} See generally Survey, supra note 304, at 1089 n.35.
\item \textsuperscript{309} The use of the word "only," in the new statute appears superfluous.
\end{itemize}

The 1979 amendments do not alter the method of determining whether North Carolina data is available. In State \textit{ex rel. Comm'r of Ins. v. North Carolina Rate Bureau}, 40 N.C. App. 85, 252 S.E.2d 811, cert. denied, 297 N.C. 452, 256 S.E.2d 810 (1979), the Commissioner disapproved a rate filing on the ground that the Rate Bureau improperly used national data when North Carolina data was available in evaluating the effect on insurance rates of workers' compensation benefit increases and higher medical costs. \textit{Id.} at 88-91, 97, 252 S.E.2d at 815-16, 820. In addition, the Commissioner found that the Rate Bureau used nationwide expense data and credibility factors. \textit{Id.} at 89-100, 752 S.E.2d 815-21. The court rejected the Commissioner's findings, however, because the Rate Bureau produced substantial evidence that its proposed rate increase was based on North Carolina data when available. \textit{Id.} at 98-99, 252 S.E.2d at 820-21. Specifically, the Rate Bureau's expert witness testified that nationwide data was used only for changes that were not fully reflected in North Carolina experience, and was required because the North Carolina data base was too small to be reliable and that the expenses of the workers' compensation business are uniform throughout the country. \textit{Id.} at 98-100, 252 S.E.2d at 820-21.
lected by nationwide figures. If, however, the new statute allows the Commissioner to ignore nationwide data even when no credible North Carolina data is available, then the statute has undergone a significant change.\textsuperscript{310}

The 1979 amendments also provide that "[d]ue consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which such information is available."\textsuperscript{311} Specific consideration must now be given to data reflecting actual experience for the most recent three-year period for which it is available, even if that data is outdated. Thus, it may now be more difficult for the Rate Bureau to justify using nationwide data because the Bureau will first have to prove that the statewide data for that specific three-year period is not credible.

In a related statutory change, the legislation deleted the requirement that due consideration in ratemaking be given to relevant judgment factors.\textsuperscript{312} Although the new statute still requires that due consideration be given "to all other relevant factors within this

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\textsuperscript{310} The court of appeals construed the former statute to authorize the Rate Bureau to rely upon nationwide data "if there is insufficient experience in North Carolina to provide credible statistics." 40 N.C. App. at 99, 252 S.E.2d at 821. If the new statute permits the Commissioner to ignore countrywide data even under those circumstances, he would arguably be acting in an arbitrary or capricious manner and, therefore, be subject to reversal under N.C. GEN. STAT. § 58-9.6(b)(6) (1975). Another reading of the statute is that the Rate Bureau may choose to rely on countrywide data in the absence of credible North Carolina data, but is not compelled to do so.\textsuperscript{311} Law of June 7, 1979, ch. 824, § 1, 1979 N.C. Sess. Laws 1038 (codified at N.C. GEN. STAT. § 58-124.19 (Cum. Supp. 1979)). The legislature also clarified that the Commissioner may require the Rate Bureau to file a breakdown of incurred losses into subcategories of "paid losses, reserves for losses and loss expenses, and reserves for losses incurred but not reported." Id. § 2 (codified at N.C. GEN. STAT. § 58-124.20 (Cum. Supp. 1979)).

In another case dealing with the nature of data to be considered in ratemaking, the court of appeals upheld the Commissioner's finding that the unaudited data submitted by the Rate Bureau was unreliable because unaudited reports have been found to be inaccurate and unreliable in ratemaking projections. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 317, 255 S.E.2d 557, 562 (1979). The court implied, however, that the Rate Bureau might have rebutted the expert testimony concerning the value of unaudited data or might have shown that such an audit would be prohibitive in cost or time. Id. at 317-18, 255 S.E.2d at 562. The court of appeals later held that the Commissioner's conclusions that the unaudited data were unreliable "cannot be sustained in the light of all of the evidence offered in connection with that question in this case." State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 75, 76, 259 S.E.2d 926, 927 (1979). It is unclear from the court's brief opinion in that case whether the record contained evidence that the data was sufficiently audited or that the unaudited data was nevertheless reliable. See note 308 supra. Under the new statute, the Commissioner may require the filing of the Rate Bureau's interpretation of its data and a description of the methods used in ratemaking. N.C. GEN. STAT. § 58-124.20(e)(1), .20(e)(2) (Cum. Supp. 1979). In addition, the Commissioner may require the filing of the number and amount of paid claims. Id. § 58-124.20(e)(4). These amendments do not specifically require the use of audited data.\textsuperscript{312} Law of June 7, 1979, ch. 824, § 1, 1979 N.C. Sess. Laws 1038 (codified at N.C. GEN. STAT. § 58-124.19 (Cum. Supp. 1979)).
State," the legislature has clearly precluded the use of subjective judgment in the ratemaking process. While the elimination of subjective factors may be a valid policy decision by the legislature, it has been shown that the subjective judgment of insurers does have validity in projecting future losses from a particular set of risks.314

The 1979 legislature also enacted several measures to protect drivers assigned to the North Carolina Reinsurance Facility, "a pool that insures bad driving risks that companies do not want to individually insure."315 Policyholders assigned to the facility may be surcharged to recoup the facility's losses.316 Because insurance companies are allowed to choose the risks to assign to the facility,317 some drivers with good records are so assigned.318 The 1979 amendments, however, provide that "clean risks" within the facility may not be charged more than "clean risks" outside the facility.319 The statute defines "clean

313. Id.
314. For example, assigned insureds with clean records cause more claims to be made than nonassigned insureds. 41 N.C. App. at 326, 255 S.E.2d at 567 (Clark, J., dissenting).

According to INSTITUTE OF GOVERNMENT, supra note 301, at 113-14, "[t]here is no published material indicating what is an undesirable risk, and this determination probably varies from company to company. Reportedly, young drivers, single or divorced persons, as well as such occupational groups as doctors and ministers, often fall within this category."


318. Surcharging good drivers assigned to the facility has been challenged as unfairly discriminatory. For example, in State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979), decided under the former statute, the court of appeals upheld the Commissioner's disapproval of a proposed 10% rate differential for insureds assigned to the facility on the ground that it would be unfairly discriminatory. Id. at 321, 255 S.E.2d at 564. The mere absence of objective criteria for assigning drivers to the pool does not support a conclusion that the proposed facility rate is excessive and unfairly discriminatory because the statute clearly gives an insurer the choice of risks to assign. Id. at 320, 255 S.E.2d at 563-64. The court held, however, that the absence of objective criteria combined with the large number of assigned risks without points or claims payments support the conclusion that the 10% rate differential is unfairly discriminatory. Id. at 320-21, 255 S.E.2d at 564.

The court did not address the Commissioner's conclusion that such a rate differential was excessive. Id. Nor did the court refer to the statute's "strong presumption that the rates and premiums for the business of the facility are neither unreasonable nor excessive." N.C. GEN. STAT. § 58-248.33(1) (Cum. Supp. 1979).

risk” to require that the owner of a private passenger vehicle and all licensed drivers in his household have two years of driving experience and no chargeable accidents or moving violations for the three years prior to the application for insurance or preparation of a renewal policy. The 1979 legislature further protected assigned insureds by providing that when a policy or renewal is assigned with a higher rate, the insurer must give notice and explanation of the assignment.

2. Consumer Legislation

The 1979 Legislature enacted several statutes in an attempt to im-

321. Law of June 1, 1979, ch. 732, § 1, 1979 N.C. Sess. Laws 802 (codified at N.C. GEN. STAT. § 58-248.31 (Cum. Supp. 1979)). The insurer must inform the policyholder of the assignment, the rate differential, and the insured's option to seek coverage with a different insurer, who may not assign the policy, and upon written request provide in writing the reasons therefor.

The new statute also provides that communication of the fact of assignment or the reasons for assignment will not give rise to liability unless those communications were “made in bad faith with malice in fact.” Id. Apparently, this would provide a limited privilege to make statements that would otherwise be defamatory.

Finally, the new statute requires that insurers provide the same “type of service” to assigned and nonassigned risks. Id. This provision, however, does not appear to require that insurers provide the same types of coverage. See generally INSTITUTE OF GOVERNMENT, supra note 301, at 116-17 (1979) (facility does not provide collision or comprehensive coverage).

322. Several recent legislative actions and cases in the insurance area are of interest to consumers. In one action the legislature increased the possibility of recovering attorneys’ fees in a suit against an insurance company. Law of April 18, 1979, ch. 401, 1979 N.C. Sess. Laws 348 (codified at N.C. GEN. STAT. § 6-21.1 (Cum. Supp. 1979)) When a court finds an unwarranted refusal to pay a claim, plaintiff may be allowed reasonable attorneys' fees if awarded a judgment of $5000 or less. The former statute limited such attorneys' fees awards to judgments of $2000 or less. Law of June 2, 1959, ch. 688, 1959 N.C. Sess. Laws 641 (repealed 1979).

The court of appeals dealt with the issue of an insurer's duty to defend in two recent cases. In National Mortgage Corp. v. American Title Ins. Co., 41 N.C. App. 613, 255 S.E.2d 622 (1979), the court held that when an insurer offers to defend only under a reservation of rights and the offer is refused by the insured, the insurer must indemnify the insured for the costs of defending an action on a loss covered by the policy. This holding is in accord with North Carolina precedent. See, e.g., Standard Accident Ins. Co. v. Harrison-Wright Co., 207 N.C. 661, 178 S.E. 235 (1935). The court of appeals held in a second case that the failure to allege compliance with conditions precedent was not fatal to the complaint in an action for breach of the insurer's duty to defend because plaintiff's other allegations gave sufficient notice to the defendant insurer. Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

In the area of policy construction, the court of appeals held that a “collision” did not occur when the collapse of a bridge caused a truck to slide into a creek and overturn. Allison v. Iowa Mut. Ins. Co., 43 N.C. App. 200, 258 S.E.2d 489 (1979). The court distinguished Morton v. Blue Ridge Ins. Co., 255 N.C. 360, 121 S.E.2d 716 (1961), in which the supreme court held that a car sliding down a boat ramp into a canal during launching was damaged by “collision”, on the ground that the driver in Morton started the chain of events resulting in the impact. The Allison court construed the term “collision” so as to permit recovery by the insured on a comprehensive policy that excluded coverage for collision; the Morton court construed the term to permit recovery on a policy that covered collision.

In Wells v. North Carolina Farm Bureau Mut. Ins. Co., 43 N.C. App. 328, 258 S.E.2d 831 (1979), the court of appeals again followed its policy of construing in favor of the insured in
prove the public's understanding of insurance policies. The Readable Insurance Policies Act, for example, requires most insurance policies to meet a quantitative readability score that corresponds to an eleventh grade reading level. Although the statute does not provide a private cause of action for violation of the act, the Commissioner must approve policies before they are used. In addition, a policyholder or claimant bringing an action arising out of an approved policy may rely on either that language or any substantive language prescribed by law, or both. This section would allow an insured to take advantage of the more favorable language; an insurer, however, would not be penalized in an action against it on the ground that it violated the readability statute.

Although experts differ on the ultimate value of quantitative mea-
measurements,\textsuperscript{329} tests have several advantages, including objectivity, certainty, uniformity and ease of administration.\textsuperscript{330} Despite the potential for improved comprehension, the statute may create new problems for policyholders by abandoning traditional language that courts have construed over many years.\textsuperscript{331} In addition, policy length will probably increase as insurers substitute explanations in lay terms for contingencies formerly covered by a single term of art.

In a related attempt to improve the understanding of prospective buyers and to facilitate cost comparison among policies,\textsuperscript{332} the legislature enacted a statute regulating the solicitation of life insurance.\textsuperscript{333} The act requires all life insurers to deliver a Policy Summary to all prospective purchasers.\textsuperscript{334} The Policy Summary must contain premium and benefit amounts as well as certain indices that quantify the policy’s value.\textsuperscript{335} In addition, life insurers must deliver a Buyer’s Guide explaining insurance policy comparison\textsuperscript{336} to all prospective purchasers.

\textsuperscript{329} “It is generally recognized that these [readability] tests all have limitations in that they only measure the difficulty of the style of writing and do not measure understandability.” 1978 \textit{PROCEEDINGS}, supra note 333, at 518. \textit{See} Prendergast, supra note 333, at 8. Even Dr. Rudolf Flesch, creator of the test, warned: “What I hope for are readers who won’t take the formula too seriously and won’t expect from it more than a rough estimate.” \textit{R. FLESCH, THE ART OF READABLE WRITING}, preface (1949).

\textsuperscript{330} \textit{See} I 1978 \textit{PROCEEDINGS}, supra note 333, at 518; II 1978 \textit{PROCEEDINGS}, supra note 333, at 298.


Although the statute does not apply to other types of insurance, the Commissioner is now required to compile lists of rates and explanations of coverage for the public concerning automobile and homeowners’ insurance. Law of June 4, 1979, ch. 755, § 19, 1979 N.C. Sess. Laws 835 (codified at N.C. GEN. STAT. § 58-9(8) (Cum. Supp. 1979)). Such explanations of coverage must comply with the Readable Insurance Policies Act. \textit{Id.}

\textsuperscript{334} N.C. GEN. STAT. § 58-213.9 (Cum. Supp. 1979). \textit{See} \textit{id.} § 58-213.8(7) for other requirements.

\textsuperscript{335} \textit{THE LIFE INSURANCE SURRENDER COST INDEX, see id.} § 58-213.8(6)(a), and \textit{THE LIFE INSURANCE NET PAYMENT COST INDEX, see id.} § 58-213.8(6)(b), for example, are single numbers based on complex calculations of cash surrender value, interest factors, premiums and benefits that allow comparison between different policies. Similarly, the Equivalent Level Annual Dividend, \textit{see id.} § 58-213.8(3), is a calculation of dividends, interest and guaranteed death benefits. The method of calculating each index is set forth at \textit{id.} § 58-213.8.

\textsuperscript{336} \textit{Id.} § 58-213.11 sets out requirements for the guide. Use of the Buyer’s Guide in the National Association of Insurance Commissioners (NAIC) Model Life Insurance Solicitation Regulations will comply with the statute. \textit{Id. See also id.} § 58-213.8(1). Although the Buyer’s Guide and Policy Summary facilitate comparison among similar insurance policies, they do not help consumers compare insurance with noninsurance investments. \textit{See generally} Life Insurance
ers. Failure to deliver a Policy Summary and Buyer's Guide is a violation of G.S. 58-199, which forbids policy misrepresentation, and the Unfair Trade Practice Act of the Insurance Law. Finally, the new statute strictly regulates solicitation practices of life insurance companies and agents. Although no enforcement provision is specifically provided in the new statute, the Commissioner's general remedies may be applicable.

When the entire package of insurance consumer legislation is considered as a whole, the need for stringent readability standards must be
questioned in light of the requirement that the insurer provide a Policy Summary and Buyer's Guide, which purportedly tell the consumer what he wants and needs to know. A further problem involves the inevitability of conflict among language in the Buyer's Guide, Policy Summary and the policy itself. Whether a court will enforce representations set forth in the Policy Summary or Buyer's Guide that conflict with language in the policy is unclear.342

H. Health Law343

1. Generic Drugs

Following the lead of over thirty states,344 the legislature in 1979 enacted a "generic drug" law,345 designed to reduce the costs of drugs.

342. See 13 APPLEMAN, PREFACE TO APPLEMAN INSURANCE LAW AND PRACTICE, III (1976).

343. In developments in the health care field, the General Assembly made changes in the statutory scheme for natural death. Law of March 6, 1979, ch. 112, 1979 N.C. Sess. Laws 76 (codified at N.C. GEN. STAT. § 90-321 (Cum. Supp. 1979)); Law of May 30, 1979, ch. 715, 1979 N.C. Sess. Laws 782 (codified at N.C. GEN. STAT. §§ 90-320, -322, -323 (Cum. Supp. 1979)). The "right to die" statute was enacted in 1977 to allow physicians to withhold extraordinary means of life support from terminally ill patients who have consented in advance. Law of June 29, 1977, ch. 815, 1977 N.C. Sess. Laws 1101 (current version at N.C. GEN. STAT. § 90-321 (Cum. Supp. 1979)). See Comment; North Carolina's Natural Death Act: Confronting Death With Dignity, 14 WAKE FOREST L. REV. 771 (1978). Under the original version of the statute, a person desiring a natural death is required to sign a consent form before a superior court clerk. Id. The amended version allows notaries public to certify the declaration of a desire for natural death. N.C. GEN. STAT. § 90-321 (Cum. Supp. 1979). In addition, both versions of the statute permit physicians to discontinue extraordinary means of life support in the absence of a declaration under certain conditions. Law of June 29, 1977, ch. 815, 1977 N.C. Sess. Laws 1101 (current version at N.C. GEN. STAT. § 90-322 (Cum. Supp. 1979)). Under the old version, one of the conditions required the attending physician to determine that the patient suffered "an irreversible cessation of brain function." Id. The new version simply requires that the physician determine that the patient's condition is "irreversible." N.C. GEN. STAT. § 90-322(b)(1) (Cum. Supp. 1979). The 1979 legislature also added a section that clarifies the criteria for determining if death has occurred. "Brain death, defined as irreversible cessation of total brain function, may be used as a sole basis for determination that a person has died . . . ." Id. § 90-323. Nevertheless, the statute specifies that other medically-accepted criteria for determining if death has occurred are still allowed. Id. Finally, the new version of the statute expressly states that it is not the sole authority for legally withholding life-sustaining procedures: "Nothing in this Article shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-sustaining procedures in any lawful manner." Id. § 90-320(b). See Comment, supra, at 791-92.


345. Law of June 8, 1979, ch. 1017, 1979 N.C. Sess. Laws 1348 (codified at N.C. GEN. STAT. §§ 90-76.1 to .6 (Cum. Supp. 1979)). The Act also repeals the antisubstitution law, N.C. GEN. STAT. § 90-76 (1975), which made it a misdemeanor for a registered drugstore or its employees to knowingly sell a drug other than the one ordered or prescribed. See generally Note, supra note
Under the new statute, a pharmacist may substitute any "equivalent drug product" that costs less than the prescribed brand and meets certain other criteria unless the physician has prohibited substitution. An "equivalent drug product" must have the same "established name," "active ingredient, strength, quantity, and dosage form" as the prescribed brand name drug. In addition, it must be "therapeutically equivalent" to the prescribed drug, a determination apparently left to the individual pharmacist.

The drug product selection law is probably most significant for what it does not do. No physician is required to prescribe in generic terms or to permit substitution for a drug prescribed by brand name. Nor is any pharmacist required to substitute an equivalent drug. In addition, although a substitute must be priced below its equivalent

347. Under G.S. 90-76.2(a), the substituted drug must meet certain manufacturing, marketing and labeling criteria. For example, the manufacturer of a substituted drug must be specified on the label.
348. Id. § 90-76.2(b).
349. Id. §§ 90-76.1(1), 90-76.1(2) provides that the term "established name" have the meaning used in the Federal Food, Drug and Cosmetic Act, 1 U.S.C. § 352(e)(3)(1976).
351. Id. The difference between various types of equivalence has been explained as follows:

Two drugs are chemically equivalent when they contain the same amount of the same active ingredients. Generic and brand name drugs are chemically equivalent.

The bioavailability of a drug refers to a measurement of the rate and extent to which an administered drug reaches general circulation in the blood stream.

Two chemically equivalent drugs are also bioequivalent if when administered in the same amount to the same individual they result in essentially the same bioavailability.

Finally, two chemically equivalent drugs are therapeutically equivalent if when administered in the same amount to the same individual they result in essentially the same therapeutic response.

Note, supra note 352, at 392 n.32 (emphasis in original).
352. A nationwide controversy exists over the means of determining therapeutic equivalence. See generally Hearings, supra note 353; SCIENTIFIC EVALUATION OF DRUG EQUIVALENCY, supra note 353; Note, supra note 352, at 394. Some states rely on lists of equivalent drugs prepared by drug experts. Id. at 400-03. Other states use the procedure recently adopted in North Carolina. Id. at 403.
353. See N.C. GEN. STAT. § 90-76.2(a) (Cum. Supp. 1979). See generally Note, supra note 352, at 396-400, which categorizes generic drug statutes according to whether the physician or pharmacist can prevent substitution.
brand,\textsuperscript{354} there is no requirement that a pharmacist dispense or stock the lowest priced equivalent among those available.

The statute also provides that a physician and pharmacist shall incur no greater liability for dispensing a substitute than they would incur if a prescription were dispensed as written.\textsuperscript{355} This limitation of liability, however, is only available if the pharmacist selected an "equivalent drug product" in accordance with the requirements of the statute.\textsuperscript{356}

2. Health Maintenance Organizations

A health maintenance organization (HMO) is a system of health care financing and delivery\textsuperscript{357} based on prepayment rather than indemnification for costs incurred.\textsuperscript{358} Consumers make payments to an HMO\textsuperscript{359} which contracts with health care providers to deliver services.\textsuperscript{360} In general, HMOs operate as either prepaid group practices,
with a staff providing services at one central location, or independent practice associations, with member physicians providing services for enrolled patients in their private offices and usually treating nonenrolled patients as well.\footnote{361} By making it financially advantageous to keep patients healthy, to use less expensive methods of treatment, to emphasize preventive care and to avoid unnecessary surgery,\footnote{362} the HMO system has been found to control health care costs.\footnote{363}

After the North Carolina Office of State Planning recommended the passage of an enabling act to remove certain legal barriers to HMOs,\footnote{364} the legislature enacted the HMO Act of 1977.\footnote{365} The 1977 act, however, was found to create barriers to HMO development by regulating HMOs and the private providers with whom they contracted in ways that insurance companies and providers in general were not regulated, for example with certificate of need and quality control requirements.\footnote{366}

In an attempt to deal with these impediments to HMO development, the legislature enacted the HMO Act of 1979.\footnote{367} The new statute simplifies the regulation of HMOs by vesting sole regulatory authority

\footnote{361. I INTERIM REPORT, supra note 365, at 15.}
\footnote{362. I INTERIM REPORT, supra note 365, at 1, 4, 13. See HEW, supra note 366, at iv-vi. "Because the physicians who participate in these plans as providers of care often share in any income surplus at the end of the fiscal year, they have an incentive to seek out the least expensive mode of treatment and to avoid unnecessary laboratory tests, hospitalization and surgery." I INTERIM REPORT, supra note 365, at 14. See generally J. KRESS & J. Singer, supra note 368, at 13 & 14.}
\footnote{363. I INTERIM REPORT, supra note 365, at 1, 4, 13.}
\footnote{364. Id. at 42. Traditional legal barriers to prepaid health delivery include the rule against corporate practice of medicine and regulation by insurance departments in ways that are appropriate for insurance companies but not for prepaid delivery systems. II INTERIM REPORT, supra note 365, at 246-48. See generally, J. KRESS & J. SINGER, supra note 368, at 34.}
\footnote{366. I INTERIM REPORT, supra note 365, at 43-44. Although doctors' offices are not generally subject to the certificate of need law, see N.C. GEN. STAT. § 131-176(10) (Cum. Supp. 1979), an HMO ambulatory facility was subject to certificate of need requirements. I INTERIM REPORT, supra note 365, at 9-10. In addition, according to the Commission on Prepaid Health Plans, see note 365 supra, physicians participating in an independent practice association HMO were required to obtain certificates of need for their private offices in which they treated non-HMO patients. I INTERIM REPORT, supra note 365, at 44. Physicians in the independent practice association were also subject to control by the local health planning agency in the location of their offices, quality of work and financial records. Id. at 44. Finally, physicians in all types of HMOs, unlike providers reimbursed by Blue Cross/Blue Shield, were subject to quality control by the Departments of Insurance and Human Resources—a task ordinarily reserved to the State Board of Medical Examiners. Id. at 10.}
in the Commissioner of Insurance and omitting joint regulation with
the Secretary of Human Resources.\textsuperscript{368} In addition, the certificate of
need requirement, in general, now only applies to HMOs when they
make capital expenditures over $150,000 or certain purchases of equip-
ment, and to hospitals controlled by HMOs when they make changes in
bed capacity.\textsuperscript{369} The new statute further encourages HMO develop-
ment by eliminating the requirement that HMOs provide a minimum
benefit package.\textsuperscript{370} Additionally, HMOs and their contracting provid-
ers may now furnish services to nonmembers and noncovered services
to members on a “fee for services basis” as long as delivery of covered
services to members is not impaired.\textsuperscript{371} The 1979 act also frees the
internal operations of HMOs from much regulatory control.

The new statute changes the HMO enrollment procedure by pro-
viding a “dual choice” provision\textsuperscript{372} which requires employees who are
offered an HMO option to elect between HMO and insurance coverage
when the offer is first made\textsuperscript{373} with an annual option to change plans.\textsuperscript{374}
Although the “dual choice” provision as originally drafted would have
required public and some private employers offering health plans to
give their employees an option to enroll in an HMO if one is avail-
able,\textsuperscript{375} this requirement was not retained in the enacted version of the
statute.\textsuperscript{376} In addition, under the 1977 statute, HMOs were generally
required to hold an annual “open enrollment period,” during which
patients had to be accepted for coverage in the order they applied re-
gardless of medical condition.\textsuperscript{377} The open enrollment requirement has
now been deleted.\textsuperscript{378} The new statute provides, however, that an HMO
shall not deny enrollment to any employee unless it is unable to pro-
vide services.\textsuperscript{379}


\textsuperscript{369} Id. § 131-178(b). The statutory language, however, does not clarify whether the con-
tracting providers for an HMO are subject to certificate of need review.

\textsuperscript{370} Law of June 8, 1979, ch. 876, 1979 N.C. Sess. Laws 1202 (repealing N.C. GEN. STAT.
§§ 57A-2(b), -4(b)(3)(Cum. Supp. 1977)). The “basic health care services” that HMOs were re-
quired to offer included “emergency care, inpatient hospital and physician care, and outpatient
medical service.” Id.


\textsuperscript{372} Id. § 57B-11.

\textsuperscript{373} Id. § 57B-11(b).

\textsuperscript{374} Id.


\textsuperscript{377} Id. § 57A-11 (repealed by Law of June 8, 1979, ch. 876, 1979 N.C. Sess. Laws 1208).

\textsuperscript{378} See id.

\textsuperscript{379} Id. § 57B-12(e).
Finally, the 1979 legislation significantly amends the categories of persons who may operate HMOs under the Act. Under both the 1977 and 1979 versions of the statute, no “person” may operate an HMO without complying with the Act’s requirements. The 1979 legislation revised the definition of “persons” to include corporations but excluded individuals and professional associations. Thus, the recent amendment may prohibit individual and incorporated physicians from operating prepaid health plans. Alternatively, however, the new act could be construed to allow such physicians to operate HMOs independent of state regulation.

I. Professional Standards and Administration of Justice

Since the creation of the Judicial Standards Commission in

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380. *Id.* § 57B-3(a).
381. *Id.* § 57B-2(g).
382. Other changes in the 1979 statute include a requirement that HMOs maintain minimum financial reserves. *Id.* § 57B-6. HMOs are exempt from this requirement, however, during their first full year of operation. *Id.* See also *id.* § 57B-4(a)(4) (Commissioner has authority to ensure HMOs are financially responsible.)
1973, the administrative procedure for judicial discipline has resulted in seven recommendations to the supreme court to censure or remove a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" or for "wilful misconduct in office." In the latest of these cases, In re Peoples, the supreme court settled several questions concerning the procedure for judicial discipline. The court held that: (1) once the Judicial Standards Commission's jurisdiction over a judge attaches in a disciplinary proceeding, the judge's subsequent resignation does not destroy its jurisdiction, and (2) the judge's resignation prior to termination of the disciplinary action does not render moot the question before the Commission. In addition, the court held that "wilful misconduct in office" is necessary to remove a judge from office. The lesser offense of "conduct prejudicial to the administration of justice" warrants only censure.

385. The Judicial Standards Commission was created by an amendment to the North Carolina Constitution, which changed art. IV, § 17(1), and added art. IV, § 17(2), and by its enabling legislation, Law of June 17, 1971, ch. 590, § 1, 1971 N.C. Sess. Laws 517 (codified at N.C. GEN. STAT. §§ 7A-375 to -377) (Cum. Supp. 1979) (effective 1973). The Commission has the power to recommend to the supreme court the censure or removal of a judge for enumerated reasons. The Commission may conduct preliminary investigations on its own motion or upon a citizen complaint. A due process hearing before the Commission is then conducted on the basis of which the Commission may recommend to the supreme court that a judge be removed or censured. Only the supreme court, however, has the actual power to censure or remove. N.C. GEN. STAT. §§ 7a-375 to -377 (Cum. Supp. 1979).

The Judicial Standards Commission is also empowered to institute proceedings for the removal of a justice of the supreme court. A 1979 amendment to the statute provides that the Commission's recommendation for censure or removal of a justice of the supreme court will be acted upon by the court of appeals. Law of April 30, 1979, ch. 487, § 1, 1979 N.C. Sess. Laws 476 (codified at N.C. GEN. STAT. § 7A-378 (Cum. Supp. 1979)). Prior to this amendment the supreme court had the power to remove its own justices.

For a discussion of the Judicial Standards Commission and the judicial discipline procedure, see 54 N.C.L. REV. 1074 (1976).


388. Id. at 145-46, 250 S.E.2d at 910-11.

389. Id. at 147-51, 250 S.E.2d at 912-14.

390. Id. at 158, 250 S.E.2d at 918. The term "wilful misconduct in office" has been defined by the supreme court as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present." In re Edens, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976).

391. See 296 N.C. at 158, 250 S.E.2d at 918. The phrase "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to
In December 1977 the Judicial Standards Commission notified Judge Peoples\textsuperscript{392} that it had ordered a preliminary investigation of his conduct in office to determine whether formal proceedings should be instituted against him.\textsuperscript{393} In January 1978, Judge Peoples tendered his resignation to Governor Hunt, which the Governor accepted to be effective February 1. Two days before his resignation was to become effective the judge was served with a complaint and notice that formal proceedings would be instituted against him.\textsuperscript{394} The complaint charged him with the separate offenses of "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."\textsuperscript{395} Although Judge Peoples did not answer the complaint, he made a special appearance in which he moved to dismiss on the ground that the Commission's jurisdiction extended only to judges and he was no longer a judge.\textsuperscript{396} The Commission denied the motion and conducted a formal hearing.\textsuperscript{397} Based on the evidence presented, the Commission made extensive findings of fact\textsuperscript{398} to support its conclusion that the judge's actions constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.\textsuperscript{399} In April 1978, the Commission submitted its recommendation to the North Carolina Supreme Court that Judge Peoples be removed from office with loss of retirement benefits and be disqualified from holding further judicial office.\textsuperscript{400}

\textsuperscript{392} Judge Peoples was a judge of the General Court of Justice, District Court Division in the Ninth District. 296 N.C. at 112, 250 S.E.2d at 894.
\textsuperscript{393} Id.
\textsuperscript{394} Id. at 113, 250 S.E.2d at 894.
\textsuperscript{395} Id. at 112, 250 S.E.2d at 894-95. The grounds for censure or removal of a judge are "wilful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." If a judge is removed based on these grounds, he receives no retirement compensation and is disqualified from holding further office. A judge may also be removed for permanent physical or mental incapacity, but is entitled to retirement or disability benefits. N.C. Gen. Stat. § 7A-376 (Cum. Supp. 1979).
\textsuperscript{396} 296 N.C. at 114, 250 S.E.2d at 895.
\textsuperscript{397} Id. Judge Peoples did not appear personally at the hearing but was represented by counsel.
\textsuperscript{398} The Commission found that Judge Peoples had on several occasions dismissed cases outside of court, some of which were never placed on the court calendar, had kept a "file" of cases that were removed from the docket and were not disposed of in open court, and had on three occasions taken small sums of money, ostensibly to cover court costs, from defendants whose cases he pulled from the active file. 296 N.C. at 131-41, 250 S.E.2d at 905-09.
\textsuperscript{399} Id. at 142, 250 S.E.2d at 909.
\textsuperscript{400} Id. The case was argued before the Supreme Court on November 15, 1978.
Meanwhile, on February 1, Judge Peoples had filed his candidacy for the office of Superior Court Judge. He was elected in November. The supreme court acted on the Commission's recommendations in November prior to the election. The first question the court faced was the effect of the judge's resignation on the jurisdiction of the Commission and the court. The court found that since the complaint was served before the effective date of the judge's resignation the Commission's jurisdiction attached. Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be impaired or destroyed by subsequent events even if they would have prevented jurisdiction from attaching in the first place. The court reserved the question whether the result would differ had the complaint been filed after the effective date of the judge's resignation.

In addition to attacking the court's jurisdiction, the judge argued that the issues before the Commission and the court were rendered moot by his resignation. Noting that this was a question of first impression in North Carolina, the court looked to the law of other jurisdictions. It found that as a general rule other courts have held that if the only purpose of the proceeding is removal from office the incumbent's resignation renders the proceeding moot, but if there are other sanctions that may be imposed, the proceeding may be prosecuted. Because North Carolina law provides for loss of retirement benefits and disqualification from future judicial office, the judge's resignation disposed only of the question of his removal, leaving the imposition of

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401. *Id.* Judge Peoples won the election November 28, and the supreme court's decision was filed December 29.

402. 296 N.C. at 143, 250 S.E.2d at 909. The claim of lack of jurisdiction was based on the language of N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1979), which reads in part: "Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for willful misconduct in office." Judge Peoples argued that since the statute confers the power to adjudicate only cases pertaining to certain classes of persons (judges), the court has no jurisdiction over those who are not members of the class. 296 N.C. at 143, 250 S.E.2d at 910.

403. 296 N.C. at 144-45, 250 S.E.2d at 910-11.

404. *Id.* at 146, 250 S.E.2d at 911. Judge Peoples also argued that even if the Commission acquired jurisdiction the supreme court did not. The court quickly disposed of this argument, stating that the removal proceeding is a single administrative proceeding that begins with the Commission and culminates in the supreme court. The supreme court sits as a court of original jurisdiction, not as an appellate court, in judicial removal proceedings. *Id.* at 147, 250 S.E.2d at 912.

405. *Id.* at 145, 250 S.E.2d at 911. Although this factual change would make for a closer case, the same policy reasons that dictated the result in *Peoples* would be relevant. See text accompanying notes 417-18 *infra*.

406. 296 N.C. at 147, 250 S.E.2d at 912.

407. *Id.* at 148, 250 S.E.2d at 913.
the other two sanctions to be adjudicated.  

The court's resolution of these two important questions is supported by policy considerations. As the court stated, "it would indeed be a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings had been brought against him . . . . [An opposite result] would emasculate the statute and thwart the legislative intent entirely."  

Allowing a judge to avoid the penalties of loss of retirement and disqualification from office by simply resigning before he is actually removed would in essence allow him to escape discipline altogether.  

As the Peoples case illustrates, it may not be at all difficult for a judge who has resigned under pressure of pending disciplinary action to be promptly elected to another, in this case higher, judicial office.

Cases involving a denial of admission to the bar on the grounds that the applicant has failed to demonstrate that he is of "good moral character" have been infrequent in North Carolina. In 1979, the

408. Id. at 150, 250 S.E.2d at 914. Judge Peoples also argued that the statutory provisions that bar a judge who has been removed from office for misconduct from again holding office are not authorized by the North Carolina Constitution. Id. at 159, 250 S.E.2d at 919. The argument was based on the language of the amendment which directs the General Assembly to "prescribe a procedure, in addition to impeachment and address . . . . for the . . . . censure and removal of a Justice or Judge of the General Court of Justice for willful misconduct in office." N.C. Const. art. IV, § 17(2). The court found that the amendment's purpose is to provide an additional procedure for removal, not to change the consequences of removal. Because disqualification from office is authorized in other sections of the Constitution that the amendment supplements, it is also authorized under the new procedure. 296 N.C. at 159-61, 250 S.E.2d at 919-20.

409. 296 N.C. at 150-51, 250 S.E.2d at 914.

410. But see Note, Judicial Discipline—The Power of North Carolina Supreme Court to Remove State Judges—In re Hardy, 14 WAKE FOREST L. REV. 1187, 1190 n.32 (1978) (literal reading of act would seem to allow a judge to resign without forfeiture of retirement benefits or disqualification from future judicial office prior to actual removal).

411. An applicant for admission to the bar must "be of good moral character." BOARD OF LAW EXAMINERS OF NORTH CAROLINA, RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA .0501(1) (1977) [hereinafter cited as RULE]. The applicant has the burden of proving that he is possessed of good moral character and is entitled to the confidence of the public. Id. at .0601. Each applicant is required to disclose to the Board all facts relating to any disciplinary proceedings or charges against him, and any civil or criminal proceedings, charges or investigations in which he was involved. Id. at .0603(2).

The Board is empowered by statute to conduct investigations and hearings to determine whether an applicant "possesses the qualifications of character and general fitness requisite for an attorney." To this end it is given the power to subpoena witnesses and records. N.C. GEN. STAT. § 84-24 (Cum. Supp. 1979). The statute authorizes the Board to promulgate rules, subject to the approval of the council of the North Carolina State Bar. Id. Appeals from the decisions of the Board lie as of right to the superior court of Wake County. RULE, supra, at .1404. Any party, including the Board, may appeal to the supreme court from the decision of the superior court. Id. at .1405.

412. The last case before Rogers was In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975). The next prior decision was In re Applicants for License, 191 N.C. 235, 131 S.E. 661 (1926).
supreme court considered such a case. In *In re Rogers* the supreme court resolved three questions concerning the bar admission procedure that have not before been considered. The court held that: (1) where the facts that would support a conclusion that the applicant is not of good moral character are in dispute, the Board of Law Examiners must resolve the factual disputes before it can reach a conclusion as to the applicant's character; (2) when an applicant makes a prima facie showing of his good moral character and to rebut this showing the Board relies on specific acts of misconduct that the applicant denies, the Board must assume the burden of proving the specific acts by the greater weight of the evidence; and (3) the appropriate scope of judicial review of a finding of the Board of Law Examiners is the "whole record" test.

The Board's decision to deny Rogers admission to the bar was based on his alleged involvement in two incidents—an attempt to cash a lost or stolen check and a forgery of a mail order form. At two hearings before the Board, Rogers denied any involvement in either of the two incidents, cross-examined the only witness against him, casting doubt on her identification of him as the person who tried to cash the check, and offered other evidence to refute the charges.

Shortly after the hearings, the Board issued an order denying Rogers admission to the bar, which was affirmed on appeal to the Wake County Superior Court. The Board's order contained no findings of fact that Rogers had indeed been involved in either of the incidents. The Board in fact "made no findings of fact at all. It merely recited some of the evidence presented and stated it conclusion that Rogers had not satisfied the Board of his good moral character."

The supreme court on appeal rejected the Board's argument that it is not required to make findings of fact. Noting that in all prior cases cited by the parties there had been no actual dispute as to the underlying facts, the court held that in a case where the facts are in sharp

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414. *Id.* at 56, 253 S.E.2d at 917.
415. *Id.* at 57, 253 S.E.2d at 918.
416. *Id.* at 64, 253 S.E.2d at 922.
417. *Id.* at 50, 253 S.E.2d at 914.
418. *Id.* at 51, 253 S.E.2d at 914-15.
419. *Id.* at 51-54, 253 S.E.2d at 915-16.
420. *Id.* at 49, 253, S.E.2d at 914.
421. *Id.* at 55, 253, S.E.2d at 917.
422. *Id.* See *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975); *In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926); *In re Dilligham*, 188 N.C. 162, 124 S.E. 130 (1924).
dispute the Board “must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be.” The court's reason for its holding was simple: because under the applicable statute the Board is the primary investigatory and fact-finding agency in the bar admissions process, it must resolve factual disputes brought before it. No other agency exists to make such resolutions.

Because under the rules for admission to the bar the applicant has the burden of proving that he is of good moral character, the Board argued that the burden of disproving the alleged acts of misconduct also fell upon the applicant. The court rejected this view. In the court's opinion, since it is inherently difficult to prove the negative, when the investigation narrows down to one or two alleged instances of misconduct, the burden of affirmatively proving the specific acts must shift to the Board. Otherwise, an applicant who can only deny his involvement in the alleged acts could be denied admission to the bar on the basis of suspicions and accusations alone.

The court also rejected the proposition that the Board only be required to produce substantial evidence of misconduct to meet its burden of proof. Sound administrative procedure does not allow the establishment of a fact unless supported by the greater weight of the evidence.

Having found that the Board erred in failing to make findings of fact, the court noted that the usual procedure in such a case is to remand for such findings. Because the prolonged proceedings had already held Rogers' application in abeyance for two years, however, the court proceeded to determine whether the findings of fact would have been supported by the evidence had they been made. This required the court to decide upon the proper scope of judicial review to be ac-

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423. 297 N.C. at 56, 253 S.E.2d at 917.
425. 297 N.C. at 57, 253 S.E.2d at 918.
426. RULE, supra note 419 at .0601. The traditional view in North Carolina and other jurisdictions has been that the applicant has the initial burden of showing prima facie his good moral character. The reason for this approach is that the facts relevant to the proof of an applicant's character are largely within his knowledge. Requiring the examiners to assume the burden of producing evidence would place an insurmountable investigatory burden on them. 297 N.C. at 58, 253 S.E.2d at 918-19.
427. 297 N.C. at 58-59, 253 S.E.2d at 919. That suspicions and accusations do not constitute a sufficient basis for a denial of admission to the bar is well settled in other jurisdictions. See Coleman v. Watts, 81 So.2d 650 (Fla. 1955); In re Crum, 103 Or. 296, 204 P. 948 (1922).
428. 297 N.C. at 59, 253 S.E.2d at 919.
429. The court noted that other jurisdictions follow a practice of examining the record of a
corded a finding of the Board of Law Examiners. Rogers urged the "whole record test," while the Board proposed a standard of "any competent evidence." The court's adoption of the whole record test was based primarily on the State's public policy as it is reflected in the various statutes providing for judicial review of the actions of other administrative agencies.

The three procedural questions presented by Rogers seem to have been properly answered. The court's resolution of these issues brings the bar admission investigation procedure into line with the procedures followed by other administrative agencies in the state.

J. Employment Regulation and Unemployment Compensation

The rights of handicapped persons to equal employment opportunities are protected in North Carolina by G.S. 168-6, which provides that handicapped persons shall be employed on the same terms and conditions as the able-bodied unless their disability impairs the performance of the particular work involved. In Burgess v. Joseph Schlitz Brewing Co., the supreme court adopted a narrow interpretation of the statute by refusing to include a person with glaucoma, but with 20/20 corrected vision, within the definition of handicapped person.

Defendant brewing company had informed plaintiff that it intended to hire him, but when a preemployment physical revealed that he had glaucoma the company told him that it was against company policy to hire persons with the disease. Plaintiff's complaint alleging violation of rights granted by G.S. 168-6 was dismissed for failure to state a claim based on a finding that he did not meet the definition of a handicapped person.

Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the able-bodied, unless it is shown that the particular disability impairs the performance of the work involved.

430. Id. at 61, 253 S.E.2d at 920. The Board's argument was based on the language of Rule 1404, which reads in part: "The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court." The court found this language to be inconclusive because the word "any" does not modify "competent evidence." Id.

431. Id. at 63-65, 253 S.E.2d at 921-22. The court went on to find that the whole record did not support a finding that Rogers was not possessed of good moral character, and issued an order that he be allowed to stand for the bar.

432. N.C. GEN. STAT. § 168-6 (1976). This section provides:

Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the able-bodied, unless it is shown that the particular disability impairs the performance of the work involved.


434. Id. at 528, 259 S.E.2d at 253-54.
handicapped person.\textsuperscript{435} The court of appeals reversed.\textsuperscript{436} Noting that G.S. 168-6 is a remedial statute, and therefore “should be construed broadly rather than narrowly to achieve its purposes,”\textsuperscript{437} the court of appeals found that the legislature “intended to grant broad protection of basic rights to all persons with any type of disability.”\textsuperscript{438} Citing the definition of the United States Department of Health, Education and Welfare\textsuperscript{439} that includes as handicapped those “regarded as having” a physical or mental impairment, the court of appeals found that defendant had denied plaintiff employment because of a disability. Because plaintiff’s handicap would not impair performance of the work involved he was held entitled to relief.\textsuperscript{440}

The supreme court, on appeal, reversed. It did not consider the HEW definition of handicapped persons. Instead it defined “disability” to mean “a present, non-correctable loss of function which substantially impairs a person’s ability to function normally.”\textsuperscript{441} Since plaintiff had an eye disease, but his corrected vision with glasses was normal, he was not visually disabled under this definition.\textsuperscript{442} The court further stated that the statute was intended to protect only those currently disabled, not those who suffer from conditions that may disable them in the future.\textsuperscript{443}

The supreme court’s decision in \textit{Burgess} is not in keeping with the remedial purpose of the statute. Courts that have construed other antidiscrimination laws have treated conditions such as diabetes,\textsuperscript{444} leuke-

\textsuperscript{435} G.S. 168-1 defines handicapped persons: “The definition of ‘handicapped persons’ shall include those individuals with physical, mental and visual disabilities. For the purposes of this Article the definition of ‘visually handicapped’ in G.S. 111-11 shall apply.” \textit{N.C. GEN. STAT.} \$ 168-1 (1976). G.S. 111-11 defines visually handicapped to include persons whose vision is so defective as to prevent the performance of ordinary activities for which eyesight is essential. \textit{N.C. GEN. STAT.} \$ 111-11 (1978).

\textsuperscript{436} 39 N.C. App. 481, 250 S.E.2d 687 (1979).

\textsuperscript{437} \textit{Id.} at 485, 250 S.E.2d at 689.

\textsuperscript{438} \textit{Id.}

\textsuperscript{439} 45 C.F.R. \$ 84.3(j) (1979).

\textsuperscript{440} 39 N.C. App. at 486, 250 S.E.2d at 690.

\textsuperscript{441} 298 N.C. at 528, 259 S.E.2d at 253. On appeal to the supreme court defendant argued that the statute applied only to persons who are visually handicapped as defined by \textit{N.C. GEN. STAT.} \$ 111-11 (1978). The court found, however, that the protection of G.S. 168-6 extends not only to the visually handicapped, but also to the visually disabled. This decision was based primarily on the language of \$ 168-1. \textit{See} note 443 \textit{supra}.

\textsuperscript{442} 298 N.C. at 528, 259 S.E.2d at 253.

\textsuperscript{443} \textit{Id.} at 528, 259 S.E.2d at 253-54.

\textsuperscript{444} Frase Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 F.E.P. Cases 1809 (D. Wis. 1976).
mia\textsuperscript{445} and asthma\textsuperscript{446} as handicaps. Like glaucoma, none of these conditions, except in their very advanced stages, would fit the definition of disability adopted by the North Carolina Court. Yet the courts that considered these cases realized that the intent of antidiscrimination statutes is to preclude the rejection of an otherwise qualified applicant solely because of a physical condition that does not impair his ability to perform the work involved. This was just the sort of discrimination that occurred in \textit{Burgess}.

The rationale behind HEW's treatment of those "regarded as having" a handicap as being handicapped is also applicable in \textit{Burgess}. These persons often have physical or mental conditions that are not truly handicaps because they do not impair ability to work.\textsuperscript{447} "If such persons were not considered handicapped . . . an anomalous situation would exist: People with severe handicaps would be protected against discrimination, while persons with lesser disabilities would not be protected (even though there might be less reason to think that their disability would affect their work)."\textsuperscript{448} This "anomalous situation" exists in North Carolina after the \textit{Burgess} decision. North Carolina is not alone, however. At least one other state court in a similar case has construed its antidiscrimination statute to deny protection to persons with nondisabling conditions and diseases.\textsuperscript{449}

In the area of unemployment compensation the court of appeals decided two cases that arose under G.S. 96-14. The statute provides that an individual who is unemployed "because he left work voluntarily without good cause attributable to the employer"\textsuperscript{450} shall be disqualified for unemployment compensation benefits. \textit{In re Scaringelli} \textsuperscript{451} involved a graduate student who worked as a teaching assistant at the University of North Carolina for a small stipend. He quit school and filed for unemployment benefits. In disqualifying Scari...
ingelli from receiving benefits, the Employment Security Commission
determined that he had left the teaching assistantship without good
cause attributable to the employer.\textsuperscript{452} The trial court reversed.\textsuperscript{453} The
court of appeals, affirming the trial court, held that the teaching assis-
tantship did not constitute "work" within the meaning of the G.S. 96-
14.\textsuperscript{454} Noting that the word "work" is not defined by the Employment
Security Law,\textsuperscript{455} the court of appeals adopted a dictionary definition of
work as "the labor, task or duty that affords one his accustomed
means of livelihood."\textsuperscript{456} Since the work performed by graduate stu-
dents "is not a permanent method of earning a livelihood, but only a
temporary job taken on and performed along with normal school work
and subordinate thereto,"\textsuperscript{457} students who terminate their studies and
leave their assistantships do not voluntarily quit work within the mean-
ing of G.S. 96-14.

Although the facts of the case are unusual, the holding may have
implications beyond this limited situation. It would seem that other
temporary or intermittent jobs could also fall outside the court's defi-
tion of "work," so that persons who voluntarily leave such jobs could
still receive benefits if they meet the other statutory requirements. This
could clearly lead to results inconsistent with the statute's general pol-
cy—to provide benefits for those "unemployed through no fault of
their own."\textsuperscript{458}

The statute's general policy provided the basis for the decision in
the second "voluntary leaving" case, \textit{In re Vinson}.\textsuperscript{459} \textit{Vinson} involved
an employee who was arrested on the job for felonious possession and
sale of drugs. When Vinson admitted the truth of the charges, his su-
pervisor suggested that he resign.\textsuperscript{460} The court of appeals found Vin-
son's immediate resignation to be a voluntary leaving without good
cause attributable to the employer.\textsuperscript{461} Since Vinson's resignation was

\textsuperscript{452} \textit{Id.} at 648, 251 S.E.2d at 729.
\textsuperscript{453} \textit{Id.} at 649, 251 S.E.2d at 729.
\textsuperscript{454} \textit{Id.}
\textsuperscript{456} 39 N.C. App. at 651, 251 S.E.2d at 730 (citing \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} (1976)).
\textsuperscript{457} \textit{Id.}
\textsuperscript{458} N.C. GEN. STAT. \textsection{}96-2 (1975).
\textsuperscript{459} 42 N.C. App. 28, 255 S.E.2d 644 (1979).
\textsuperscript{460} \textit{Id.} at 28, 255 S.E.2d at 645.
\textsuperscript{461} \textit{Id.} at 31, 255 S.E.2d at 646. The trial court held that based on the facts as found by the
Commission, Vinson's resignation, although voluntary, was with good cause attributable to the
employer as a matter of law. \textit{Id.} at 29, 255 S.E.2d at 645. The opinion does not disclose the basis
ultimately caused by his arrest, it was he who was at fault.\textsuperscript{462}

Another case\textsuperscript{463} arose under the section of the unemployment compensation statute that requires a claimant to be available for work in order to be eligible for benefits.\textsuperscript{464} Claimant was discharged by his employer after he pleaded guilty to drug charges. Although the Commission found that the discharge itself did not disqualify claimant from receiving benefits,\textsuperscript{465} it ultimately found him ineligible because he received a "prayer for judgment continued" until four months later when he would be sentenced.\textsuperscript{466} Claimant testified at the hearing before the Commission that he thought some employers would hire him but for the uncertainty of the upcoming sentence. The Commission found, and the court of appeals agreed, that claimant in pleading guilty to the charge created an impediment to his availability for work and therefore did not meet the statute's requirements.\textsuperscript{467}

Judge Martin dissented. In his view, supported by most other jurisdictions, availability depends on whether the individual is ready, willing and able to accept work, not whether employers are willing to hire him.\textsuperscript{468}

\textbf{K. Utilities Regulation}

An across-the-board increase in the rates charged by a public utility normally requires a general ratemaking hearing, in which the North Carolina Utilities Commission must consider the value of the utility's

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\textsuperscript{462} The court cited various cases from other jurisdictions that have reached the same result. In Unemployment Compensation Bd. v. Delker, 24 Pa. Commw. Ct. 148, 354 A.2d 59 (1976), an employee arrested on charges of possession and sale of drugs was given the choice to resign or face possible termination. He chose to resign. The court found that his resignation was voluntary because he was in no way coerced. In Mastro v. Levine, 382 N.Y.S.2d 589, 52 A.D.2d 708 (1976), an employee told that she would be discharged in two weeks chose to leave work immediately. The court simply stated that leaving work in anticipation of discharge is not good cause for leaving work.

\textsuperscript{463} In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

\textsuperscript{464} N.C. GEN. STAT. \S 96-13(a)(3) (Cum. Supp. 1979) provides:

\begin{quote}
(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that

(3) He is able to work, and is available for work.
\end{quote}

\textsuperscript{465} Apparently the Commission found that claimant's drug connected activities off the job did not constitute misconduct in connection with his work. See N.C. GEN. STAT. \S 96-14(2) (1975).

\textsuperscript{466} 42 N.C. App. at 686, 257 S.E.2d at 658.

\textsuperscript{467} Id. at 685, 257 S.E.2d at 659.

\textsuperscript{468} Id. (Martin, J., dissenting).
property, its reasonable operating expenses and the revenues to be expected in order to fix a rate structure that allows the utility a "fair return for its shareholders." The procedure is necessarily cumbersome and lengthy, since it requires an evaluation of the utility's property as well as a determination of reasonable operating expenses. An exception to the requirement of a general rate case proceeding is contained in G.S. 62-133(f). The statute allows the Utilities Commission to approve rate changes for natural gas distributors without resort to the general rate case procedure when the reason for the change is a change "in the wholesale rate of such natural gas." In a 1979 case, *Utilities Commission v. C.F. Industries*, the court of appeals construed the term "changes in the wholesale rate of such natural gas."

In July 1977 North Carolina Natural Gas requested permission to adjust its retail rates to recover the cost of leasing additional storage capacity from its gas supplier, Transcontinental Gas Pipe Line Corporation. The Utilities Commission determined that the charges for increased storage capacity paid to the gas wholesaler were "an increase in the wholesale cost of natural gas within the meaning of G.S. 62-133(f)." The court of appeals disagreed, and found that G.S. 62-133(f) has the limited purpose of allowing a utility to pass on automatically any increase in the price it pays for gas "over which neither the retailer nor the Utilities Commission has control." Increasing storage capacity was a discretionary determination on the part of the util-

470. Id. § 62-133(b)(4).
471. G.S. 62-133(f) reads in part:
   (f) Unless otherwise ordered by the Commission subsections (b), (c), and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas.

Id. § 62-133(f). (Subsections (b), (c) and (d) contain the provisions for a general rate change procedure).
472. Id.
474. Id. at 477, 250 S.E.2d at 716.
475. Id. at 478, 250 S.E.2d at 717. The Commission issued an order requiring all customers of North Carolina Natural Gas to share the cost on a proportionately volumetric measure. Id. This was in effect an authorization of an across-the-board rate increase. The basis for the Commission's determination is not clear. Apparently it was based on the increased storage costs paid to the wholesaler. Since the statute applies to "changes in the wholesale rate" paid by utilities, the Commission may have reasoned that its coverage extended to all changes in wholesale costs. Furthermore, since no change in the utility's rate base was involved, there was no obvious indication that a general rate case proceeding was required.
476. 39 N.C. App. at 479, 250 S.E.2d at 717-18.
ity, not a change in wholesale cost beyond its control.\textsuperscript{477}

The court's interpretation of the statutory language in \textit{C.F. Industries} is in harmony with other ratemaking provisions. A decision by the natural gas company to build additional storage facilities and recover the costs would unquestionably have required a general rate case proceeding in which the Commission would have ruled on the necessity of the additional storage. The fact that the additional storage was leased from the wholesaler rather than built by the utility should not remove the question of its necessity from the Commission's determination.

In another utility rate case, \textit{Wall v. City of Durham},\textsuperscript{478} the court of appeals held that the procedure used by the City of Durham to compute the charges for water and sewer services to apartment complexes served by one meter "unreasonably discriminated" among customers of essentially the same service.\textsuperscript{479} The city used a procedure known as "decapping," whereby the water usage shown by the one meter serving an apartment building is divided by the number of apartments served through the meter; the charge for the quantity obtained by this division is calculated, and the charge is multiplied by the total number of apartments to obtain the total charge for the building.\textsuperscript{480} Because the city used a declining rate structure, the use of decapping resulted in a substantially higher charge for the apartment owners than was paid by other users of the same amount of water.\textsuperscript{481}

The court noted that G.S. 160A-314(a), which authorizes cities to fix and enforce rates for public enterprises, provides that schedules of charges "may vary according to classes of service."\textsuperscript{482} The supreme court, in \textit{State ex rel Utilities Commission v. Mead Corp.},\textsuperscript{483} has interpreted this language to mean that "[t]here must be substantial differences in services or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service."\textsuperscript{484} In \textit{Wall v. City of Durham} the court of appeals found that because it cost the city no more to deliver the water to an apartment complex than it did to deliver the same amount of

\begin{footnotes}
\item[477] \textit{Id.}
\item[479] \textit{Id.} at 660, 255 S.E.2d at 745.
\item[480] \textit{Id.} at 652, 255 S.E.2d at 741.
\item[481] \textit{Id.} at 659, 255 S.E.2d at 745.
\item[482] N.C. GEN. STAT. § 160A-314(a) (1976).
\item[483] 238 N.C. 451, 78 S.E.2d 290 (1953).
\item[484] \textit{Id.} at 462, 78 S.E.2d at 298.
\end{footnotes}
water to another customer, there was no difference in service and the different rates were not justified.\footnote{485. 41 N.C. App. at 659-60, 255 S.E.2d at 745. The court did not consider significant the city's argument that the use of decapping was motivated by a desire to equalize the cost of water and sewage service among family units. See id. at 656, 255 S.E.2d at 743-44. The court was clearly correct in disregarding this argument since it can hardly be reconciled with the requirement that there be differences in services or conditions.}

Another basis for the court's decision was that the decapping procedure was not uniformly applied to all apartment complexes,\footnote{486. Id. at 660, 255 S.E.2d at 745.} although it appears that the procedure would have been held discriminatory nonetheless. In addition, the court noted that some identical users received preferential treatment in the form of "recapping," a procedure in which the readings of several meters serving one user are added together and the charge computed on the total amount. Although the validity of the recapping procedure was not before it, the court noted that it too appeared discriminatory.\footnote{487. Id. at 656, 255 S.E.2d at 743.}

Plaintiffs-apartment owners in *Wall* had elected to install a single meter in their buildings because it meant substantial savings in installation and maintenance costs.\footnote{488. Id. at 656, 255 S.E.2d at 743.} Those who received the benefit of recapping, however, were primarily users who had built new buildings or additions on their property during a period when the city used a flat rate structure and installing several meters did not mean an increase in water use costs.\footnote{489. Id. at 650, 255 S.E.2d at 740.} If the city must now compute charges strictly on a meter-by-meter basis, as it appears it must, the latter users may have to consider a substantial capital investment to reduce their water use costs.

Another development that will affect utilities is the 1979 General Assembly's enactment of substantial changes in the way public utilities appeal their property tax valuations when the appeal is based on the ground that the utility's property is appraised substantially higher than other property in the county or municipality.\footnote{490. Law of May 28, 1979, ch. 665, § 1, 1979 N.C. Sess. Laws 706 (codified at N.C. GEN. STAT. § 105-342 (c) (1979)).} There are two possible sources of inconsistency in valuation between public utility property and other property. First, public utility property is appraised by the Department of Revenue\footnote{491. N.C. GEN. STAT. § 105-335 (1979) provides that the property of public utilities shall be appraised "at its true value" by the Department of Revenue. Once the appraisal value for each utility's entire system is determined, it is allocated among the taxing units (counties and cities) in}
Second, public utility property is revalued every year while most counties revaluate property only every eight years. During an inflationary period the eight-year span can result in a large difference in valuation.

The numerous appeals of property valuations filed by utility companies in 1978 brought to light the deficiencies in the old statutory provisions. Under the earlier version of the statute the utility filed a notice of appeal to the Property Tax Commission, a hearing was held, and if the Commission determined that there was an "inequitable difference" between the valuation of utility property and that of other property in the county or city, it made an adjustment. There were at least three major problems with the old statute: (1) the key term "inequitable difference" was not defined; (2) the utilities could appeal every year, and (3) collection of property taxes was delayed during the appeal process, thus causing budgeting difficulties for some local governments.

Under the new version of the statute, the public utility petitions directly to the board of county commissioners for a reduction in the assessment of its property. The board may approve the reduction as requested, deny the request, or grant a lesser reduction. If the board and the utility agree on the reduction, they notify the Department of Revenue which then makes the appropriate adjustment in its certification. A hearing before the Property Tax Commission is required only upon the request of a utility unsatisfied with the board's decision.

In addition to providing for a simpler first step in the appeal proc-
ess, the new statute defines "inequitable difference" as a difference of 15 per cent or more between the level of appraisal used by the Department of Revenue for utility property and the level used by the county for other property. The statute requires the utility to pay taxes when due, subject to a possible refund, and allows it to appeal its property valuation only in the year of the county's revaluation and on the third and seventh year thereafter. The new statute thus eliminates most of the problems presented by the old version. In addition, by allowing the utilities and the counties to bargain directly before resorting to administrative hearings, the new procedure could result in a savings of the state's administrative time and costs.

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500. Id. § 105-342(c)(1).
501. Id.
II. CIVIL PROCEDURE

A. Appeal & Error

1. Partial Summary Judgment

In *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, the North Carolina Supreme Court held that an order granting a motion for partial summary judgment on the issue of liability, but reserving the issue of damages for trial, is not, by itself, immediately appealable as a final judgment under rule 54(b) of the North Carolina Rules of Civil Procedure or under the interlocutory appeal provisions of G.S. 1-277(a) and G.S. 7A-27 despite the trial court's characterization of the order as final. The trial court in *Tridyn* had granted plaintiff's motion for partial summary judgment and, in an effort to make the order immediately appealable under rule 54(b), had recited that the order was final and that no just reason for delaying an appeal of the order existed. The court of appeals dismissed defendant's appeal without opinion and the supreme court accepted defendant's petition for further review. In determining what constitutes a final and therefore appealable order under rule 54, the supreme court applied the traditional rule that final judgment completely disposes of a single claim and not a fragmented part of a claim. The court also held that the trial judge's

2. Rule 54(b) of the North Carolina Rules of Civil Procedure provides in part that
   [when more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. . . ]
   N.C.R. Civ. P. 54(b).
4. 296 N.C. at 491, 251 S.E.2d at 447. As a general rule a final judgment is required before an appeal may be taken. G.S. 1-277(a) and 7A-27, however, allow the immediate appeal of an interlocutory order or judgment that "affects a substantial right" of a party, "discontinues the action," "grants or refuses a new trial" or "in effect determines the action and prevents a judgment from which an appeal might be taken." N.C. GEN. STAT. §§ 1-277(a), 7A-27 (1969). G.S. 1-277(a) has been a part of North Carolina law without amendment since 1868. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 126, 225 S.E.2d 797, 803 (1976). G.S. 7A-27 repeats G.S. 1-277(a) in substance and was enacted to account for the creation of courts of appeal in North Carolina.
5. The trial court held that the liability insurance policy issued by defendant covered certain claims made against plaintiff by two of its customers and ordered that a trial be held on the issue of damages. 296 N.C. at 487, 251 S.E.2d at 445.
6. Id. The recitations made by the trial court are prerequisites for an appeal under rule 54(b). See N.C.R. Civ. P. 54(b), quoted in note 2, supra.
7. 296 N.C. at 491, 251 S.E.2d at 447. In explaining the difference between interlocutory
description of the order as a final judgment did not invoke rule 54(b) because the order was not in fact a final judgment.\textsuperscript{8}

The court's interpretation of rule 54(b) endows a trial court, in a multiple party or multiple claim lawsuit, with the discretionary power to enter a final judgment on a distinctly separate claim or on claims involving fewer than all of the parties.\textsuperscript{9} This construction is consistent with the rule's function as a companion to the procedural rules permitting the liberal joinder of claims and parties\textsuperscript{10} and does not compromise the general policy against splitting claims and allowing piecemeal appeals.\textsuperscript{11} Because the right to appeal from a partial summary judgment would clearly split claims and make joinder difficult, the court correctly held that rule 54(b) did not apply.

Finding the grant of partial summary judgment to be interlocu-


A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

The court also noted that appeal of partial summary judgment is described as interlocutory in N.C.R. Civ. P. 56(c).

8. \textit{Id.} at 491, 251 S.E.2d at 447. In construing rule 54(b) the court in \textit{Tridyn} looked to federal authority for guidance. \textit{Fed. R. Civ. P.} 54(b) similarly provides that:

\textit{When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment.}

When presented with a fact situation similar to that in \textit{Tridyn}, the United States Supreme Court, in \textit{Liberty Mut. Ins. Co. v. Wetzel}, 424 U.S. 737 (1976), held that the district court's recitation that its grant of partial summary judgment on the issue of plaintiff's liability was final and that no just reason for delaying an appeal existed did not make the order immediately appealable because partial summary judgments are by definition interlocutory. \textit{Id.} at 743, 745-46 (citing \textit{Fed. R. Civ. P.} 56(b) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone. . . ."). Lower federal courts have reached the same conclusion. \textit{See} Leonidakis v. International Telecoin Corp., 208 F.2d 934 (2d Cir. 1953); Russell v. Barnes Foundation, 136 F.2d 654 (3d Cir. 1943).


9. By reiterating that rule 54(b) requires that a judgment on a single claim rather than a fragmented part of a claim be final before it can be appealed, the court sanctioned the current practice allowing trial judges to split multiple claim lawsuits at their discretion for purposes of appeal but did not expand the appealability of interlocutory orders. 296 N.C. at 490, 251 S.E.2d at 446.


11. This policy is reflected in the supreme court's statement in Veazey v. City of Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950), that the most effective way to delay the administration of justice is to bring cases to an appellate court "piecemeal through the medium of successive appeals from intermediate orders."
tory, the *Tridyn* court considered whether the order was appealable under G.S. 1-277(a) and G.S. 7A-27, the statutory provisions governing interlocutory appeals. The court found that the order was not immediately appealable under these provisions because it did not affect a substantial right of defendant. The court reasoned that because defendant can, by excepting to the order, obtain review of the grant of partial summary judgment on appeal from a final judgment following the trial on the issue of damages, defendant's rights are fully protected without allowing an appeal. The court further stated that the most harm a party can suffer from the denial of an immediate appeal is the time and expense occasioned by a trial on the issue of damages, and mere avoidance of a trial on the issue of damages is not a substantial right entitling a party to an immediate appeal.

In the subsequent case of *English v. Holden Beach Realty Corp.*, the court of appeals held that an order granting a motion for partial summary judgment on the issue of liability, reserving the issue of damages for trial, was immediately appealable when the order included a mandatory injunction that clearly affected a substantial right of the de-

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12. See note 3 supra.
13. 296 N.C. at 491, 251 S.E.2d at 447.
14. Id. at 492, 251 S.E.2d at 448-49.
15. Id. at 491, 251 S.E.2d at 447.
fendant. In accord with Tridyn, the opinion emphasizes that the test for immediate appeal is not the existence of a partial summary judgment, but whether the order affects a substantial right of the party.

English involved an action for continuing trespass in which plaintiffs sought damages and a mandatory injunction to stop defendant from completing construction of a road across plaintiffs' property and to restore plaintiffs' land to its original condition. The trial court granted plaintiffs' motion for partial summary judgment on the issue of defendant's liability for the trespass and reserved the issue of damages for jury determination. The trial court also granted plaintiff's request for a mandatory injunction, which it included in its order of partial summary judgment.

On review of this order the court of appeals noted that although a partial summary judgment on liability generally is not immediately appealable, it is immediately appealable when the order includes a mandatory injunction because the injunction affects a "substantial right." The court did not discuss whether the grant of partial summary judgment could be reviewed apart from the mandatory injunction. It implicitly assumed that the order was reviewable in its entirety because part of it affected a substantial right, and it proceeded to determine whether the trial court properly awarded partial summary judgment for plaintiffs. When partial summary judgment is accompanied by injunctive relief, the issue is whether to allow review of the partial summary judgment incidental to the appeal of the injunction. Review of a grant of partial summary judgment under facts similar to those in English is not only necessary to adequately review the issuance of the injunction but also to make efficient use of the judges' time and the parties' funds.

2. New Trial

In addition to allowing the immediate appeal of orders that affect

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19. 41 N.C. App. at 2, 254 S.E.2d at 227. A mandatory injunction is an injunction that commands a party to take affirmative action. BLACK'S LAW DICTIONARY 923 (4th ed. 1968).

20. 41 N.C. App. at 3, 254 S.E.2d at 228.

21. Id. at 10, 254 S.E.2d at 231.

22. Id.
a substantial right of a party, G.S. 1-277(a) expressly provides for the immediate appeal of an interlocutory order that "grants or refuses a new trial."23 Faced with the general undesirability of allowing immediate appeal of new trial orders24 and the supreme court's recent decision in Tridyn,25 the court of appeals in Uniguard Carolina Insurance Co. v. Dickens26 attempted to limit the scope of the new trial provision of G.S. 1-277(a) by holding that it does not encompass orders granting only partial new trials.27

The trial court in Uniguard accepted the jury's verdict fixing defendant's liability in a subrogation action brought by plaintiff insurance company and granted plaintiff's motion for a partial new trial limited to the issue of damages.28 The court of appeals held that this order was not immediately appealable under G.S. 1-277(a).29 In reaching this decision the court relied upon Tridyn, emphasizing that defendants in both Uniguard and Tridyn faced an order that fixed liability and retained the cause solely for a determination of damages.30 Adopting the Tridyn analysis, the court in Uniguard reasoned that disallowing immediate appeal of the interlocutory order would not deprive defendant of a substantial right because defendant could, by a timely exception to the denial, preserve his right to appellate review of the order on appeal from a final judgment.31 Thus, the court of appeals, in effect, excluded an order for a partial new trial from the new trial provision of G.S. 1-277(a) on the basis that an order for a partial new trial does not affect a substantial right of defendant under the same section. The two provisions of G.S. 1-277(a), however, provide separate grounds for an interlocutory appeal and should be analyzed accordingly.32

Although G.S. 1-277(a) expressly allows the immediate appeal of

24. See text accompanying notes 37-40 infra.
25. For a discussion of Tridyn see notes 1-16 and accompanying text, supra.
27. Id. at 187, 254 S.E.2d at 198.
28. Id. at 185, 254 S.E.2d at 197.
29. Id. at 186, 254 S.E.2d at 198.
30. Id.
31. Id. This conclusion is consistent with past North Carolina cases. The North Carolina Supreme Court stated long ago, in construing the identical precursor of G.S. 1-277(a), that denial of an immediate appeal of a trial court's ruling on a motion for a new trial when no question of law or legal inference is involved does not affect a substantial right of a party because, by taking an exception, the party can raise the issue on review of the final judgment after trial. Billings v. Charlotte Observer, 150 N.C. 540, 64 S.E. 435 (1909).
32. G.S. 1-277(a) explicitly states that an "appeal may be taken from every judicial order . . . which affects a substantial right . . . or grants or refuses a new trial." N.C. GEN. STAT. § 1-277(a)
interlocutory orders, granting or denying a new trial, all orders for a new trial historically have not been appealable under this section. North Carolina courts have long held that no immediate appeal from a trial court's ruling on a motion for a new trial can be taken unless the ruling is based on a controlling question of law, as opposed to one of fact. The basis for this rule lies in the traditional notion that discretionary decisions of the trial court, including grants of new trials, are not reviewable and thus not appealable. Today, however, a new trial order is reviewable for abuse of discretion. Thus the historical basis for distinguishing between new trials granted as a matter of law and those granted as a matter of discretion no longer exists. One could argue, therefore, that under the plain language of G.S. 1-277(a) any new trial order, including a grant of a partial new trial, is immediately appealable.

The court in Uniguard rejected this argument, however, choosing instead to limit the scope of interlocutory appeal of new trial orders. While this decision displays a blatant disregard for the plain language
and past judicial interpretations of G.S. 1-277(a), an explanation for the court's approach can be found in the basic policy against allowing fragmentary appeals that waste judicial resources.\footnote{38} When an immediate appeal of an order granting a new trial is allowed and an appellate court determines that the motion was properly granted, the possibility of another appeal remains.\footnote{39} Because of this potential for multiple appeals, the federal courts generally prohibit immediate appeal from the trial court's grant or denial of a new trial regardless of whether the order is for a partial or an entire new trial or whether the order was based on a matter of discretion or a matter of law.\footnote{40}

Thus by excluding partial new trials from G.S. 1-277(a), albeit through a contorted interpretation of this provision, the court in Uniguard reached a result consistent with the rationale of Tridyn and the practice in the federal courts. After Uniguard, however, orders granting or denying entire new trials in North Carolina remain immediately appealable under G.S. 1-277(a). In view of the judicial disdain for piecemeal appeals reflected in both Tridyn and Uniguard and the anomalous treatment of partial and entire new trials, the legislature should reconsider the value of the new trial provision of G.S. 1-277(a).

\textbf{B. Argument of Counsel}

In North Carolina attorneys have the statutory right to argue before the court in all jury trials.\footnote{41} Although attorneys do not have a statutory right to argue in nonjury cases in North Carolina, the United States Supreme Court has held that counsel has an absolute constitutional right to present a closing argument in nonjury, criminal trials.\footnote{42} In the recent decision of \textit{Roberson v. Roberson},\footnote{43} however, the court of appeals refused to recognize a right of an attorney to argue in nonjury, civil cases. In \textit{Roberson}, a case of first impression, the court held that in a civil, nonjury trial, argument of counsel before the court is a privi-

\begin{itemize}
    \item \footnote{38} See, e.g., City of Raleigh v. Edwards, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951); Veazey v. City of Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).
    \item \footnote{39} See, e.g., Steele v. Wiedemann Mach. Co., 280 F.2d 380, 383-84 (3d Cir. 1960).
    \item \footnote{40} See 10 C. Wright & A. Miller, supra note 8, § 2818, at 114.
    \item \footnote{41} G.S. 84-14 gives counsel the right to argue in jury trials in superior court. N.C. Gen. Stat. § 84-14 (1969). This right appears to extend to district court proceedings by reason of G.S. 7A-193, which provides that references to the superior court in the chapters of the general statutes governing civil procedure shall be deemed also to apply to the district courts. \textit{Id.} § 7A-193.
    \item \footnote{42} Herring v. New York, 422 U.S. 853 (1975). In \textit{Herring} the Supreme Court held that the denial of an opportunity for counsel to make closing argument in a nonjury, criminal case violated the accused's sixth amendment right to adequate representation by counsel. \textit{Id.} at 865.
    \item \footnote{43} 40 N.C. App. 193, 252 S.E.2d 237 (1979).
\end{itemize}
lege subject to the trial judge's discretion instead of an absolute right.\textsuperscript{44}

The trial court in \textit{Roberson} denied defendant's attorney permission to speak on behalf of his client at the conclusion of a hearing upon an order directing defendant to show cause why he should not be held in contempt for a violation of a previous alimony decree. The court ordered the defendant jailed for four months or until he purged himself of the contempt violation.\textsuperscript{45}

On review, the court of appeals found no reversible error and upheld the trial court's refusal to allow defendant's attorney to argue before the court.\textsuperscript{46} The court inferred from the failure of the legislature to provide counsel the statutory right to argue in civil, nonjury cases that the legislature did not intend for counsel to have this right and that control of arguments of counsel in these cases was therefore within the discretion of the trial judge.\textsuperscript{47} The court, however, failed to discuss the value of closing arguments or the wisdom of placing control of these arguments within the discretion of the trial judge. This decision reflects a judicial reluctance to limit the broad power of the trial judge to maintain absolute control of his courtroom.\textsuperscript{48} The court's simplistic analysis, however, does not supply an acceptable rationale for providing a potential limit on the ability of counsel to argue before the court.

Attempts have been made to justify denying closing arguments in nonjury trials on the basis of the trial judge's alleged ability in a bench trial to discern those instances in which closing arguments would be valuable.\textsuperscript{49} The United States Supreme Court, however, in \textit{Herring v. New York},\textsuperscript{50} recently found this rationale unpersuasive.\textsuperscript{51} The Court

\textsuperscript{44} \textit{Id.} at 195, 252 S.E.2d at 238.

\textsuperscript{45} \textit{Id.} In \textit{Roberson} the trial court held that defendant wilfully refused to obey a previous order of the court directing that defendant pay alimony to plaintiff and sentenced defendant to a jail term contingent upon nonpayment of the alimony. Given the criminal nature of this action, the case is arguably within the scope and spirit of \textit{Herring}, see supra note 42. The court in \textit{Roberson}, however, did not discuss this possibility. \textit{See also Argersinger v. Hamlin}, 407 U.S. 25, 37 (1973) ("No person may be imprisoned for any offense ... unless he was represented by counsel at trial.").

\textsuperscript{46} 40 N.C. App. at 195, 252 S.E.2d at 238.

\textsuperscript{47} \textit{Id.} Numerous states have held that in a civil, nonjury case argument of counsel is a privilege and not an absolute right. See Annot., 38 A.L.R.2d 1396, 1431-34 (1954 & Supp. 1980). The court in \textit{Roberson} expressly adopted the reasoning of those courts that have held that the opportunity of counsel to argue in civil, nonjury cases is discretionary because no state statute guarantees this right. 40 N.C. App. at 195, 252 S.E.2d at 238.

\textsuperscript{48} 40 N.C. App. at 194, 252 S.E.2d at 238. The court, quoting State v. Miller, 75 N.C. 73, 74 (1876) (emphasis in original), stated that "the judge holds his court as a driver holds the reins... to govern, guide, restrain, except where he is himself restrained by law."

\textsuperscript{49} \textit{See}, e.g., People v. Don Carlos, 47 Cal. App. 2d 863, 865, 117 P.2d 748, 750 (1941).

\textsuperscript{50} 422 U.S. 853 (1975).

\textsuperscript{51} \textit{Id.} at 864 n. 15.
noted that in many cases a closing argument will not affect the decision of the court, yet on occasion the final argument will prevent an erroneous verdict. The Court held that it is reversible error to deny counsel the opportunity to make a closing argument in nonjury criminal cases. Although this holding was based upon constitutional grounds and involved a criminal trial, the court's statements concerning the importance of the argument of counsel are equally applicable to civil litigation.

In one significant respect, final arguments are potentially more important in nonjury trials than in jury trials. A jury, by definition, makes a collective decision and, as Mr. Justice Powell has perceived, "[t]his collective judgment tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." In a bench trial, however, a judge formulates his decision without the immediate stimulation of opposing perspectives. Unlike a juror, a judge in a nonjury trial is exposed to differing points of view only during the trial itself and the closing arguments by counsel. The denial of closing arguments further reduces the inputs into the factfinding process and thus increases the possibility of an erroneous verdict.

In addition, closing argument facilitates the factfinding process in a bench trial by providing the trial judge with a refreshed opportunity to view and evaluate the dispute before the court. Requiring closing arguments assures that the judge will be presented the controversy in

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52. Id. at 863.
53. Id.
54. See note 42 supra.
55. The Supreme Court of North Dakota in Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977), found the statement of the United States Supreme Court in Herring concerning the value of final arguments applicable to civil litigation. The court held that:

Litigants in civil nonjury cases... have a right to have their attorneys make a final argument. This right may be limited as to time and may be limited as to content so as to preclude improper argument, but it cannot be totally denied. In civil nonjury cases the right may be waived.

Id. at 101.

Two other states have held that counsel has an absolute right to closing arguments in civil, nonjury cases. See Callan v. Biermann, 194 Kan. 219, 398 P.2d 355 (1965); Aladdin Oil Burner Corp. v. Morton, 117 N.J.L. 260, 187 A. 350 (1936).
57. See F. JAMES, CRISIS IN THE COURTS 191, 192 (1967). The author quotes Jacob Fuchsberg, former president of the American Trial Lawyers Association:

Judges have no monopoly on intelligence, insight, or fairness. They are ordinary human beings like anyone else. I believe the opinions of 12 people are better than the opinion of one—and I don't care whether they are 12 lawyers, 12 judges, or 12 laymen... When 12 people must come to a decision, the prejudices that are inherent in most people get worked out in the discussion that is involved.
58. A judge is an ordinary human being and thus lacks any inherent abilities to recollect or
summary and will be exposed again to developments he might have missed during trial.\(^{59}\)

While providing an absolute right to closing argument necessarily involves the time and resources of the trial court,\(^{60}\) it eliminates the burden on the appellate court to review the decision of the lower court and forecloses the possibility of a retrial of the case in the event that the appellate court finds that the trial court abused its discretion in not allowing counsel to make a closing argument.\(^{61}\) Because every denial of the opportunity of counsel to argue has the potential to both waste judicial resources with appeals and subsequent retrials and deny a party the effective representation of counsel, the better approach is to require the trial court to hear the arguments as a matter of law.\(^{62}\)

**C. Directed Verdict**

A motion for a directed verdict under rule 50 of the North Carolina Rules of Civil Procedure may be granted only if the evidence is insufficient as a matter of law to justify a verdict for the nonmovant.\(^{63}\) In two recent cases the North Carolina Supreme Court outlined the circumstances in which it may be appropriate to grant a directed verdict in favor of the party with the burden of proof.

In *Murray v. Murray*,\(^{64}\) the court recognized for the first time that

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59. In describing the importance of closing argument in a nonjury case one author wrote:

Before counsel waives oral argument, he would do well to consider whether the judge may have only appeared to be listening to the witnesses but did not in fact hear them. Counsel cannot really be sure that during the trial the judge was not thinking of some other case (or perhaps about his troublesome prostate).


60. Because *Roberson* was the first North Carolina case to raise the issue of whether counsel has an absolute right to argue before the court in civil, nonjury cases, it is reasonable to believe that trial courts in North Carolina allow arguments of counsel in these cases as a matter of course. Thus the provision of an absolute right to argue will not significantly increase the burden on the trial courts.

61. Extensive litigation has been generated over whether the trial court abused its discretion in denying counsel the opportunity to argue in all types of cases. See Annot., 38 A.L.R.2d 1396, 1410-20 (1954 & Supp. 1980).

62. Allowing the trial court the discretion to deny counsel the opportunity to argue means that these decisions will be reversible only upon a showing of abuse of discretion. An aggrieved party, therefore, has the onerous burden of showing that the argument that was denied would have somehow affected the outcome. For an indication of the showing necessary to warrant a reversal for abuse of discretion in denying the closing arguments of counsel, see Annot., 38 A.L.R.2d 1396, 1410 (1954 & Supp. 1980).

63. See N.C.R. Civ. P. 50(b); see also Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979).

64. 296 N.C. 405, 250 S.E.2d 276 (1979).
it may be proper to grant a directed verdict to a party with the burden of proof when credibility is established as a matter of law. Plaintiff filed an action for alimony without divorce alleging that defendant wilfully abandoned her. The trial court denied plaintiff's motion for a directed verdict and, following a jury verdict in defendant's favor, denied her motion for a judgment notwithstanding the verdict (JNOV). Both the court of appeals and the supreme court affirmed the trial court's decision, not on the ground that the movant was the party with the burden of proof, but because the conflicting testimony presented a factual issue of whether the parties consented to the separation.65

In its decision the supreme court in Murray cited Cutts v. Casey66 for the proposition that a directed verdict cannot be granted for the party with the burden of proof on testimonial evidence unless its credibility can be established as a matter of law.67 The majority in Cutts, however, had stated that a trial judge could not direct a verdict in favor of the party with the burden of proof when recovery depended upon the credibility of the movant's witnesses.68 Although the Cutts majority briefly noted authority stating that there may be instances when credibility is established as a matter of law,69 the concurring opinion of Justice Huskins70 and subsequent courts and commentators have consistently interpreted the majority's opinion in Cutts to stand for the basic proposition that it is always improper to direct a verdict in favor of the party with the burden of proof on testimonial evidence because the credibility of witnesses is for the jury to determine.71 Several courts have even interpreted the broad language in Cutts to absolutely pro-

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65. Id. at 406, 250 S.E.2d at 277.
67. 296 N.C. at 408, 250 S.E.2d at 278. The opinion in Murray is consistent with that of Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976), in which the court granted a summary judgment to the party with the burden of proof based solely upon testimonial evidence when credibility was established as a matter of law. Id. at 369-70, 222 S.E.2d at 410.
68. 278 N.C. at 417, 180 S.E.2d at 311. The Cutts court reasoned that a directed verdict in favor of a party with the burden of proof based on testimonial evidence would violate the nonmovant's right to trial by jury because testimonial evidence by its nature involves questions of credibility that must be presented to the jury. Id. at 417, 180 S.E.2d at 311.
69. 278 N.C. at 421, 180 S.E.2d at 314 (citing J. Dickson Phillips in McIntosh, N.C. Practice and Procedure § 1488.20, (Supp. 1970)). In noting the contention that credibility may be established as a matter of law, the majority chose "to recognize that situation when it confronts us." Id.
70. 278 N.C. 390, 423, 180 S.E.2d 297, 319 (Huskins, J., concurring).
hibit a directed verdict for the party with the burden of proof, regardless of the type of evidence supporting the motion. By expressly recognizing that a directed verdict may be granted for the party with the burden of proof on testimonial evidence when credibility can be established as a matter of law, however, the Murray decision adopts the federal position espoused by Justice Huskins in his Cutts concurring opinion.

Although the supreme court limited the broad propositions of Cutts in Murray, it was not until North Carolina National Bank v. Burnette, in an opinion by Justice Huskins, that the court expressly outlined the circumstances in which credibility can be established as a matter of law and a directed verdict in favor of the party with the burden of proof is appropriate.

In Burnette the trial court entered JNOV for plaintiff on the ground that plaintiff had, as a matter of law, complied with G.S. 25-9-601, which provides for the commercially reasonable disposition of collateral by public sale. The court of appeals reversed the JNOV on the ground that plaintiff failed to comply with the notice requirements of G.S. 25-9-603. On certiorari the supreme court held that plaintiff's evidence was credible and established substantial compliance with G.S. 25-9-603 as a matter of law.

In holding that the trial court properly granted JNOV, the supreme court had to consider whether a trial court may grant JNOV in favor of the party with the burden of proof. The court reasoned that because the motion for JNOV is in effect a renewal of the earlier motion for a directed verdict, the same considerations should control the

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73. 278 N.C. at 423, 197 S.E.2d at 319. Justice Huskins disagreed "with that portion of the opinion which holds that the trial judge cannot under Rule 50, under any circumstances, direct a verdict in favor of the party carrying the burden of proof." Id. Justice Huskins argued that rule 50(b) of the North Carolina Rules of Civil Procedure should be interpreted in accordance with the comparable federal rule, id. at 427, 197 S.E.2d at 321-22, and thus when credibility is established as a matter of law it may be proper to grant a directed verdict to the party with the burden of proof. Id. at 425, 197 S.E.2d at 319. 5A J. Moore, FEDERAL PRACTICE ¶ 50.02[1], at 2318-19 (2d ed. 1975).
75. Id. at 537-38, 256 S.E.2d at 396.
77. 297 N.C. at 528, 256 S.E.2d at 390.
78. Id. at 528, 256 S.E.2d at 390.
79. Id. at 533, 256 S.E.2d at 392-93.
80. Id. at 536, 256 S.E.2d at 395.
determination of the propriety of granting either motion. 81 Thus the
court considered the question of when a verdict can be directed to the
party with the burden of proof. 82 

The court found no constitutional or procedural barriers to the
grant of a motion for directed verdict when the "credibility of movant's
evidence is manifest as a matter of law." 83 Although credibility is gen-
erally for the jury to determine, the court described three recurrent situ-
atations when credibility can be established as a matter of law: when the
non-movant admits the essential elements of the movant's claim, when
the evidence is documentary and not challenged, and when only latent
doubts about the credibility of the oral testimony exist and the non-
movant has failed to challenge the evidence. 84 

Thus Justice Huskins' decision in Burnette clarifies a decade of
confusion surrounding the propriety of granting a directed verdict to
the party with the burden of proof. In the aftermath of Burnette North
Carolina attorneys must take affirmative steps to impeach or contradict
the evidence of the party with the burden of proof in order to avoid the
risk that the evidence will be regarded as credible as a matter of law
and therefore susceptible to a directed verdict.

D. Rule 60(b) Relief from Judgment

An appeal generally divests the trial court of jurisdiction to take
any additional action in a case except to aid in the appeal. 85 Conse-
quently, while an appeal is pending the trial court lacks the power to
grant affirmative relief under rule 60(b) of the North Carolina Rules of
Civil Procedure 86 without the permission of the appellate court. 87 The

81. Id. Rule 50(b) states that a motion for JNOV shall "be granted if it appears that the
motion for directed verdict could properly have been granted." N.C. R. Civ. P. 50(b)(1). See
Sizemore, General Scope and Philosophy of The New Rules, 5 Wake Forest L. Rev. 1, 41 (1969);
see also 9 C. Wright & A. Miller, supra note 8, § 2537, at 598 (1973).
82. 297 N.C. at 536, 256 S.E.2d at 395.
83. Id. at 537, 256 S.E.2d at 396. The court stated that the constitutional right to trial by jury
provided under art. I, § 25 of the North Carolina Constitution was not absolute but subject to the
initial determination by the trial judge that genuine issues of fact existed. In addition, the court
noted that the "no comment" provision of rule 51(a), under which the trial judge must explain the
law to the jury but give no opinion on the facts, applies only after this preliminary determination
by the trial judge. Id.
84. Id. at 537-38, 256 S.E.2d at 396.
85. Traditionally, only one court has jurisdiction over a case at a given time. See Bowen v.
Hodge Motor Co., 292 N.C. 633, 636, 234 S.E.2d 748, 750 (1977); Wiggins v. Bunch, 280 N.C. 106,
111, 184 S.E.2d 879, 881 (1971).
86. Rule 60(b) provides that a court may grant relief from a final judgment or order on the
grounds of mistake, inadvertence, surprise, excusable neglect, misrepresentation, or other miscon-
duct by an adverse party. N.C. R. Civ. P. 60(b).
North Carolina Court of Appeals recently held in *Bell v. Martin,* however, that although a trial court cannot grant a rule 60(b) motion while an appeal in the case is pending, it must consider the motion for the limited purpose of indicating how it would have ruled on the motion in the absence of the appeal.

Defendant in *Bell* filed a notice of appeal following the trial court's entry of summary judgment for plaintiff and then filed a rule 60(b) motion for relief from the judgment with the trial court. The trial judge dismissed the motion on the ground that the pending appeal deprived the court of jurisdiction to hear or determine the motion. The court of appeals held that the trial court should have heard the motion and indicated how it would have ruled.

The court of appeals based its decision on dicta in the prior supreme court case of *Sink v. Easter.* In *Sink,* the supreme court noted the availability of two alternative procedures by which a trial court could state how it would rule on a rule 60(b) motion after an appeal had been taken. First, assuming the lower court lacks the

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89. As a general proposition a motion for relief under rule 60(b) is within the discretion of the trial court and appellate review is limited to the determination of whether the trial court abused its discretion. *See Sink v. Easter, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).*
90. 43 N.C. App. at 143, 258 S.E.2d at 409. The court noted that this procedure has been accepted by the second, fifth, sixth, seventh, eighth, ninth, tenth and D.C. circuits. *Id.* at 142, 258 S.E.2d at 409.

This technique parallels that adopted under the Federal Rules of Criminal Procedure. Under rule 33 of these rules the district court cannot grant a new trial once notice of appeal has been filed but can hear the motion and indicate whether it is inclined to grant it. *FED. R. CRIM. P. 33; see 2 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557, at 535 (1969).*

The technique adopted in *Bell* parallels that used with rule 52 of the North Carolina Rules of Civil Procedure, which gives a court the power to amend or change its findings within 10 days of judgment. *N.C.R. CIV. P. 52.* The court of appeals in *Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978),* held that a pending appeal does not prevent the trial court from adjudicating a rule 52(b) motion. *See Survey, supra* note 16, at 910-11 (discussion of *Parrish*).

91. 43 N.C. App. at 136, 258 S.E.2d at 405. In *Bell,* upon defendant's failure to file an answer to the complaint, the trial court entered summary judgment for plaintiff, holding defendant to be the father of plaintiff's illegitimate child and ordering support payments. Thereafter, defendant gave notice of appeal, filed an answer to the complaint without the leave of the court and then filed a rule 60(b) motion for relief from judgment accompanied by an affidavit alleging that plaintiff's attorney misled defendant concerning the time allowed for filing an answer. The trial judge dismissed defendant's rule 60(b) motion on the ground that the pending appeal deprived the court of jurisdiction to hear or determine the motion. *Id.*
92. *Id.*
93. *Id.* at 143, 258 S.E.2d at 409.
95. *Id.* at 199, 217 S.E.2d at 541 (quoting 11 C. WRIGHT & A. MILLER, supra note 8, § 2873, at 263-65 (1973)).
power to consider a rule 60(b) motion after notice of appeal has been filed, a party seeking relief from a judgment while an appeal is pending could first present the motion to the appellate court, which could remand the case to the trial court if it deemed necessary. Alternatively, indicated the supreme court, a lower court could consider a rule 60(b) motion while an appeal is pending for the limited purpose of indicating how it would rule on the motion. Although the supreme court did not adopt or reject either of these approaches, the court of appeals in Bell interpreted the higher court’s discussion of the available techniques by which a trial court could state its position on a rule 60(b) motion while an appeal is pending as an indication that “such options were available.”

The court of appeals in Bell reasoned that because rule 60(b) allows a motion to be made while an appeal is pending and because the trial court is better able to decide the issues presented in a rule 60(b) motion than an appellate court, the better approach is to permit the lower court to consider the motion while an appeal is pending for the limited purpose of indicating how it would rule on the motion absent the pending appeal. Under this procedure, when a rule 60(b) motion is made at the trial court level while an appeal is pending, the movant must notify the appellate court so that it may postpone consideration of the appeal until after the trial court has acted. If the lower court indicates that it would have granted the motion, the appellant can move the appellate court to remand the case to the trial court for judgment on the motion. If, however, the trial court indicates that it

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96. 288 N.C. at 199, 217 S.E.2d at 541.
97. Id.
98. 288 N.C. at 200, 217 S.E.2d at 543. The court did not reach the issue of whether the trial court could rule on a rule 60(b) motion while an appeal was pending because the court found that the appeal had been abandoned. Thus, the trial court retained jurisdiction. Id.
99. 43 N.C. App. at 141, 258 S.E.2d at 408.
100. Id. A Rule 60(b) motion in the trial court is generally subject to a one year time limit that is not tolled by the pendency of an appeal. See N.C.R. Civ. P. 60(b). Therefore, the court reasoned that an appellant has the right to make a rule 60(b) motion in the trial court while an appeal is pending. Cf. 11 C. WRIGHT & A. MILLER, supra note 8, § 2866, at 233 (discussion of comparable federal rule).
101. 43 N.C. App. at 141, 258 S.E.2d at 408. The United States Supreme Court recently acknowledged that the trial court “is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b).” Standard Oil Co. v. United States, 429 U.S. 17, 19 (1976), (citing Wilkin v. Sunbeam Corp., 405 F.2d 165 (10th Cir. 1968)). See 11 C. WRIGHT & A. MILLER, supra note 8, § 2873, at 269 (1973).
102. 43 N.C. App. at 142, 258 S.E.2d at 409.
103. Id.
104. Id. Although the court did not expressly state that the lower court’s indication that it would grant the motion is binding, it is evident that the trial court must fully consider the motion
would have denied the motion, the appellant can request the appellate court to immediately review the trial court's holding.  

The technique outlined in *Bell* implicitly recognizes the greater familiarity of the trial court with the merits of the rule 60(b) motion. By allowing the trial court to deny or indicate that it would grant the motion while an appeal is pending, the lower court is the first to rule on the motion, and the appellate court is able to review the trial court's decision on the motion at the same time that it reviews the full case on appeal. Under this procedure the appellate court will not intrude upon a function better suited for the trial court.

In addition, this technique for allowing trial court review while an appeal is pending is judicially economical because it avoids the potential of a wasted remand. To require that a rule 60(b) motion be made at the appellate level because of a pending appeal means that the court will either rule on the motion itself or remand the motion for consideration by the trial court if it deems necessary. On remand, however, the trial court may or may not grant the motion and thus the possibility of a pointless remand that needlessly burdens the appellate court and increases the costs and delays of litigation remains. By allowing the trial court to indicate its opinion on a motion made before it during the pendency of an appeal, the appellate court would remand only if the trial court intended to grant the motion.

Although *Bell* involved a motion under rule 60(b), the procedure adopted by the court seems equally applicable to the trial court's review of a motion under rule 59 of the North Carolina Rules of Civil Procedure for a new trial made during the pendency of an appeal.

Before it and not wait until the appellate court has remanded. For all practical purposes the trial court's grant of the motion on remand should be automatic.

105. *Id.*

106. Rule 60(b) has been described as a "grand reservoir of equitable power to do justice in a particular case." 7 Moore's Federal Practice ¶ 60.27(2), at 375 (1976), quoted in Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976). Because of the trial court's unique exposure to all facets of a case it is able to make the rulings equity requires. See 11 C. Wright & A. Miller, supra note 8, § 2873, at 269 (1973).

107. The court stated that "the initial consideration of rule 60(b) motions at the appellate level does not provide the essential ingredient of trial court review" and that "this procedure should not be encouraged." 43 N.C. App. at 142, 258 S.E.2d at 409 (1975).

108. Once an appeal is pending a party has the option of filing the rule 60(b) motion either in the appellate or the trial court. See Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971). The appellate court may adjudicate the motion itself; however, such motions are not generally heard first at the appellate level. See Locklear v. Snow, 5 N.C. App. 434, 437, 168 S.E.2d 445, 448 (1969).

109. Rule 59 requires that a motion for a new trial be made within 10 days of judgment while rule 60(b) motions can be made within one year of judgment. N.C.R. Civ. P. 59, 60(b). There-
In both situations allowing the trial court to hear the motion while the appeal is pending facilitates the trial court's disposition of the motion and promotes the economical use of judicial resources.

E. Jurisdiction

In *United Buying Group, Inc. v. Coleman*, the North Carolina Supreme Court rejected the per se approach of the court of appeals and held that a nonresident's guaranty or endorsement of a debt to be paid to North Carolina creditors does not necessarily constitute sufficient "minimum contacts" to support in personam jurisdiction over the nonresident. In reaching this decision, the court ruled that the acts of an individual nonresident defendant in his capacity as president and principal shareholder of a foreign corporation may be attributed to him personally for the purpose of establishing the existence of minimum contacts between him and North Carolina.

Plaintiff, a North Carolina corporation, periodically sold shoes to the Coleman Shoe Company, a Virginia corporation. During the course of this business relationship, defendants Lawrence and Morton Coleman each signed "conditional promissory notes" to guarantee payment to plaintiff for any merchandise ordered by the Coleman Shoe Company. When Lawrence Coleman signed his promissory note, he was a resident of Virginia and president of the shoe company. Aside from the promissory note itself, Lawrence's only contacts with the state of North Carolina arose out of his status as agent of the Coleman Shoe Company. In that capacity he ordered substantial amounts of footwear from plaintiff and attended trade shows in North Carolina. Lawrence's brother Morton Coleman was a physician who resided in New

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111. See notes 122-24 and accompanying text infra.
112. For a discussion of the "minimum contacts" test for asserting in personam jurisdiction over a nonresident defendant, see notes 125-27 and accompanying text infra.
113. 296 N.C. at 513, 251 S.E.2d at 613.
114. In an affidavit in support of his motion to dismiss for lack of personal jurisdiction, Lawrence Coleman stated:

I am a resident of the State of Virginia, and am not now nor have I ever been a resident of the State of North Carolina. I do not now and never have in the past maintained any office, bank account, mailing address, telephone listing or other business or personal facilities in the State of North Carolina. ... I do not now nor have I ever owned any real property in the State of North Carolina. I have visited the State of North Carolina for business purposes at which time to attend shoe shows for the purpose of selecting shoes to be purchased on behalf of the Coleman Shoe Company. ...
York and had no financial interest in the shoe company. His only contact with North Carolina was the promissory note,\footnote{115} from which he could derive no personal monetary benefit.\footnote{116}

When the shoe company failed to pay for merchandise received and refused to honor purchase orders yet to be filled, plaintiff sued defendants individually on the notes.\footnote{117} Plaintiff asserted personal jurisdiction over defendants under G.S. 1-75.4(5), the North Carolina "long arm" provision that creates jurisdiction in actions arising out of promises to pay for services to be performed in the state.\footnote{118} In spite of defendants' contention that the statute applied only to promises to pay for services and, therefore, did not apply to the notes in question because the notes guaranteed payment of debts arising out of the sale of goods,\footnote{119} neither the court of appeals nor the supreme court had any difficulty in finding that the execution by defendants of the promissory notes brought them within the scope of the statute.\footnote{120} Both courts therefore focused primarily on the issue of whether an assertion of jurisdiction over defendants pursuant to the statute would violate their rights to due process.\footnote{121}

The court of appeals,\footnote{122} in holding that jurisdiction could be as-

\footnote{115} Morton Coleman's affidavit was substantially identical to that of Lawrence Coleman, note 114 \textit{supra}, except for the last quoted sentence. In lieu of that statement Morton asserted: "I have never visited the State of North Carolina for any business-related purpose whatever, nor do I maintain any business interests in the State of North Carolina. I have, moreover, never maintained any business interests in that state." Record at 29.

\footnote{116} The court remarked that the "only conceivable benefit accruing to Dr. Coleman as a result of signing the note was the personal satisfaction of helping his brother Lawrence." 296 N.C. at 517, 251 S.E.2d at 615.

\footnote{117} Plaintiff alleged that the Coleman Shoe Company owed it $4,906 from previous orders and had cancelled orders for approximately $26,198 worth of merchandise. Plaintiff resold the merchandise covered by the cancelled orders at a loss and alleged total damages of $14,609.24, for which it sued defendants individually. Lawrence Coleman's note guaranteed payment up to $36,718.75, and Morton Coleman's note guaranteed payment up to $25,000. Record at 11-13.

\footnote{118} N.C. GEN. STAT. § 1-75.4(5) (1969).

\footnote{119} Brief of Appellee to the Court of Appeals at 3-6.

\footnote{120} 37 N.C. App. 26, 28, 245 S.E.2d 402, 404 (1978); 296 N.C. at 514, 251 S.E.2d at 613. Neither court discussed this issue to any significant extent. The court of appeals characterized plaintiff's delivery of merchandise to and acceptance of orders from the Coleman Shoe Company as a service rendered in North Carolina, 37 N.C. App. at 28, 245 S.E.2d 403, and the supreme court merely noted that "the Coleman brothers promised to pay for services, namely the acquisition of shoes from manufacturers. . . ." \textit{Id.} at 514, 251 S.E.2d at 613.

\footnote{121} 27 N.C. App. at 28-29, 245 S.E.2d at 404; 296 N.C. at 514, 251 S.E.2d at 613. The court of appeals and the supreme court employed the two-step analysis of Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977), the leading North Carolina case in this area. Under this analysis the court must first determine whether the long-arm statute itself applies to the particular transaction and then decide whether the exercise of jurisdiction by North Carolina violates due process of law. \textit{Id.} at 675, 231 S.E.2d at 630.

serted over both defendants, relied on its earlier decision in *First-Citizens Banks and Trust Co. v. McDaniel*\(^\text{123}\) in which the court held that

[where the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant.\(^\text{124}\)

The supreme court, however, rejected this per se rule and applied the well-established standard announced by the United States Supreme Court in *International Shoe Co. v. Washington*\(^\text{125}\) instead. Under *International Shoe*, the exercise of personal jurisdiction over a nonresident defendant is constitutional if the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." \(^\text{126}\)

As indicated by the Supreme Court, the determination of the jurisdictional importance of the contacts between a particular defendant and the forum state is made on case-by-case basis and cannot be based on rigid formulae.\(^\text{127}\)

In *Coleman*, the North Carolina Supreme Court concluded that defendant Lawrence Coleman had sufficient contacts with the state to justify an assertion of jurisdiction over him,\(^\text{128}\) but that defendant Morton Coleman did not.\(^\text{129}\)

In a threshold determination, the court held without discussion that Lawrence Coleman's corporate acts could be attributed to him personally for the purpose of its minimum contacts analysis. Conse-

\(\text{123. 18 N.C. App. 644, 197 S.E.2d 556 (1973).}\)
\(\text{124. Id. at 647, 197 S.E.2d at 558.}\)
\(\text{125. 326 U.S. 310 (1945).}\)
\(\text{126. Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court in *International Shoe* stated that a finding that due process is satisfied depends on the quality and nature of defendant's activity in the forum state "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." Id. at 319. More recently, in World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), the Supreme Court listed several factors that should be considered in assessing the fairness of extending jurisdiction to a nonresident. These factors include the burden on defendant of having to defend a lawsuit in a foreign state, the forum state's interest in adjudicating the dispute, plaintiff's interest in obtaining convenient and effective relief, the interest of the judicial system in effecting efficient resolution of controversies and "the shared interest of the several States in furthering fundamental social policies." 100 S. Ct. at 564.}\)
\(\text{127. In Kulko v. California Superior Court, 436 U.S. 84, 92 (1978), the Supreme Court noted that "[l]ike any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present."}\)
\(\text{128. 296 N.C. at 516, 251 S.E.2d at 614.}\)
\(\text{129. Id. at 517, 251 S.E.2d at 615.}\)
quently, the promissory note signed by Lawrence Coleman individually was part of an "ongoing relationship" between him and plaintiff rather than a mere casual or fortuitous contact with the state. The note, the court stated, evidenced Lawrence Coleman's continuing efforts to secure plaintiff as a regular supplier of merchandise for his shoe stores. Because of this ongoing relationship, the court considered it fair and reasonable to require Lawrence to defend this suit in the North Carolina courts.

In contrast, the court held that Morton Coleman's signing of his promissory note constituted an "isolated, fortuitous contact" with plaintiff. Because Morton could derive no financial benefit, either direct or indirect, from the note, the court concluded that he could not be said to have purposefully invoked the benefits and protection of North Carolina's laws and that his right to due process would be violated if he were required to appear in North Carolina.

In holding that North Carolina could not assert jurisdiction over Morton Coleman, the court explicitly rejected the McDaniel rule as applied by the court of appeals. The McDaniel decision was an extension of suggestions by the United States Supreme Court that jurisdiction may be based on a single contract with a resident of the forum state. The North Carolina Supreme Court, however, correctly observed that per se rules like the one adopted in McDaniel are inconsistent with the Supreme Court's requirement that the facts and circumstances of each case be examined carefully to determine whether an assertion of jurisdiction conforms to "traditional notions of fair play and substantial justice."

The court's conclusion that an assertion of jurisdiction over Morton Coleman would offend those "traditional notions" is a reasonable one. Although many courts, including the United States Supreme Court, have predicated in personam jurisdiction over a nonresident on a single contract with a resident of the forum state, additional factors in

130. Id. at 515, 251 S.E.2d at 614.
131. Id. at 516, 251 S.E.2d at 615.
132. See note 116 supra.
133. The court of appeals in McDaniel relied heavily on McGee v. International Life Ins. Co., 355 U.S. 220 (1957), in which the Supreme Court upheld jurisdiction over a nonresident defendant on the basis of a single insurance contract with a resident of the forum state. In McGee defendant insurance company had solicited a reinsurance contract with a California resident. Defendant had no office or agents in California, and insured no other California residents. Nevertheless, the Court held that the contract had a "substantial connection" with the state and upheld the California court's assertion of jurisdiction. Id. at 223.
134. 296 N.C. at 518, 551 S.E.2d at 615.
these situations have always been relied upon to make the assertion of jurisdiction conform to constitutional standards. When, as here, additional "affiliating circumstances" are not present, the inconvenience to defendant of having to come to North Carolina to defend a lawsuit outweighs the interests of the state and the plaintiff in resolving the dispute within the state.

Although the court in Coleman found additional affiliating circumstances in the relationship between Lawrence Coleman and North Carolina; those additional factors consisted entirely of Lawrence's acts as agent of the shoe company, which acts the court imputed to him personally. This imputation, although supported by some authority, is by no means indisputable. Courts that have been faced with the question whether it is fair to impute a person's acts as a corporate agent to him personally in order to establish in personam jurisdiction over him appear to have split; some have adhered strictly to the rule that jurisdiction over an individual may not be predicated upon jurisdiction over a corporation, while others have been willing to pierce the corporate veil and balance the interests of the parties involved.

135. In Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court noted several factors that had been important in its decision in McGee v. International Life Ins. Co., 355 U.S. 220 (1957). The Court stressed that defendant had solicited the contract with the California resident, that the contract had been accepted in California, that all premiums had been mailed from California, and that California had, through regulatory legislation, expressed a strong state interest in providing its citizens with legal recourse against nonresident insurers. 357 U.S. at 251-52.

In cases factually similar to Coleman, other courts, in asserting jurisdiction over a nonresident defendant, have stressed, in addition to the existence of a contract between defendant and a resident of the forum state, factors such as previous business dealings between the parties, Standard Life and Accident Ins. Co. v. W. Finance, Inc., 436 F. Supp. 843 (W.D. Okla. 1977); Gubitsi v. Buddy Schoellkopf Prods. Inc., 545 S.W.2d 528 (Tex. Civ. App. 1976); solicitation by defendant, O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971); and execution or payment of the note in the forum state, Federal Nat'l Bank & Trust Co. of Shawnee v. Moon, 412 F. Supp. 644 (W.D. Okla. 1976); Einhorn v. Home State Savings Ass'n, 256 So. 2d 57 (Fla. App. 1971).

136. See note 127 supra.

137. See generally, Kulko v. California Superior Court, 436 U.S. at 92.

138. See cases cited note 141 infra.

139. But see note 139 infra.

140. See, e.g., Spelling-Goldberg Prods. v. Bodek & Rhodes, 452 F. Supp. 452, 454 (E.D. Pa. 1978) ("Establishing personal jurisdiction over an individual on the basis of 'doing business' requires that the evidence show . . . that the business was done by the individual for himself and not for or on behalf of his corporation."); Feld v. Tele-view, Inc., 422 F. Supp. 1100, 1104 (E.D. Pa. 1976) ("[An individual's] transaction of business solely as an officer or agent of a corporation does not create personal jurisdiction over that individual."); Lehigh Valley Indus., Inc. v. Birenbaum, 389 F. Supp. 798, 803-04 (S.D.N.Y. 1975), aff'd, 527 F.2d 87 (2d Cir. 1975) ("[An individual's] transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual.").

141. See, e.g., Costin v. Olen, 449 F.2d 129 (5th Cir. 1971) (individual defendant held to be alter ego of corporation); Odell v. Signer, 169 So. 2d 851 (Fla. App. 1964) (individual defendants held subject to liability for their corporate acts, corporate acts could therefore be imputed to them...
The *Coleman* court followed the latter approach; however, it limited its consideration of defendant’s corporate acts to situations in which “defendant is a principal shareholder of the corporation and conducts business in North Carolina as principal agent for the corporation.”\(^{142}\) The court further limited its holding by stating that corporate acts may be imputed to an individual defendant only for the purpose of determining the sufficiency of defendant’s contacts with the state.\(^{143}\) This limitation makes it clear that the court is not imposing liability on defendant for his acts as corporate agent. It is merely stating that if defendant’s actions as an individual bring him within the scope of the long-arm statute, the court may consider all of his actions, including those on behalf of his corporation, in its inquiry into the constitutional validity of requiring defendant to come to North Carolina to defend the lawsuit.\(^{144}\)

The court’s holding, so limited, is clearly correct. It would have been unfair to allow Lawrence Coleman to hide behind his role as agent of his own corporation in order to avoid the reach of the North Carolina courts. Because the corporate acts of an individual who is president and controlling shareholder of a corporation will inure largely to his own benefit, a substantial identity exists between his interests and those of the corporation. It is only reasonable to take those corporate acts into account in determining whether, based on all defendant’s contacts with the state, it is fair to require him to defend a lawsuit in North Carolina.

In the wake of the United States Supreme Court’s decision in *Shaffer v. Heitner*\(^{145}\) that all assertions of jurisdiction by state courts must conform to the due process standards set forth in *International Shoe Co.*
CIVIL PROCEDURE

v. Washington, 146 considerable doubt has been raised about the continued viability of quasi in rem jurisdiction. 147 The North Carolina Court of Appeals, in the recent decision of Holt v. Holt, 148 expressed its view that, in particular circumstances, quasi in rem jurisdiction is still a legitimate means by which the state may compel nonresidents to come into its courts. The court in Holt held that quasi in rem jurisdiction can be constitutionally asserted when a defendant owns real estate in North Carolina and this real estate bears "some relation" to the underlying controversy between the parties.

Plaintiff in Holt alleged that defendant failed to make alimony and child support payments as ordered by a Missouri divorce decree previously obtained by the parties. She also alleged that defendant had several other outstanding obligations arising out of the parties' separation agreement. Neither plaintiff nor defendant lived in North Carolina at the time of the separation agreement or divorce decree, and neither lived in North Carolina at the time of the suit. The parties had jointly owned some real estate in North Carolina prior to their divorce, however, and, at the time of the suit, defendant owned real estate in North Carolina that he had purchased soon after the divorce. 149 Plaintiff sought judgment against defendant in North Carolina for accrued alimony and child support as well as the obligations owed her pursuant to the separation agreement, and procured an order of attachment against defendant's real property in North Carolina pursuant to G.S. 1-440.2. 150

The court of appeals construed plaintiff's attachment proceeding as an attempt to assert quasi in rem jurisdiction over defendant 151 and

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146. 326 U.S. 310 (1945). For a discussion of these standards, see notes 125-27 and accompanying text supra.
149. Id. at 345, 255 S.E.2d at 408.
150. Id. at 345, 255 S.E.2d at 408. G.S. 1-440.2 provides for a proceeding to attach property in order "to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child." N.C. GEN. STAT. § 1-440.2 (1969).
151. The court stated that "the basis of the court's jurisdiction must rest on plaintiff's proceeding to attach defendant's realty under G.S. 1-440.1 in order to give the court jurisdiction quasi in rem . . . ." 41 N.C. App. at 352, 255 S.E.2d at 412. G.S. 1-440.1(e) sets forth an exception to the general rule that no personal judgment can be entered against a defendant unless the court has personal jurisdiction over him. It states that "[a]lthough there is no personal service on the de-
recognized that *Shaffer* controlled the validity of such assertions.\(^{152}\) In applying *Shaffer*, the court relied on its previous interpretation of that decision in *Balcon, Inc. v. Sadler*\(^{153}\) in which the court, pursuant to suggestions in the *Shaffer* decision,\(^{154}\) indicated that "[w]here real property has some relation to the controversy," the state's interest in controlling real estate within its borders coupled with defendant's substantial relationship with the forum in connection with that real estate should support jurisdiction.\(^{155}\) The *Holt* court followed the *Balcon* rule that if the realty in question has "some relation" to the controversy, its presence alone can be an adequate minimum contact to satisfy *Shaffer*.\(^{156}\)

Conceding that no direct relationship existed between the real property owned by defendant in North Carolina and the Missouri separation agreement and divorce decree,\(^{157}\) the court nevertheless found that defendant's ownership of North Carolina real estate bore "some relation" to the controversy, thereby satisfying the minimum contacts test and supporting jurisdiction over defendant.\(^{158}\) The court based its conclusion on several factors. First, the court noted that one purpose of the prior divorce action was to determine the property rights of the parties,\(^{159}\) and that the North Carolina action could therefore be regarded as a continuation of the Missouri litigation. Viewed in this

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\(^{152}\) Id.

\(^{153}\) 36 N.C. App. 322, 244 S.E.2d 164 (1978).

\(^{154}\) 41 N.C. App. at 348, 255 S.E.2d at 410.

\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) Id. at 352-53, 255 S.E.2d at 412-13.

\(^{158}\) Id. at 352, 255 S.E.2d at 412.
light, defendant's real estate in North Carolina related to the overall controversy. Next, the court pointed out that defendant purchased his North Carolina real estate less than a month after he was ordered to begin making payments to plaintiff and that those payments ceased the following month. The court surmised that defendant chose to spend a large part of his income on his North Carolina property instead of making payments under the Missouri divorce decree. Finally, the court took notice of the parties' former joint ownership of real property in North Carolina. Although this property had no relation to the present litigation, the court considered it an additional contact between defendant and the state.

While the factors noted by the court suggest a connection between defendant and North Carolina, the Holt decision is unsatisfactory in that it fails to justify its invocation of quasi in rem rather than in personam jurisdiction. The court's holding that minimum contacts existed between defendant and the state should have warranted an assertion of in personam jurisdiction according to the Shaffer doctrine, but the court clearly stated its view that jurisdiction over defendant must be quasi in rem. While the court may have felt, as does at least one commentator, that the test for minimum contacts in a quasi in rem action is less stringent than in a strict in personam action, the decision gives no indication that the court made such an assumption.

The court also failed to address the question whether a judgment recovered by plaintiff would be limited to the value of defendant's property in the state. A traditional quasi in rem judgment would be so limited, and if the court applies a relaxed minimum contacts test this limitation would continue to be appropriate. However, if the court has found contacts sufficient to invoke in personam jurisdiction, and has simply labeled it quasi in rem, a limitation of plaintiff's recovery to the value of defendant's North Carolina property would be incongruous.

Another weakness in the decision, discussed by Judge Clark in his

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160. Id. at 352-53, 255 S.E.2d at 412-13.
161. Id. at 353, 255 S.E.2d at 413.
162. See note 151 supra.
163. See Moore, supra note 147, at 183.
164. See generally Moore, supra note 147, at 184:

The existence within a state of property owned by a defendant may give rise to sufficient expectations or duties of the defendant to justify requiring him to defend a suit, at least to the extent of the value of the property. . . . Principles of fairness may not be offended if the judgment is limited to the value of the property, though the contacts may be insufficient to justify the imposition of general liability.
is the court's failure to explain why it is fair to require defendant to defend this lawsuit in North Carolina when a more appropriate forum exists. Although the majority expressed its concern that defendant might be able to completely avoid his obligations if jurisdiction were not asserted in North Carolina, no apparent reason exists why plaintiff could not obtain relief in the courts of Missouri. A final Missouri judgment establishing that defendant owed plaintiff a sum certain could be enforced in the courts of North Carolina under the full faith and credit clause of the Constitution without raising any jurisdictional problems. The majority mentioned this approach, but dismissed it as an alternative and totally distinct means by which plaintiff could obtain relief. It seems, however, that the availability of a more efficient resolution of the controversy ought to be an important factor in the court's due process analysis. Although it is not necessary that North Carolina be the most appropriate forum for due process to be satisfied, fairness to defendant and the "orderly administration of the laws which it was the purpose of the due process clause to insure" requires that the existence of a more appropriate forum be considered.

In another jurisdictional development, the North Carolina legislature responded to a request by the court of appeals to resolve an inconsistency between the statute of limitations tolling provision of G.S. 1-21 and the state's long arm statute, G.S. 1-75.4. Under of G.S. 1-21, the applicable statute of limitations was tolled whenever a defendant was absent from the state, even if the defendant was subject to

166. Id. at 354, 255 S.E.2d at 413.
168. 41 N.C. App. at 347, 255 S.E.2d at 409.
169. See World-Wide Volkswagen Corp. v. Woodsen, 100 S. Ct. 559, 582 (1980) (Brennan, J., dissenting): "[T]he Constitution does not require that trial be held in the State which has the 'best contacts' with the defendant."
171. See Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 859 (1976). The court in Duke noted the inconsistency but declined to amend G.S. 1-21 by judicial decree. The court applied the tolling statute despite defendant's amenability to process in North Carolina during the time he was absent. Id. at 571-72, 221 S.E.2d at 898.
172. N.C. GEN. STAT. § 1-21 (Cum. Supp. 1979) provides:

If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment.
173. Id. § 1-75.4 (1969).
process under the long arm statute. The legislature amended G.S. 1-21 to provide that it "shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of the long arm statute."\textsuperscript{174}

The purpose of this tolling statute is to prevent a defendant from avoiding a lawsuit by removing himself from the state.\textsuperscript{175} When a defendant is subject to the jurisdiction of the North Carolina courts notwithstanding his absence from the state, however, there is no reason to deny him the protection of the statute of limitations or to permit a plaintiff to delay bringing his claim.\textsuperscript{176} This amendment is therefore a reasonable resolution of the conflict and brings North Carolina in line with the majority of states.\textsuperscript{177}

\section*{F. Summary Judgment}

In \textit{Moore v. Fieldcrest Mills, Inc.},\textsuperscript{178} the supreme court held that when a defendant's motion for summary judgment is supported by affidavits showing a lack of negligence on his part and the credibility of the affiants is not in question, summary judgment is appropriate if the plaintiff fails to raise an issue of material fact in response.\textsuperscript{179} This decision overrules \textit{sub silentio} the holding of the court of appeals in \textit{Goode v. Tait, Inc.}\textsuperscript{180} that summary judgment should be granted only when the moving party affirmatively shows not only that, based on the evidence presented in support of the motion, he is entitled to judgment, but also that the opposing party could not possibly present other evidence from which a jury could reach a different conclusion as to a material fact.\textsuperscript{181}

In \textit{Goode}, a negligence action, defendant moved for summary judgment on the basis of a deposition of plaintiff that indicated a lack of negligence on the part of defendant. Although plaintiff submitted no evidence in response, the court of appeals held that because other evidence of defendant's negligence could be presented at trial, a material

\begin{itemize}
\item \textsuperscript{174} Law of May 8, 1979, ch. 525, § 1, 1979 Sess. Laws 543 (codified at N.C. GEN. STAT. § 1-21 (Cum. Supp. 1979)).
\item \textsuperscript{175} Broadfoot v. Everett, 270 N.C. 429, 432, 154 S.E.2d 522, 525 (1967).
\item \textsuperscript{176} See generally 12 WAKE FOREST L. REV. 1041 (1976).
\item \textsuperscript{177} See \textit{id.} at 1045-46.
\item \textsuperscript{178} 296 N.C. 467, 251 S.E.2d 419 (1979).
\item \textsuperscript{179} \textit{id.} at 474, 251 S.E.2d at 424.
\item \textsuperscript{180} 36 N.C. App. 268, 243 S.E.2d 404 (1978).
\item \textsuperscript{181} \textit{id.} at 270, 243 S.E.2d at 406.
\end{itemize}
issue still existed and defendant’s motion could therefore not be granted.

The supreme court in Moore implicitly rejected the court of appeals’ approach in Goode, which in effect required a defendant to conclusively prove his lack of negligence before summary judgment could be entered in his favor. Without mentioning Goode, the Moore court made it clear that Rule 56 of the rules of civil procedure does not require a defendant to meet such a heavy burden. In a fact situation almost identical to that of Goode, the Moore court noted that the rule requires only that the moving party demonstrate that no issue of material fact exists and that he is entitled to judgment as a matter of law. The court concluded that because the depositions offered by defendants in support of their motion for summary judgment established their lack of negligence, defendants were entitled to judgment as a matter of law “unless forestalled by a forecast of evidence by plaintiff sufficient to counter the effect” of the depositions. Plaintiff offered no evidence in response to defendant’s motion, and the court entered judgment against plaintiff.

Clearly, plaintiff could have produced other evidence of defendant’s negligence at trial; the court, however, held that if plaintiff failed to produce such evidence at the appropriate time, summary judgment should be entered against him. This holding is consistent with the purpose of the summary judgment procedure, which is to eliminate formal trials when only questions of law are involved and to dispose of unfounded claims when fatal weaknesses in them are revealed. If a plaintiff is unable to present any evidence to support his claim when challenged to do so by his opponent’s summary judgment motion, it is unlikely that any evidence will be forthcoming at a trial of the claim. Accordingly, the action should be dismissed at the earliest possible stage of the litigation.

The court of appeals applied Moore in Middleton v. Meyers, a tort action for malicious prosecution. Defendant moved for summary

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183. For a comparison of the holdings, see Middleton v. Meyers, 41 N.C. App. 543, 547, 255 S.E.2d 255, 257 (1979), discussed at text accompanying notes 78-79 infra.
184. Plaintiff in Goode was injured when a stack of water pumps and tanks he was unloading fell against him, and plaintiff in Moore was injured when bales of fiber he was unloading fell on him. In both cases plaintiff testified by deposition that he did not know what caused the piles to fall.
185. 296 N.C. at 473, 251 S.E.2d at 423.
186. Id. at 470, 251 S.E.2d at 422.
judgment, offering evidence of his good faith and lack of malice. Plaintiff, relying on Goode, claimed that defendant had failed to show that no other evidence could be produced to establish malice, and defendant's motion must therefore be denied. The court rejected this contention, however, and followed the supreme court's guidelines as set forth in Moore. The court in Middleton held that because a showing of malice is an essential element of an action for malicious prosecution, the burden shifted to plaintiff to make an affirmative showing that a material issue of fact existed on that element. Ruling that, as a matter of law, plaintiff's showing was inadequate to raise an issue of fact, the court affirmed the trial court's grant of summary judgment. This result is consistent with the Moore decision and with the spirit of rule 56.

BARRY JAMES SOBERING
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188. Id. at 547, 255 S.E.2d at 257.
III. COMMERCIAL LAW

A. Contracts

When awarding damages in breach of contract actions, North Carolina courts have generally followed the rule that only those damages which were “foreseeable” by the parties when they contracted are compensable.1 Plaintiffs generally have not been allowed to recover for alleged mental anguish on the grounds that such damages are too remote to have been in the contemplation of the parties at the time of contract.2 The courts have recognized a line of exceptions, however, and awarded damages for mental anguish resulting from the breach of burial3 and marriage4 contracts. The accepted rule is that damages for mental anguish will be awarded in cases where the contract was “personal” in nature, and one party’s duty was “so coupled with matters of mental concern or solicitude . . .” that a breach of that duty rendered mental anguish foreseeable.5 The North Carolina Supreme Court recently reexamined this rule in Stanback v. Stanback.6

Stanback was an action for damages resulting from the breach of a supplementary provision to a separation agreement.7 Under the contract plaintiff-wife agreed to pay her attorneys’ fees on the condition that defendant-husband reimburse her by increasing four of his periodic separation payments by 25% of the total legal fees paid by his wife.8 In addition, the husband agreed that if the wife was not allowed a deduction for the attorneys’ fees on her 1968 federal and state income tax returns, he would pay the resulting increase in the wife’s taxes.9 The dispute arose when the IRS disallowed the wife’s deduction for attorneys’ fees and the husband failed to pay her tax deficiency.10

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2. See Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977). Courts have held that mental anguish damages are less likely to be foreseen by the parties in “pecuniary” as opposed to “personal” contracts, thus have often referred to the “pecuniary” nature of the contract rather than the lack of foreseeability as grounds for rejecting such claims. See generally, McCormick, DAMAGES § 145, at 592 (1935).
7. Id. at 183, 254 S.E.2d at 614.
8. Id.
9. Id.
10. Id. Plaintiff was forced to borrow the sum needed to pay the deficiency, but was unable to repay the loan. At the time of the complaint her home was the subject of a foreclosure action by the private lender. Id. at 186, 254 S.E.2d at 616.
When the wife could not afford to pay the additional tax assessment, the IRS filed a tax lien against her home, levied, and published a formal notice of sale.\textsuperscript{11}

Plaintiff alleged that she suffered "great mental anguish and anxiety"\textsuperscript{12} as a result of public knowledge of her tax deficiency, and that consequential damages of that nature were within the contemplation of the parties when the separation agreement was made.\textsuperscript{13} The trial court granted defendant's motion to dismiss the part of the complaint seeking recovery for mental anguish\textsuperscript{14} and the court of appeals affirmed.\textsuperscript{15} The court of appeals, citing the rule that damages for mental anguish resulting from the breach of pecuniary contracts are not recoverable,\textsuperscript{16} concluded that the disputed separation provision was "commercial" rather than "personal" in nature.\textsuperscript{17} Although plaintiff's complaint alleged that the parties contemplated consequential mental anguish damages, the court held that the very nature of the contract prohibited recovery.\textsuperscript{18}

On appeal, the supreme court thoroughly reviewed North Carolina cases on the mental anguish issue and scrutinized the standards adopted in other jurisdictions.\textsuperscript{19} While the court acknowledged the policy argument for limiting contractual risk by awarding damages

\begin{itemize}
  \item \textsuperscript{11}Id.
  \item \textsuperscript{12}Id. at 186, 254 S.E.2d at 616.
  \item \textsuperscript{13}Id. at 184, 254 S.E.2d at 615. Plaintiff alleged that actions taken by the IRS to foreclose the tax lien were given publicity in the local media thereby causing her to suffer great embarrassment, humiliation, and degradation in the eyes of her friends and the public in that "this information has been interpreted by the members of the public as indicating that she has failed to pay taxes which were justly due the Internal Revenue Service and indicating a lack of public responsibility and personal integrity" .
  \item \textsuperscript{14}Id. at 186, 254 S.E.2d at 616.
  \item \textsuperscript{15}Id. at 184, 254 S.E.2d at 615. In addition to the mental anguish claim, plaintiff sought recovery for actual damages equal to the amount of the tax deficiency and the punitive damages. She also joined a claim for "abuse of process" by defendant resulting from a related action. The actual damages issue was not disputed. The court's disposition of the abuse of process and punitive damage claims will not be discussed.
  \item \textsuperscript{16}37 N.C. App. 324, 246 S.E.2d 74 (1978).
  \item \textsuperscript{17}Id. at 328, 246 S.E.2d at 78.
  \item \textsuperscript{18}Id. at 330, 246 S.E.2d at 79. The court referred to the contractual provision as a "tax arrangement," stressing that they were not holding that a separation agreement provision could never be "personal" in nature. Id.
  \item \textsuperscript{19}Plaintiff's claim that by its very nature a separation agreement contemplates mental anguish damages was rejected. It is thus apparent that the separation agreement was not viewed by the court as an agreement "coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed . . . ," so as to automatically indicate that the parties contemplated mental anguish damages upon breach. Lamm v. Shingleton, 231 N.C. 10, 15, 55 S.E.2d 810, 813 (1949) (burial contract). \textit{See also} Allen v. Baker, 86 N.C. 91 (1882).
\end{itemize}
only for injuries that are clearly foreseeable, it also recognized that special situations arise in which unusual damages are not unreasonably remote, either because of information communicated between the parties or because of the knowledge of the breaching party at the time of contracting.\textsuperscript{20} In an attempt to clarify prior case law and state a workable standard for evaluating a claim for mental anguish damages in a contract action, the \textit{Stanback} court concluded that such a claim is not valid unless plaintiff's complaint shows:

First, that the contract was not one concerned with trade and commerce with concomitant elements of profit involved. Second, that the contract was one in which the benefits contracted for were other than pecuniary, \textit{i.e.}, one in which pecuniary interests were not the dominant motivating factor in the decision to contract. And third, the contract must be one in which the benefits contracted for relate \textit{directly} to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which \textit{directly} involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.\textsuperscript{21}

Applying the three elements to the case before it, the court found that the disputed separation agreement provision clearly was not one concerned with trade or commerce or elements of profit.\textsuperscript{22} The complaint, however, failed the second and third tests. Plaintiff's pecuniary interest in assuring herself either an income tax deduction for her legal expenses or an equivalent increase in settlement payments was found to be the "motivating factor in the decision to enter into the contract."\textsuperscript{23} The agreement also was not one relating directly to matters of mental concern or the interests and emotions of the plaintiff.\textsuperscript{24} The court therefore declared the claim for mental anguish damages properly dismissed.\textsuperscript{25}

In limiting recovery for mental anguish to contracts directly related to "personal" factors, the \textit{Stanback} court rejected a more liberal approach taken in other jurisdictions.\textsuperscript{26} California, for example, has

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\textsuperscript{20} 297 N.C. at 187, 254 S.E.2d at 616. \textit{See also} Troitino v. Goodman, 225 N.C. 406, 35 S.E.2d 277 (1945).
\textsuperscript{21} Id. at 194, 254 S.E.2d at 620 (emphasis in original).
\textsuperscript{22} Id. at 195, 254 S.E.2d at 621.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 195-96, 254 S.E.2d at 621.
\textsuperscript{26} \textit{See}, e.g., Crisci v. Security Ins. Co., 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Mitchell v. Shreveport Laundries, 61 So.2d 539 (La. Ct. of App. 1952). These courts recognized that a contract may be primarily concerned with trade, commerce or pecuniary benefits, yet still
\end{quote}
established a standard allowing mental anguish damages when the breached contract relates to "matters which concern directly the comfort, happiness, or personal welfare of one of the parties." The North Carolina Supreme Court viewed this rule as overly broad and adhered to a more restrictive standard of foreseeability when considering recovery for mental anguish in breach of contract cases. Thus, Stanback's primary significance lies in the court's apparent elimination of the possibility of recovery for mental anguish damages when a breached contract contains significant commercial or pecuniary attributes, although it also is personal in nature.

B. The Uniform Commercial Code

1. Negotiable Instruments

Two cases reached the North Carolina appellate courts in 1979 concerning forged indorsement of checks. In IFCO v. Southern National Bank of North Carolina, plaintiff IFCO, a financier of insurance premiums, delivered presigned checks to one Clamp, who was instructed to fill in the name of an insurance company as payee and deliver the check to that company. IFCO also had an agreement with

27. Westervelt v. McCullough, 68 Cal. App. 198, 208-09, 228 P. 734, 738 (1924). The Westervelt court reasoned that:

Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.

Id.

28. 297 N.C. at 194, 254 S.E.2d at 620. The Stanback court did not address the question whether physical injury is a necessary element for recovery of mental anguish damages upon breach of contract. That it did not include this element in its list of essential items for a cause of action indicates actual physical manifestation of harm is not required. Absent such a requirement, mental anguish damages for breach of contract may be more readily available than mental anguish damages in a tort action. Under tort law, the long-standing rule in North Carolina is that recovery for mental anguish will not be allowed unless accompanied by a physical injury. See, e.g., Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Byrd, Recovery for Mental Anguish in North Carolina, 58 N.C.L. Rev. 435 (1980). The courts, however, have defined "physical injury" so broadly that one commentator has speculated that recovery may be allowed in any case in which significant and genuine mental or emotional harm is established. Id. at 458.

29. See text accompanying note 21 supra.


31. Id. at 500, 256 S.E.2d at 825. Clamp was apparently an insurance agent who sold policies under a premium-financing arrangement. The lump-sum premium was paid to the insurance company by IFCO, who was repaid in periodic payments by the policy holder. Record at 34-36. IFCO gave Clamp authority to enter the name of the insurance company issuing the policy on a
Southern National Bank, the drawer, that allowed an agent of IFCO to inspect and approve each check completed by Clamp and presented to the bank for payment.\textsuperscript{32} The dispute arose when Clamp filled in the name of an unauthorized payee on a series of IFCO checks, forged the payee's indorsement, and deposited the checks in his personal account.\textsuperscript{33} IFCO inspected the checks when they were presented to the drawee bank and authorized payment.\textsuperscript{34}

Upon discovering Clamp's unauthorized actions and its own mistaken approval of the checks, IFCO demanded restitution from Southern National.\textsuperscript{35} When the bank refused, IFCO filed suit, claiming that defendant breached its duty to IFCO, which was to make payment on checks drawn by plaintiff only when those checks bore the genuine indorsement of the payee.\textsuperscript{36} Southern National defended on two grounds, that IFCO's prior inspection and approval of each check estopped it from disputing defendant's subsequent payment, and that Clamp, who indorsed the checks, was IFCO's agent and authorized to so act, thus rendering the indorsements genuine and binding upon IFCO.\textsuperscript{37} The trial court granted defendant's motion for summary judgment and the court of appeals affirmed, barring plaintiff from seeking reimbursement for payment of the checks because of its prior inspection and approval.\textsuperscript{38} The only authority cited by the court was dictum from a previous supreme court case in which drawer specifically requested his drawee bank to make payment on a particular check.\textsuperscript{39} In

\textsuperscript{32} Id. at 500, 256 S.E.2d at 826.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} IFCO alleged that Clamp improperly deposited 106 checks, totalling $45,097.56, into his personal account. Record at 4-7.
\textsuperscript{36} Plaintiff IFCO apparently based its theory of defendant's duty upon N.C. GEN. STAT. § 25-4-401(1) (1965), which provides that "as against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft." Plaintiff argued that a check presented to a drawee bank bearing a forged indorsement of a payee was not "properly payable" by the bank.
\textsuperscript{37} Brief for Defendant at 7-22.
\textsuperscript{38} 42 N.C. App. at 501, 256 S.E.2d at 826.
\textsuperscript{39} Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. 648, 657, 147 S.E.2d 37, 44 (1969). In \textit{Modern Homes}, plaintiff was the legitimate payee of a check drawn on defendant bank. When the check was presented to defendant bank by plaintiff's employee, who did not have authority to cash or indorse the check, the drawer told defendant's employee, "[T]his man is Modern Homes Construction Company and you cash it for me." Id. at 650, 147 S.E.2d at 39.
that case the court held that the drawer’s conduct would estop it from later disputing the propriety of the payment.40

While the IFCO decision is logically sound, the brief opinion is unsatisfactory because the court failed to address several provisions of article 3 of the Uniform Commercial Code (UCC) that appear directly applicable to the IFCO fact situation. Two sections of the UCC warranted consideration by the court. The first pertinent section provides that “(1) An indorsement by any person in the name of a named payee is effective if . . . (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.”41 Under G.S. 25-3-405(1)(c), when a forged indorsement is “effective,” the drawer is precluded from denying the authenticity of the indorsement.42 Applicability of this section to the IFCO facts turns on whether Clamp could be considered IFCO’s “agent.” While “agent,” is not defined in the UCC, the term is well defined in North Carolina case law and generally includes anyone who “undertakes to transact some business or manage some affairs” for the account of another.43 A convincing argument could be made that Clamp was

40. The IFCO court did not expressly state that it was relying upon a theory of estoppel. It quoted, however, the following dictum from the Modern Homes case as a basis for its holding: “[I]t is clear that drawer’s conduct in advising and requesting the Bank to make payment . . . would have estopped drawer in any subsequent suit against the Bank.” 42 N.C. App. at 501, 256 S.E.2d at 826 (quoting Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. at 657, 147 S.E.2d at 44). See note 39 supra. For a discussion of the principle of equitable estoppel, see generally, Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Boddie v. Bond, 154 N.C. 359, 70 S.E. 824 (1911); 31 C.J.S. Estoppel § 59 (1964 & Cum. Supp. 1980).

41. N.C. GEN. STAT. § 25-3-405(1)(c) (1965).

42. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 16-8, at 632-33 (2d ed. 1980). When applicable this paragraph contains, in effect, a conclusive presumption that the drawer of a check was negligent in allowing his agent or employee to provide the name of a fictitious payee. There is authority for the position that § 3-405(1)(c) does not apply if the forged check is made to a payee who actually has a bona fide claim against the drawer. Id. at 636. See Snug Harbor Realty Co. v. First Nat’l Bank, 105 N.J. Super. 572, 253 A.2d 581, aff’d, 54 N.J. 95, 253 A.2d 545 (1969). In IFCO, however, American States Insurance Company, the payee of the disputed checks, had no claim against IFCO.

The IFCO case is analogous to an example presented in the UCC’s official comments to illustrate the application of § 3-405(1)(c). That example involves an employee who pads the payroll of his employer by adding the name of P, an actual person. The employee, who never intended P to have an interest in the check, forges P’s indorsement and deposits the check in his own account. The indorsement “in the name of P is effective and the loss falls on the [employer].” U.C.C. § 3-405, Official Comment 4(b).

43. SNML Corp. v. Bank of North Carolina, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279, cert. denied, 298 N.C. 204 (1979):

An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed by his principal primarily to bring about business relations between the latter and third persons.

indeed IFCO's agent, at least while pursuing the duties that gave rise to this suit.\textsuperscript{44} If so, the second requirement of G.S. 25-3-405(1)(c)—that the agent did not intend the payee to have an interest in the instrument—is obviously met. It appears, therefore, that the \textit{IFCO} court could have relied on G.S. 25-3-405(1)(c), to render the indorsement effective and conclusively prohibit IFCO from collecting from defendant bank. Perhaps owing to the complexity of the issue involved, or to the difficulty of dealing with the status of Clamp, the court chose not to rely upon this Code provision.

A second UCC provision pertinent to the \textit{IFCO} decision is G.S. 25-3-406:

\begin{quote}
Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.\textsuperscript{45}
\end{quote}

Application of this provision to the \textit{IFCO} facts would have required a showing that IFCO was negligent in giving pre-signed checks to Clamp and that its negligence "substantially contributed" to a material alteration or an unauthorized signature. Important factual inquiries would have included examination of IFCO's past experience with Clamp, whether IFCO acted "reasonably" in trusting him with a large number of presigned checks, and whether its practice of delivering blank checks to a person in Clamp's position was common in insurance premium financing. It would be difficult for a drawee bank to convince a court that IFCO's practice was negligent. The check-inspection scheme set up by IFCO was to avoid forgeries. Thus, delivery of presigned checks to Clamp was arguably a reasonable business practice. A related issue under section 3-406 is whether IFCO was negligent in failing to detect the forged indorsements. The drawee bank could argue that once IFCO undertook the responsibility of inspecting and approving checks prior to authorizing payment, it had a duty to inspect each one thoroughly.\textsuperscript{46} A mere cursory examination may not be sufficient.

\begin{footnotes}
\item[44] See note 35 \textit{supra}.
\item[46] "[A] party who sets up procedural safeguards and then fails to follow them may be in more hot water than one who has no procedures at all." J. White & R. Summers, \textit{supra} note 42, at 628. See also Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. Ct. 42, 234 A.2d 32 (1967). The circumstances surrounding IFCO's failure to detect the fraudulent check are unclear from the court's opinion. Daily visits to Southern National Bank apparently were made
\end{footnotes}
But even had the court found the company negligent in its failure to detect the fraudulent check, that the inspection came after the falsification by Clamp raises the question whether such negligence could have "substantially contributed" to the forgery. The applicability of section 3-406 to this issue is tenuous.

Any attempt to explain the *IFCO* court's failure to address pertinent U.C.C. sections is purely speculative. The court apparently felt that the case was resolvable on general principles of common law es-toppel, thus avoiding a thorough Code analysis that would have raised several interpretation problems. The ambiguous nature of many provisions in articles 3 and 4 of the Code, however, calls for judicial interpretation in situations of questionable application. The court of appeals may well have reached the correct decision in this case, but its opinion offers no guidance for a future court attempting to apply UCC provisions in a case involving forged indorsements.

In a second forged indorsement case of 1979 the North Carolina Supreme Court, in *North Carolina National Bank v. Hammond*, defined the term "good title" as used in G.S. 25-4-207, the general warranty section of article 4. Hammond signed a $30,000 promissory note and received a check drawn on the lender, North Carolina National Bank (NCNB). The check was deposited by Hammond's associate, Daniels, in an Alabama bank indorsed "to order of Energon, Inc., M. T. (Bill) Hammond, P.A." and "for deposit only Energon, Inc. by Charlie T. Daniels." After negotiation through a series of collecting banks, defendant Federal Reserve Bank of Richmond presented the checks to an *IFCO* representative to examine checks presented for payment on the *IFCO* account. Record at 69. A cursory examination of the checks arguably would not have fulfilled *IFCO*'s responsibility to determine the authenticity of the items before authorizing payment by the drawee bank. *See* Gresham State Bank v. O. & K. Constr. Co., 231 Or. 106, 370 P.2d 726 (1962) (company's cursory comparison of its accounts receivable with receipts, resulting in failure to discover diversion of company funds, held to be negligence).

The question of negligence is one for the court or jury, based on the particular facts. N.C. GEN. STAT. § 25-3-406, Official Comment 7 (1965).

47. While § 3-406 apparently only contemplates negligent acts that precede a forgery or alteration, that conclusion is not absolutely clear. *See id.*, Official Comment 4. An argument could be made that § 3-406 should also cover a situation in which *IFCO*'s negligence in failing to discover a forged indorsement substantially contributed to the payment of the check by drawee bank.


49. N.C. GEN. STAT. § 25-4-207 (1965). The court's definition of "good title" applies equally to id. § 25-3-417.

50. 298 N.C. at 703, 260 S.E.2d at 619. NCNB was both the drawer and drawee of the check in question.

51. *Id.*
check to NCNB and received payment. Hammond failed to repay the note, and, upon suit by NCNB, alleged that his indorsement on the check was neither genuine nor authorized. NCNB then demanded reimbursement from the Federal Reserve Bank, the last collecting bank, alleging that if the check was forged the collecting bank did not have "good title" to it, and had breached the warranty of good title contemplated by G.S. 25-4-207(1)(a). The Federal Reserve Bank refused payment, and NCNB included it as a defendant.

Plaintiff NCNB argued that the definition of "good title" contemplated by G.S. 25-4-207(1)(a) is the same as the property law concept of title free from any "cloud" or "reasonable doubt." The trial court accepted this definition, holding that plaintiff's mere allegation of a forged indorsement "meant that [the Federal Reserve Bank] did not have a marketable title, which was free from reasonable doubt." Because the claim of forged indorsement was found to breach the section 4-207(1)(a) warranty, the court granted summary judgment for plaintiff. The supreme court reversed the court of appeals' affirmation of the trial court's judgment, holding that the property law definition of "good title" is unsuited to the purposes for which section 4-207 was

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52. Id.
53. Id. at 704, 260 S.E.2d at 619. The Federal Reserve Bank presented evidence that Hammond had joined with one Robbins to set up a mining operation called Energon, Inc. The NCNB loan was obtained by Hammond in his own name for Energon. The Federal Reserve Bank argued that Hammond turned the check over to Robbins with express permission to indorse it and to deposit it to Energon's account. Robbins stated that he indorsed the check as instructed, then gave it to Daniels who also indorsed and deposited it. Hammond alleged that he had not given Robbins permission to indorse the check, and that he had never received the $30,000. Id. at 704-05, 260 S.E.2d at 619-20.
54. Id. at 704, 260 S.E.2d at 619.
55. N.C. GEN. STAT. § 25-4-207(l)(a) (1965). Section 4-207 provides in pertinent part:

(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that

(a) he has good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title . . .

Plaintiff NCNB mistakenly based its claim on subsection (2) of § 4-207, but could only recover under subsection (1) because the warranties of subsection (2) do not run to payor banks from previous customers or collecting banks. See J. WHITE & R. SUMMERS, supra note 42, § 15-5, at 599 (citing Comment 4 to § 4-207). The court considered plaintiff's error "technical" and reviewed its claim under subsection (1). Under subsection (1)(a) a collecting bank breaches its warranty of "good title" to the payor bank by presenting an item bearing a forged indorsement that breaks the chain of title. J. WHITE & R. SUMMERS, supra note 42, at 598.
56. 298 N.C. at 704, 260 S.E.2d at 619.
57. Id. at 706, 260 S.E.2d at 620. See generally 21 C.J.S. Covenants § 110 (1940).
58. 298 N.C. at 705, 260 S.E.2d at 620.
59. Id.
60. 40 N.C. App. 34, 37, 252 S.E.2d 104, 106.
designed. The court concluded that the warranty of good title under section 4-207 "means only that a collecting bank is warranting that it is presenting a check whose indorsements appear to be genuine." Only an adjudicated or uncontested forgery should trigger the warranty.

The Hammond court properly recognized that the rule announced by the court of appeals could lead to a series of lawsuits up the collection chain whenever a forged indorsement was alleged. Ultimately, the depository bank could be held liable for payment of a check with a valid indorsement. Although the depository bank could recover from the drawee or drawer if the indorsement was ultimately found to be valid, the effect of granting summary judgment on an unproven allegation of forgery would be substantial.

The court noted, however, that the string of suits would begin if the drawer was granted summary judgment in a suit against its drawee on the basis of an unproven allegation of a forged indorsement. The defendant drawee would seek reimbursement from its transferor, who would then sue the next collecting bank down the chain, relying on § 4-207(2), and so on. The court may be implying that it would allow such a direct suit if the issue arose.

The last lawsuit would involve an adjudication of the validity of the controverted indorsements. The depository bank could find itself having paid the amount of the check in a summary judgment on a previous lawsuit and then having the indorsement determined to be valid. It then would have no right of recovery against the indorsers because the indorsement was in fact not forged. See 298 N.C. at 711-12, 260 S.E.2d at 623-24. In Hammond the check was actually endorsed twice before deposit, first by Robbins and then by Daniels. Under those circumstances, it would seem that the depository bank could recover from Daniels for breach of his warranty that Robbins' signature was not forged. The warranty under § 4-207(2) runs from "each customer and collecting bank who transfers an item . . .," and is not limited to collecting banks.

A determination of the indorsement's validity would presumably allow the depository bank to renegotiate the check back through the collection chain. The court said such an attempt may not have been successful in Hammond, owing to NCNB's stormy experience with the check and the loan and its probable reluctance to honor the check. The conclusion that NCNB, as drawee, could refuse to accept the check is apparently based on N.C. GEN. STAT. § 25-3-409(1) (1965), which provides that a drawee, absent special agreement, is not liable on the instrument until he accepts it. J. White & R. Summers, supra note 42, § 13-9, at 410.
gation of forgery would be an entangling snare of lawsuits and a misuse of judicial time and resources. Thus, the court properly determined that “unproven and contested allegations of forged endorsement are insufficient as a matter of law to breach a warranty of good title under G.S. 25-4-207.”

2. Secured Transactions

In Hassell v. First Pennsylvania Bank, the court of appeals was faced with a dispute between two secured creditors, each claiming a priority interest in the debtor's property.

1976, and no continuation statement was filed as required by G.S. 25-9-403(2). In November, 1976, defendant bank filed a continuation statement extending the life of its financing statement for an additional five years.

In September, 1977, after Seacrest defaulted on its notes, defendant bank exercised its rights under its security agreement with Seacrest and gave notice of a proposed public sale of the machinery and equipment. The sale took place on September 27, 1977, with defendant the high bidder at $400,000. Home Indemnity subsequently levied on the machinery pursuant to its assigned interest in Koehring’s 1975 judgment against Seacrest.

Plaintiff Home Indemnity Company appealed the trial court’s dismissal of its suit to enjoin the sale of the encumbered property by defendant bank, arguing that it retained a priority interest in the property despite its failure to file the continuation statement. Home Indemnity contended that the action by Koehring against Seacrest, which culminated in the April, 1975 judgment, occurred within the valid period of the financing statement and made a continuation statement unnecessary because the judgment itself provided continuing notice of Koehring’s security interest. The court of appeals affirmed the trial court’s decision, however, agreeing with defendant bank that mere institution of a suit against Seacrest did not automatically extend perfection of Koehring’s security interest. Plaintiff’s lien on the Seacrest machinery under Koehring’s 1975 judgment did not attach until the October 1977 execution and levy more than two weeks after

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74. See N.C. GEN. STAT. § 25-9-403(3) (1965) for the formal requisites of a continuation statement.
75. Id. § 25-9-403(2). Section 403(2) provides generally that a financing statement expires after a period of five years unless a continuation statement is filed prior to the lapse.
76. 41 N.C. App. at 297, 254 S.E.2d at 769.
77. Brief for Defendant at 2.
78. 41 N.C. App. at 297, 254 S.E.2d at 769. Home Indemnity successfully obtained a temporary restraining order enjoining the sale, but was denied both a permanent injunction and a priority interest in the proceeds from the sale. Record at 3, 68-9.
79. 41 N.C. App. at 297, 254 S.E.2d at 769.
80. Id.
81. Id. at 296, 254 S.E.2d at 768.
82. Id. at 298, 254 S.E.2d at 769. Plaintiff argued that, as assignee of Koehring’s secured claim, it had no interest in the security agreement until October of 1976, and therefore could not have filed a continuation statement prior to that time. Brief for Plaintiff at 5. The court found this factor nondeterminative, stating the rule that an assignee has no greater rights than his assignor. 41 N.C. App. at 298, 254 S.E.2d at 769.
83. 41 N.C. App. at 298, 254 S.E.2d at 769.
84. Id. at 299, 254 S.E.2d at 770. The Hassell court pointed out that in North Carolina a
Seacrest's interest in the machinery was extinguished by the public sale. 85

The court of appeals contrasted this situation with one that arose in *Chrysler Credit Corporation v. United States*, 86 a 1978 case decided by the United States District Court for the Eastern District of Virginia. In that case plaintiff Chrysler already held a perfected security interest in its debtor's property when a tax lien was filed by the United States against the same property. 87 Pending completion of a suit brought by Chrysler against the United States to determine priority interest in the debtor's assets, Chrysler's financing statement lapsed. 88 The court held that, as between Chrysler and the United States, the filing of the action gave notice sufficient to abrogate the need for a continuation statement. 89 The *Hassell* court distinguished *Chrysler* by noting that the very purpose of the litigation that resulted in the tolling of Chrysler's obligation to file another continuation statement was to establish the priority of the parties involved to the debtor's assets, and that the obligation was abrogated only in respect to the defendant United States; whereas in *Hassell* plaintiff sought to maintain priority through a judgment against the debtor and not through a judgment against defendant bank. 90 Defendant bank justifiably relied on the recorded UCC financing statements in evaluating its security position. 91

*Hassell* reaffirms the rule that a levy upon personal property must

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85. *Id.* at 299, 254 S.E.2d at 769.

86. *Id.* at 299, 254 S.E.2d at 770.


88. *Id.* at 795.

89. *Id.*

90. 41 N.C. App. at 298, 254 S.E.2d at 769.

91. Plaintiff argued that defendant bank had actual knowledge of the litigation between Koehring and Seacrest, and that actual knowledge is sufficient to prevent a secured creditor from gaining priority over an unperfected security interest. Brief for Plaintiff at 7. Several courts in other jurisdictions have accepted this "subjective notice" rule, holding that a party can be on "notice" of another creditor's security interest that has not been properly perfected. *See* Gray v. Raper, 115 Ga. App. 600, 155 S.E.2d 670 (1967); Ford Motor Credit Co. v. Patchogue, 5 U.C.C. Rep. 1272 (N.Y. Sup. Ct. 1969); Cash Loan Co. v. Boser, 34 Wis.2d 410, 149 N.W.2d 605 (1967). While the subjective notice view can be supported, the court of appeals apparently rejected plaintiff's argument. It thus appears that creditors in North Carolina are allowed absolute reliance on the record, regardless of their subjective knowledge.
take place within the valid period of perfection.\textsuperscript{92} An action by a secured creditor against his debtor will not automatically extend the effective period against a creditor not a party to the suit. The rule in the Chrysler case, while not expressly adopted by the Hassell court, is a sound one. When two secured creditors are involved in an ongoing judicial dispute concerning priority, the outcome of that suit should not be affected when one of the parties' financing statement lapses before the suit is resolved. As the Hassell case indicates, however, such judicial action will not give notice of security interests to other creditors or subsequent purchasers. Those parties should be able to rely on the U.C.C. record in establishing their priority.\textsuperscript{93}

C. Antitrust

In its 1979 legislative session the General Assembly amended the North Carolina antitrust statutes\textsuperscript{94} by adding G.S. 75-16.2,\textsuperscript{95} which provides a four year statute of limitations for causes of action accruing under chapter 75.\textsuperscript{96} The bill settled the general confusion over the applicable limitation period for treble damages actions under chapter 75\textsuperscript{97} and superceded an October 1979 ruling by the court of appeals\textsuperscript{98} that applied a three year period of limitations to a treble damages action arising under G.S. 75-1.1.\textsuperscript{99}

Much of the confusion over the applicable period of limitations has arisen in cases under G.S. 75-1.1,\textsuperscript{100} the Unfair Trade Practices section of chapter 75. Adapted from section 5 of the Federal Trade Com-

\textsuperscript{93} See 79 C.J.S. Secured Transactions § 59 (1974) (and cases cited at n.96).
\textsuperscript{96} N.C. GEN. STAT. § 75-16.2 reads in pertinent part: "Limitation of actions.—Any civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." The section also provides that the commencement of any civil or criminal action under chapter 75 by the Attorney General or a district attorney will, in certain cases, suspend the statute of limitations with respect to a private action. \textit{Id.}
\textsuperscript{97} See N.C. GEN. STAT. § 75-16 (1975).
\textsuperscript{98} Holley v. Coggin Pontiac, 43 N.C. App. 229, 259 S.E.2d 1, \textit{cert. denied}, 298 N.C. 806, 261 S.E.2d 919 (1979). The Holley case, awaiting final decision by the court of appeals when the legislature amended the statute, was not affected by the statute because the legislature exempted pending civil actions. \textit{See} N.C. GEN. STAT. § 75-16.2 (Cum. Supp. 1979).
\textsuperscript{99} N.C. GEN. STAT. § 75-1.1 (1975).
\textsuperscript{100} \textit{Id.}
mission Act, the Unfair Trade Practices Act, added to chapter 75 in 1969, was aimed at encouraging enforcement of the antitrust laws and included a treble damage provision for private actions under the act. As originally enacted, the act contained no limitation period for actions, giving rise to a conflict over which of two general statutory limitation sections should apply. G.S. 1-54(2) sets a one year period of limitations for actions “upon a statute, for a penalty, or forfeiture,” and G.S. 1-52(2) provides a three year period for actions “upon a liability created by statute.”

Prior to 1979, only the state’s three federal district courts had addressed the issue, and each had adopted the one year limitation period that applies to penalties or forfeitures. The federal district courts relied on the decision by the United States Court of Appeals for the Fourth Circuit in North Carolina Theatres, Inc. v. Thompson, a 1960 case in which the court held that under North Carolina law a civil antitrust action for treble damages is an action for a “penalty or a forfeiture” and therefore the one year limitation period of G.S. 1-54(2) governed. The question, however, reached the state’s appellate courts in 1979 in Holley v. Coggin Pontiac. The Holley court, perhaps influenced, although not bound, by the General Assembly’s adoption of a four-year limitation period earlier in 1979, held that the three year period of G.S. 1-52(2) was applicable.

The passage of G.S. 75-16.2 eliminates the confusion over which limitation period should be applied in chapter 75 actions. Expansion of the period of liability for a violation of the antitrust statutes to four

104. Id. § 1-52(2).
105. See note 98 and accompanying text supra.
107. 277 F.2d 673 (4th Cir. 1960).
110. See note 95 and accompanying text supra.
111. 43 N.C. App. at 240, 259 S.E.2d at 8.
years also furthers the goal of the Unfair Trade Practices Act to “maintain ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State.”

D. Products Liability

I. Express Warranty Actions

Since the inception of the privity doctrine in the case of Winterbottom v. Wright, the notion that a party breaching a contract owes no duty to those with whom he is not in “privity” has often led to inequitable results, and accordingly has drawn criticism from courts and legal scholars. While North Carolina has abandoned the privity re-


113. In Reid v. Eckerds Drugs, 40 N.C. App. 476, 253 S.E.2d 344, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979), the court of appeals held that a duty to warn consumers of the dangerous propensities of a product is a part of the implied warranty of merchantability provided by N.C. GEN. STAT. § 25-2-314 (1965). Plaintiff in Reid applied aerosol deodorant purchased from defendant Eckerds Drugs to his underarms and neck, crossed the room to light a cigarette and, when he struck a match, burst into flames. 40 N.C. App. at 478, 253 S.E.2d at 346. He suffered severe burns to his upper torso in the areas where deoderant had been applied. Id. As a result of these burns plaintiff required hospitalization, lost five work weeks and developed scar tissue in the burned areas. Id.

Plaintiff’s complaint alleged both negligence and breach of warranty against Eckerds, the retailer, and J.P. Williams Co., the manufacturer of the deoderant. The trial court granted defendant’s motion for summary judgment on all counts. Id. at 478-79, 253 S.E.2d at 347. Plaintiff elected to proceed on appeal solely on his breach of warranty claim against Eckerds and convinced the court of appeals to remand for a new trial on that issue.

Eckerds contended that no warranties had been breached because plaintiff had failed to allege or prove any defect in the deoderant itself. The court rejected this contention, concluding that “a failure to adequately warn of all [dangerous] propensities may ... render a product unmerchantible ... and provide grounds for an action to recover damages for breach of the implied warranty of merchantability embodied in G.S. § 25-2-314(1).” Id. at 482, 253 S.E.2d at 348-49.

The court’s conclusion that the implied warranty of merchantability includes a duty of warranty of dangerous propensities is a sound one and has since received statutory support in G.S. 99B-1(3). This new statute provides a “product liability action” for, inter alia, injury resulting from products marketed with inadequate warnings or labeling. N.C. GEN. STAT. § 99B-1(3) (1979); see note 159 infra.


115. In Winterbottom, plaintiff was injured while riding as a passenger in a mail coach that collapsed. The court held that he had no cause of action against the person who was contractually obligated to maintain the coach because the plaintiff was not a party to the contract. See also Brendle v. General Tire and Rubber Co., 304 F. Supp. 1262 (M.D.N.C. 1969), aff’d, 505 F.2d 243 (4th Cir. 1974).


quirement for claims sounding in negligence, the doctrine has not been eliminated completely in cases based on the breach of an express or implied warranty, probably because of the jurisdiction's view that a warranty is basically contractual in nature. In Kinlaw v. Long Mfg. N.C. Inc., the North Carolina Supreme Court took a further step toward abandoning the doctrine by removing the requirement of privity of contract from all actions based on breach of an express warranty.

Plaintiff in Kinlaw sought damages for the economic losses he allegedly incurred as a result of the breach of an express warranty on a new "Long 900" farm tractor that he had purchased from Sessions Farm Machinery, Inc., an authorized dealer of defendant-manufacturer. Contained in the Owners Manual was a warranty, providing in part that

Long Mfg. N.C. Inc., warrants that . . . each new farm or agricultural tractor sold by it and its authorized dealers will be free from defects in material and workmanship under normal use and service for a period of one year or one thousand (1,000) hours of operation; whichever occurs first from the date of purchase.

Plaintiff alleged: (1) that immediately after the tractor was delivered

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118. See, e.g., Corprew v. Geigy Chemical Corp., 271 N.C. 485, 157 S.E.2d 98 (1967), in which Chief Justice Parker noted that "the exceptions to the general rule of non-liability of a manufacturer for negligence because of lack of privity of contract have so swallowed up the general rule of non-liability that such a general rule for all practical purposes has ceased to exist." Id. at 497, 157 S.E.2d at 106.


120. In Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960), the North Carolina Supreme Court noted that "[a] warranty, express or implied, is contractual in nature. Whether considered collateral thereto or an integral part thereof, a warranty is an element of a contract of sale . . . ." Id. at 358, 117 S.E.2d at 24. This view is not unique to North Carolina; a warranty has historically been viewed as a "curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." W. PROSSER, supra note 117, at 634. Even to the present day, "[u]nderlying the requirement of privity is the erroneous idea that a warranty is, and always has been, a contractual concept." 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03, at 3A-51 (1979). In Winterbottom, it was the fear of unlimited liability for the contracting parties that led the court to formulate the privity doctrine, concluding that "[u]nless we confine the operation of such contracts as these to the parties who enter into them, the most absurd consequences, to which I see no limit, would ensue," 152 Eng. Rep. at 404.


122. Id. at 495, 259 S.E.2d at 553.

123. Id. at 495 n.1, 259 S.E.2d at 553 n.1. The warranty also stated that Long's obligation under this warranty is limited to repairing or replacing at its option in an authorized Long Tractor Dealer's place of business any part or parts that, which within the applicable period perviously stated, are returned to its factory in Tarboro, North Carolina, or one of its distributing branches . . . .
and put to farm use it began “breaking down,”124 (2) “that various parts of the tractor were defective, inoperative, or missing; (3) that the defective parts were duly returned to defendant’s Tarboro factory for repair or replacement; and (4) that defendant failed or refused to repair or replace the parts.”125 Plaintiff further alleged that the tractor was useless and that he lost a portion of his crops as a result of the breach of warranty by defendant. The trial court dismissed plaintiff’s claim and the court of appeals affirmed,126 concluding that privity of contract was a necessary predicate, with limited exceptions,127 to the maintenance of a suit based on a breach of an express warranty. The supreme court reversed, holding “that a manufacturer can extend a warranty beyond the bounds of privity if he makes representations designed to induce a purchase and directed to the ultimate purchaser.”128

This decision is in line with the trend of authority throughout the country129 and clarifies North Carolina law with respect to claims based on breach of an express warranty. Prior to Kinlaw, the supreme court apparently abandoned the privity requirement in an express warranty action, in Simpson v. American Oil Co.,130 only to resurrect the concept, at least partially, in subsequent cases.131

124. Id. at 495, 259 S.E.2d at 553.
125. Id.
127. See notes 130-34 and accompanying text infra. The court of appeals did not believe that previously recognized exceptions to the privity requirement for breach of warranty actions extended to mechanical devices. 40 N.C. App. at 645, 253 S.E.2d at 631.
128. 298 N.C. at 499, 259 S.E.2d at 556. The court noted that:
Plaintiff here purchased both goods and a promise. He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner’s manual. Plaintiff would reasonably expect the author of the warranty to stand by its promise. He may base a claim upon its alleged breach. We find no ‘sensible or sound reason’ requiring us to hold otherwise.
Id. at 501, 259 S.E.2d at 557.
129. The court cites a number of jurisdictions that have abandoned the privity requirement either totally or partially. Id. at 497 n.4, 500 n.8, 259 S.E.2d at 554 n.4, 557 n.8. The status of the privity doctrine is unclear in many states because of the various approaches taken in limiting its application. Some states have statutorily eliminated the privity defense, see, e.g., Ark. Stat. Ann. § 85-2.318.1 (Supp. 1977), while others have judicially abolished the privity requirement in actions based on either express or implied warranties, see, e.g., Scheuler v. Aamco Transmissions, Inc., 1 Kan. App. 2d 525, 571 P.2d 48 (1977) (express warranty); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975) (implied warranty). Still other states have adopted the strict liability in tort approach. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For an attempt to track the developments in this area see 2 L. Frumer & M. Friedman, Products Liability § 2 (1979). See also Hodge, Products Liability: The State of the Law in North Carolina, 8 Wake Forest L. Rev. 481 (1972); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Prosser, The Assault on the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).
130. 217 N.C. 542, 8 S.E.2d 813 (1940).
131. See text accompanying notes 134-38 supra.
In *Simpson* the supreme court held for the first time that express assurances addressed by the manufacturer to the ultimate consumer could support a breach of warranty action against the manufacturer notwithstanding lack of privity. The express warranty in *Simpson* was found in directions on a can of insecticide asserting that the chemical was harmless to humans. The requirement of privity in express warranty situations was revitalized, however, in *Perfecting Service Co. v. Product Development & Sales Co.* when Justice Moore specifically limited the *Simpson* exception to "cases involving sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon." Later cases applied *Simpson* as restricted by *Perfecting Service* with the result that the privity doctrine in express warranty actions approached its pre-*Simpson* dimensions. *Kinlaw*, however, removes the distinction between expressly warranted products intended for human consumption and products intended for other uses by eliminating the privity requirement in all actions where an express warranty is established.

Following *Kinlaw*, a plaintiff suing on a breach of express warranty theory will be able to maintain his action, notwithstanding lack

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132. 217 N.C. at 546, 8 S.E.2d at 815-16.
133. *Id.* at 543, 8 S.E.2d at 814. Plaintiff suffered severe skin reactions after using the insecticide. *Id.* Referring to the fact that the product's label indicated that it was harmless to humans, the court concluded:

> We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended.

*Id.* at 546, 8 S.E.2d at 816.
135. *Id.* at 668, 136 S.E.2d at 62-63.

For a complete history of *Simpson* and its progeny, see Hodge, *supra* note 129.
137. The court stated that

> [t]he privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor, in turn, against the manufacturer... is unnecessarily expensive and wasteful. We find no reason to inflict this drain on the court's time and the litigants' resources when there is an *express* warranty directed by its terms to none other than the plaintiff purchaser.

298 N.C. at 500-01, 259 S.E.2d at 557 (emphasis added).
of privity, if he establishes that the warranty runs directly to him.\textsuperscript{138} While the *Kinlaw* court did not offer specific guidelines for determining when an express warranty "runs" to a claimant,\textsuperscript{139} it did note that a manufacturer can extend a warranty beyond the bounds of privity by making representations to the ultimate consumer "designed to induce a purchase".\textsuperscript{140} The Court also acknowledged that other jurisdictions focus on whether the claimant "relied" on a seller's representations in making his purchase decision.\textsuperscript{141} In essence, it appears that a claimant will be allowed to proceed against the seller or manufacturer if he can establish that the express warranty allegedly breached was an important factor in his purchase decision.\textsuperscript{142}

Although the claimant is unable to bring himself within the

\textsuperscript{138} The court quoted with approval an Ohio case, *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 S.E.2d 612 (1958), which recognized that under modern merchandizing practices advertisements function as warranties aimed at the consumer. 298 N.C. at 501, 259 S.E.2d at 557. This language indicates that the manufacturer will be liable for his express warranty whether it is included in a writing accompanying the product as in *Kinlaw*, or made orally through the mass media. *See generally* Fowler v. General Elec. Co., 40 N.C. App. 301, 252 S.E.2d 862 (1979); McKinney Drilling Co. v. NelloTeer Co., 38 N.C. App. 472, 248 S.E.2d 444 (1978).

The court also recognized that few modern express warranties are the product of direct negotiation between the buyer and seller. Justice Exum noted that

"[t]he Winterbottom rationale [requiring privity of contract] is justified in warranty cases . . . only to the extent that the warranty sued on is inherently an element of a true contract. Regarding the tort aspects of a false warranty claim, the rule of privity has itself produced absurd consequences and has no real application."

298 N.C. at 497, 259 S.E.2d at 557.

\textsuperscript{139} The court looked to the particular facts giving rise to plaintiff's expectations and noted that

[plaintiff's posture here is stronger than that of the purchaser whose tastes are shaped by inducements of mass media advertising . . . or whose expectations arise in response to assurances on the product's label . . . . Plaintiff here purchased both goods and a promise. He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner's manual. Plaintiff could reasonably expect the author of the warranty to stand by its promise. He may base a claim upon its alleged breach.]

298 N.C. at 501, 259 S.E.2d at 557.

\textsuperscript{140} *Id.* at 499, 259 S.E.2d at 556.

\textsuperscript{141} *Id.* at 500 n.7, 259 S.E. 2d at 557, n.7.

\textsuperscript{142} It may be inferred that lessees, as well as buyers, should be allowed to bring breach of warranty claims under the *Kinlaw* doctrine. The lessee who acquires a product expecting it to perform as warranted should have the same rights as a claimant who relied on an express warranty when purchasing the product. The Nebraska Supreme Court's decision in *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973), illustrates this point. In *Hawkins* plaintiff rented scaffolding from a manufacturer's authorized dealer in reliance on express representations made in an advertising brochure prepared by the manufacturer. The scaffolding collapsed, resulting in extensive property damage, and plaintiff brought suit against both the dealer and manufacturer alleging breach of an express warranty. The court upheld plaintiff's claim against both defendants without discussing plaintiff's lessee status.

See notes 175-77 and accompanying text *infra* (discussing the lessee's potential inability to recover for breach of an implied warranty under G.S. 99B-2(b)).
Kinlaw vertical privity exception by showing that an express warranty runs directly to him,\textsuperscript{143} he may be able to establish that he is a third party beneficiary of the seller's or manufacturer’s warranty under G.S. 25-2-318.\textsuperscript{144} This statute extends the warranty to several persons in horizontal privity to the purchaser;\textsuperscript{145} however, the extension is limited in several ways. First, the coverage of G.S. 25-2-318 restricts recovery to family members and household guests of the buyer. Thus, an employee injured by a defective product purchased by his employer is not considered a third party beneficiary of his employer’s breach of warranty claim.\textsuperscript{146} Second, the statute limits recovery to "personal injuries" suffered by the plaintiff. Finally, the statute only puts the third party claimant in the shoes of his principal. Unless it can be established that the seller’s warranty “ran” to the principal, the third party action will not be allowed. Thus, although Kinlaw eliminates the privity requirement in express warranty actions when the warranty runs directly to the plaintiff, the narrow extension afforded by G.S. 25-2-318 still denies recovery to worthy claimants who were foreseeable “users” of a defective product, but not the actual buyers.\textsuperscript{147}

2. G.S. Chapter 99B—“Products Liability”

Beginning with Justice Cardozo’s landmark opinion in \textit{MacPherson v. Buick Motor Co},\textsuperscript{148} products liability concepts have expanded to

\textsuperscript{143} Vertical privity refers to the relationship between parties in the direct chain of distribution. For example, the manufacturer is in vertical privity with the wholesaler and the wholesaler is in vertical privity with the retailer. \textit{See} R. Nordstrom, \textit{Law of Sales} 2828-83 (1970). In the \textit{Kinlaw} case plaintiff purchased from an intermediary distributor and, therefore, was not in privity with defendant-manufacturer.

\textsuperscript{144} N.C. GEN. STAT. § 25-2-318 (1965) provides that

[a] seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty . . . .

\textsuperscript{145} Horizontal privity refers to the relationship between a member of the vertical distribution chain and one who comes in contact with the product while it is in the hands of the vertical member. For example, an employee who uses a product purchased by his employer is in horizontal privity with his employer, but is not a part of the chain of vertical privity. \textit{See} R. Nordstrom, \textit{supra} note 143, at 282-83.

\textsuperscript{146} \textit{See} Brendle \textit{v. General Tire and Rubber Co.}, 304 F. Supp. 1262 (M.D.N.C. 1969), aff’d, 505 F.2d 243 (4th Cir. 1974) (plaintiff injured as result of defective tire sold employer); Wyatt \textit{v. North Carolina Equip. Co.}, 253 N.C. 355, 117 S.E.2d 21 (1960) (plaintiff injured by defective loader sold to employer); Byrd \textit{v. Star Rubber Co.}, 11 N.C. App. 297, 181 S.E.2d 227 (1971) (plaintiff's decedent killed as result of defective tire sold employer). In each of these pre-\textit{Kinlaw} cases the defendant prevailed with a "lack of privity" defense.

\textsuperscript{147} Compare G.S. 25-2-318 with the more liberal application of horizontal privity in implied warranty actions of G.S. 99B-2(b), discussed in \textit{notes 179-81} and accompanying text \textit{infra}.

\textsuperscript{148} 217 N.Y. 382, 111 N.E. 1050 (1916). In \textit{MacPherson}, the court held a manufacturer liable
provide remedies for injured plaintiffs notwithstanding lack of privity of contract. The expansion of consumer-oriented products liability law has not been without its critics, however, and in 1976 the Defense Research Institute published a position paper alleging that this trend had precipitated a products liability insurance crisis. The thrust of the report was that the unavailability or prohibitive expense of products liability insurance was forcing many small manufacturers out of business. Despite a government study reaching a contrary conclusion, a number of states have responded to the Institute's allegations by enacting statutes intended to limit the liability of manufacturers and sellers. In 1979, the North Carolina General Assembly joined the attempt to resolve this supposed insurance crisis by enacting chapter 99B, entitled "Products Liability," and amending several statute of

for negligence in failing to discover a defective wheel it had installed on plaintiff's car, notwithstanding lack of privity of contract between the parties. Defendant-manufacturer had sold the car to a dealer who, in turn, sold it to plaintiff. The defective wheel collapsed, injuring plaintiff, who brought suit alleging that defendant had been negligent in failing to discover the defect. Defendant asserted lack of privity as a defense. The court rejected this contention, holding that when inherently dangerous products are involved, privity of contract is no longer a necessary predicate to liability.


151. DEFENSE RESEARCH INSTITUTE, INC., PRODUCTS LIABILITY POSITION PAPER, reprinted in 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY app.I (1979). The Defense Research Institute is a private, nonprofit organization primarily concerned with civil litigation defense techniques.

152. See U.S. DEPT'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY (1978), reprinted in 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY app.G (1979). This report asserts that while products liability insurance premiums have risen significantly in recent years, there is no direct correlation between consumer-initiated products liability actions and the rise in insurance rates. In essence, the study concludes that there is no products liability insurance crisis.


limitations provisions of G.S. 1.\textsuperscript{155}

Section 99B-2(a) of the new chapter provides several absolute defenses for a seller\textsuperscript{156} in actions based on the alleged breach of an implied warranty.\textsuperscript{157} Under this section, a claimant\textsuperscript{158} cannot maintain a product liability action\textsuperscript{159} against a seller if the allegedly defective item acquired and sold by the seller was enclosed in a sealed container or if the seller was not afforded reasonable opportunity to inspect the product.\textsuperscript{160} These defenses are inapplicable, however, if (1) the seller mishandled or damaged the product while it was in his possession; (2) the manufacturer\textsuperscript{161} has been judicially declared insolvent, or; (3) the manufacturer is not subject to the jurisdiction of North Carolina courts.\textsuperscript{162} The intent of this section is to insulate a seller from liability when he is merely a conduit for the product of a solvent manufacturer who can be brought before the courts of North Carolina.

In section 99B-2(b) the legislature addresses the privity of contract requirement, a concept that has often troubled North Carolina appel-

\begin{footnotes}
\footnotetext{155}{See notes 189-91 and accompanying text infra.}
\footnotetext{156}{G.S. 99B-1 provides the following definition for the term “seller”:}
\footnotetext{157}{“Seller” includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. “Seller” also includes a lessor or bailor engaged in the business of leasing or bailment of a product.}
\footnotetext{158}{N.C. GEN. STAT. § 99B-1(4) (1979).}
\footnotetext{159}{The seller’s defenses in G.S. 99B-2(a) are expressly limited to product liability actions based on the breach of an implied warranty. Id. § 99B-2(a).}
\footnotetext{160}{A “claimant” is “a person or other entity asserting a claim and, if said claim is asserted on behalf of an estate, an incompetent or a minor, ‘claimant’ includes plaintiff’s decedent, guardian, or guardian ad litem.” Id. § 99B-1(1).}
\footnotetext{161}{A “product liability action,” as defined in G.S. 99B-1(3), “includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product.” Id. § 99B-1(3).}
\footnotetext{162}{Id. § 99B-2(a). Unfortunately, the term “sealed container” is not defined by the statute. While there are obvious examples, such as packaged foods and chemicals, see, e.g., Corprew v. Geigy Chemical Corp., 271 N.C. 485, 157 S.E.2d 98 (1967), other items will require judicial interpretation. For example, a retailer may assert that it is not responsible for a television set’s mechanical problems that could have been discovered by letting the set play for several hours before sale because the body of the set is a sealed container. A broad reading of the term “sealed container” would include virtually every product currently offered for sale. It seems unlikely that the legislature intended to provide the seller with a defense of such breadth.}
\footnotetext{163}{“Manufacturer” means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or in significant part.}
\end{footnotes}
late courts,\textsuperscript{163} by identifying those claimants who will be allowed to bring a suit directly against the manufacturer of a product, notwithstanding the lack of privity.\textsuperscript{164} According to this section, which is also limited to claims based on implied warranties, a direct product liability action\textsuperscript{165} may be brought by a "buyer", as defined by the Uniform Commercial Code,\textsuperscript{166} a member of the buyer's family, a guest of the buyer or his family, or an employee of the buyer not covered by workmen's compensation insurance.\textsuperscript{167}

The enactment of G.S. 99B-2(b) represents another step in North Carolina's slow movement away from strict common law rules requiring privity in negligence and warranty actions.\textsuperscript{168} Judicial statements pertaining to privity are numerous and often needlessly confusing;\textsuperscript{169} however, the basic rule for implied warranty actions was stated in \textit{Tedder v. Pepsi-Cola Bottling Co.}\textsuperscript{170} The North Carolina Supreme Court held in \textit{Tedder} that the buyer of a product intended for human consumption could bring a direct action against the manufacturer for breach of an implied warranty of fitness created by advertisements directed at ultimate consumers.\textsuperscript{171} Subsequent attempts to extend \textit{Tedder} beyond the area of consumable products were unsuccessful.\textsuperscript{172} Section 99B-2(b), however, is not limited to items intended for human consumption and thus expands the vertical privity\textsuperscript{173} exception set out in \textit{Tedder}.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{163} See notes 168-74 and accompanying text infra.
\item \textsuperscript{164} See N.C. GEN. STAT. § 99B-2(b) (1979).
\item \textsuperscript{165} See note 159 supra.
\item \textsuperscript{166} The U.C.C., as adopted in North Carolina, provides that "'[b]uyer' means a person who buys or contracts to buy goods." N.C. GEN. STAT. § 25-2-103 (1)(a) (1965).
\item \textsuperscript{167} Id. § 99B-2(b).
\item \textsuperscript{168} The privity requirement for negligence actions was eliminated in 1967 in Corprew v. Geigy Chemical Corp., 271 N.C. 485, 157 S.E.2d 98 (1967). See note 118 supra. For a history of the privity doctrine in North Carolina, see generally, Hodge, supra note 129.
\item \textsuperscript{169} See Hodge, supra note 129, at 484-97; note 172 infra.
\item \textsuperscript{170} 270 N.C. 301, 154 S.E.2d 337 (1967).
\item \textsuperscript{171} Id. at 306, 154 S.E.2d at 340.
\item \textsuperscript{172} See, e.g., Fowler v. General Elec. Co., 40 N.C. App. 301, 252 S.E.2d 862 (1979); Byrd v. Star Rubber Co., 11 N.C. App. 297, 181 S.E.2d 227 (1971); Hodge, supra note 129, at 491-94. The cases addressing the privity doctrine often deal imprecisely with the issue, usually obscuring the distinction between vertical and horizontal privity and frequently citing prior decisions incorrectly. For example, the \textit{Tedder} decision is often referred to as an express warranty case despite the court's specific statement to the contrary. Although it was possible to find an express warranty on the \textit{Tedder} facts, the court sent the evidence "to the jury on the theory of implied warranty." \textit{Tedder v. Pepsi-Cola Bottling Co.}, 270 N.C. 301, 306, 154 S.E.2d 337, 340 (1967).
\item \textsuperscript{173} See note 143 supra.
\item \textsuperscript{174} For a discussion of the current rules pertaining to vertical and horizontal privity in express warranty actions, see notes 122-47 and accompanying text supra, discussing the North Caro-
A significant limitation on application of the G.S. 99B-2(b) vertical privity exception is its restriction to actions brought by a "buyer" as defined in the Uniform Commercial Code.\(^\text{175}\) Unfortunately, the UCC's definition of buyer includes only those who buy or contract to buy goods, ignoring potentially meritorious claims of a lessee not in privity with the manufacturer of a defective product. This omission was probably inadvertent given that a claimant has a reasonable expectation that a product will perform as warranted whether the transaction is a sale or a lease.\(^\text{176}\) Another indication that the omission of lessees from G.S. 99B-2(b) was unintentional is that the definition of "seller" in G.S. 99B-1(4) includes "a lessor . . . engaged in the business of leasing . . . a product."\(^\text{177}\)

It is also important to note that prior to the adoption of G.S. 99B-2(b), section 2-318 of the Uniform Commercial Code controlled horizontal privity questions in all warranty actions. Under G.S. 25-2-318:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty . . . .\(^\text{179}\)

The effect of this section is to place the qualifying nonbuyer in the shoes of the buyer; if a warranty action is available to the buyer, G.S. 25-2-318 extends the right of action to the buyer's family members or guests injured by a breach of that warranty.\(^\text{180}\) G.S. 99B-2(b) expands the horizontal privity exceptions created in G.S. 25-2-318 by: (1) extending recovery to property damage as well as personal injury; (2) removing the requirement that guests of the buyer be injured while in his home in order to recover; (3) eliminating the reasonable expectation of use, consumption or affect test by specifically identifying those who are forseeable claimants; and (4) extending coverage to employees of the buyer not covered by workmen's compensation insurance.\(^\text{181}\)

\(^{175}\) See note 166 supra.

\(^{176}\) See note 142 supra for a discussion of a lessee's rights upon breach of an express warranty.


\(^{178}\) See note 145 supra.


\(^{180}\) See notes 144-47 and accompanying text supra.

\(^{181}\) See notes 165-67 and accompanying text supra. Limiting product liability actions to employees not covered by workers' compensation insurance could result in a seriously injured party
In addition to the seller's defenses provided in G.S. 99B-2(a), section 99B-3(a) provides a defense for a seller or a manufacturer in any product liability action—either implied or express—where the product was altered or modified after it left the control of the seller or manufacturer. Essentially, under G.S. 99B-3(a) any alteration or modification made without the express consent of the manufacturer or seller or in contravention of the instructions or specifications of the manufacturer or seller precludes liability whenever the alteration or modification is a proximate cause of the claimant's injury.

G.S. 99B-3(b) defines alteration or modification to include changes in "design, formula, function, or use of the product from that . . . intended by the manufacturer." The basis of this limitation is not the plaintiff's contributory fault, but simply his use of the product in a way not intended by the manufacturer or seller. Although this rule probably will yield an equitable result in most product liability disputes, it serves no good purpose if the alteration or modification was not unreasonable or was foreseeable by the manufacturer or seller.

G.S. 99B-4, which also applies to product liability actions in general, codifies several existing case law defenses to product liability claims. It provides that a manufacturer or seller may defend against a product liability claim with proof that the claimant used the product contrary to express and adequate warnings or instructions, used the product after discovering a defect or unreasonably dangerous condition, or failed to exercise reasonable care when using the product.

As Chief Justice Sharp stated in her much quoted concurring opinion in *Terry v. Double Cola Bottling Co.*, "An unreasonable use of the product or the use of it when its defect should have been apparent [should] preclude recovery."
The legislature also made several additions to the statute of limitations provisions of G.S. 1, as a result, creating a three-pronged approach to products liability actions. First, G.S. 1-52(16) was added, providing that causes of action for personal injury or property damage are barred if not brought within three years following the discovery of the bodily injury or property damage giving rise to the claim. Second, G.S. 1-52(16) also provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." To illustrate the effect of G.S. 1-52(16), assume a claimant purchases on January 1, 1986 a defective product that was manufactured on January 1, 1980. If the claimant suffers an injury proximately caused by the defective product on January 1, 1988, he must bring his suit before January 1, 1991. If the injury occurs on January 2, 1990, the claimant will have no cause of action against the manufacturer because ten years will have elapsed since the manufacturer's last act or omission giving rise to the claim. The claimant may, however, still be able to pursue a claim against the seller whose "last act or omission" was within the ten year period.

Third, new section 1-50(6) bars claims for "personal injury, death or damage to property based upon ... any alleged defect or any failure in relation to a product [if] ... brought more than six years after the date of initial purchase for use or consumption." Using a variation of the previous example, assume that the defective product is purchased by the claimant on January 1, 1981. If an injury occurs on January 1, 1985, the claimant must bring his suit before January 1, 1981.


While some jurisdictions maintain that contributory negligence is not a defense to a breach of warranty claim, see, e.g., Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962), few courts require a manufacturer to act as an absolute insurer of his product. When the plaintiff's use of the product is unreasonably dangerous or outrageous, most courts recognize contributory negligence as a defense, though perhaps under a different name. See Murphy v. Eaton, Yale & Towne, Inc., 444 F.2d 317 (6th Cir. 1971) (allegation that plaintiff's conduct was sole cause of accident adequate defense even though contributory negligence not recognized as defense to breach of warranty claim). Cf. Preston v. Up-Right, Inc., 243 Cal. App.2d 636, 52 Cal. Rptr. 679 (1966) (contributory negligence no defense to strict liability claim, but plaintiff must prove that he used product in intended way).

190. N.C. GEN. STAT. § 1-52 (16) (Cum. Supp. 1979) (emphasis added). G.S. 1-53(4), which bars wrongful death actions if not brought within two years of date of death, also provides "that whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of ... G.S. 1-52(16), no action for his death may be brought." Id. § 1-53(4) (1969 & Cum. Supp. 1979).
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1987 or his claim against any manufacturer or seller will be barred by G.S. 1-50(6).

The three-pronged approach provides that failure to bring an action within any one of the limitations periods bars the claim. From the plaintiff's viewpoint, unjust results are possible under both the ten and six year prongs of the three-pronged approach because neither is tied to the date of the claimant's bodily injury or property damage. This may cause even the most diligent plaintiff to be barred from recovering on a meritorious claim.

Finally, the legislature amended the pleading procedures, providing that in product liability actions, where the amount in controversy exceeds $10,000.00, the plaintiff's damages must be expressed as "in excess of $10,000.00" and no larger figure may be fixed. This change appears to be aimed at encouraging smaller damage awards by eliminating any psychological effect large ad damnum clauses may have on juries.

Viewed as a package, G.S.99B and the complementary amendments to G.S.1 bring about potentially far-reaching changes in North Carolina products liability law. Both established rules and emerging trends in the case law must be reexamined in light of the new statutory scheme. Undoubtedly, the effects of these statutory changes will be the

192. Interpreting the proper interaction of the three statute of limitations periods may prove troublesome for the courts. The introductory clause of G.S. 1-52(16) states that the three and 10 year limitation periods apply "unless otherwise provided by statute." It is arguable that this conditional phrase means that only the six year limitation period of G.S. 1-50(6) should be applied in product liability actions because G.S. 1-50(6) specifically refers to personal injury or property damage arising out of an "alleged defect or any failure in relation to a product," while G.S. 1-52(16) contains no reference to "products." This result, however, apparently was not intended by the drafters of the new products liability legislation. The original version of the eventually enacted G.S. 99B contained a statute of limitation section, later deleted, stating that:

A more logical interpretation of the G.S. 1-52(16) introductory clause is that it refers to G.S. 25-2-725, the Uniform Commercial Code statute of limitations provision covering breach of warranty claims. That statute, which provides that an action on a contract must be brought "within four years after the cause of action has accrued," appears to be inconsistent with the three-pronged approach of G.S. 1-50(6) and G.S. 1-52(16). The apparent conflict will have to be resolved by the courts or by legislative amendment.

dominant concern in this jurisdiction's products liability litigation for the foreseeable future.

E. Fiduciary Duty of Corporate Insider

In *Lazenby v. Godwin*, the Court of Appeals held that under "special circumstances" a corporate insider stands in a fiduciary relationship to a shareholder in the acquisition of the shareholder's stock and therefore has a duty to disclose any information pertinent to the value of the stock. The court further defined "special circumstances" in *Stone v. McClam*, finding that no fiduciary relationship, and thus no duty to disclose, exists between shareholders and insiders possessing substantially equal access to pertinent business information.

The claim in *Lazenby* involved the purchase by a majority shareholder of outstanding interests in a family held corporation. Defendant was both majority shareholder and president-manager of the corporation. In a letter to plaintiffs, he suggested that "if something were to happen to me... you could wind up with nothing" and "if you would like to sell [your stock] let me know..." At a subsequent informal shareholders' meeting defendant informed the other owners that he was in ill health and would be interested in purchasing their stock, although a sale of the corporate assets was not possible.

195. *Id.* at 494-95, 253 S.E.2d at 492-93.
197. *Id.* at 403, 257 S.E.2d at 84-85.
198. Prior to the transactions in question the stock of the corporation, Fayetteville Wholesale Building Supply, Inc., was owned as follows:

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant, Derwood H. Godwin</td>
<td>42.05%</td>
</tr>
<tr>
<td>Larry Godwin</td>
<td>12.04%</td>
</tr>
<tr>
<td>Margret Godwin Caviness</td>
<td>11.3%</td>
</tr>
<tr>
<td>Linda Godwin Furr</td>
<td>11.3%</td>
</tr>
<tr>
<td>Plaintiff, Jean G. Lazenby</td>
<td>11.3%</td>
</tr>
<tr>
<td>Plaintiff, Glenn Lazenby</td>
<td>9.86%</td>
</tr>
<tr>
<td>O.W. Godwin Estate</td>
<td>2.15%</td>
</tr>
</tbody>
</table>

40 N.C. App. at 489, 253 S.E.2d at 490. All stockholders listed above were children of O. W. Godwin, deceased, except for Glenn Lazenby, who was the husband of the deceased's daughter. *Id.* Defendant became the majority shareholder after his acquisition of Larry Godwin's interest in February 1973. *Id.*

199. Plaintiffs were nominally directors of the corporation, but the evidence tended to show that regular directors' meetings were not held; defendant had effective control of all corporate business. *Id.* at 495, 253 S.E.2d at 493.

200. *Id.* at 489, 253 S.E.2d at 490.

201. Defendant offered each shareholder $60,000.00 for his interest in the corporation. This amount was less than the stock's book value. *Id.*
Plaintiffs accepted defendant's offer\textsuperscript{202} and two weeks later learned that defendant was selling the corporate assets at a price representing a per share value greatly in excess of what they had received.\textsuperscript{203} Defendant actually had engaged in negotiating the sale of the assets prior to the time he offered to buy plaintiffs' stock, yet failed to disclose the existence of these negotiations.\textsuperscript{204}

The trial court awarded plaintiffs damages on the basis of a jury finding of constructive fraud.\textsuperscript{205} Plaintiff moved for a partial new trial on the grounds that the damages awarded were inadequate and against the weight of the evidence.\textsuperscript{206} The trial court granted a new trial on all issues raised by the pleadings and defendant appealed, alleging that no fiduciary relationship existed between the parties and that the court erred in refusing to grant a directed verdict in defendant's favor on the constructive fraud issue.\textsuperscript{207}

\textsuperscript{202} Plaintiffs initially rejected defendant's offer at the informal meeting, held March 11, 1973, but reconsidered and decided to accept two days later. \textit{Id.}

\textsuperscript{203} On March 27, 1973, plaintiffs learned from shareholder Linda Furr (who had refused to sell to defendant) that Ms. Furr had consented to a sale of the corporate assets to Valley Forge Corporation for $2,600,000. This price represented a gain to defendant of about $180,000 over what he had paid plaintiffs for their stock. \textit{Id.} at 489-90, 253 S.E.2d at 490.

\textsuperscript{204} Plaintiffs' evidence tended to show that Valley Forge Corporation had approached defendant regarding a sale of the assets in December 1972 and that in January 1973 defendant traveled to Houston, Texas to discuss the sale with Valley Forge's president. Valley Forge submitted a written offer to purchase on March 4, 1973, one week before the shareholder's meeting at which defendant offered to purchase each plaintiff's block of stock for $60,000. \textit{Id.} at 490, 253 S.E.2d at 490.

\textsuperscript{205} The trial court submitted the following interrogatories to the jury:

1. At the time of the sale of the 236 shares of stock of Fayetteville Wholesale by the plaintiffs to the defendant on March 16, 1973, did a relationship of trust and confidence exist between the plaintiffs and the defendant?
   ANSWER: Yes.

2. If so, was the sale of stock on that date an open, fair, and honest transaction?
   ANSWER: No.

3. Did the defendant, by actual fraud and deceit, obtain the 236 shares of stock of Fayetteville Wholesale from the plaintiffs on March 16, 1973?
   ANSWER: No.

4. Did the plaintiffs affirm and ratify the sale of stock as alleged in the answer?
   ANSWER: No.

5. In what amount, if any, are the plaintiffs entitled to recover of the defendant for:
   (a) Principal $10,000.00?
   (b) Interest 0 ?

\textit{Id.} at 490-91, 253 S.E.2d at 490-91.

\textsuperscript{206} Plaintiffs' evidence indicated that defendant received approximately $300,000 for the stock he had purchased from plaintiffs for $120,000 10 days earlier. The jury, however, awarded damages of only $10,000. \textit{Id.} at 489-91, 253 S.E.2d at 490-91.

The *Lazenby* opinion, noting that North Carolina courts had not directly addressed the question whether a fiduciary relationship exists when a corporate insider negotiates the purchase of a shareholder’s stock, examined three views on this issue recognized in other jurisdictions. The majority view is that a corporate insider never owes a fiduciary duty to a shareholder and thus is never under an obligation to disclose material inside information prior to engaging in stock transactions with a shareholder. At the other extreme is the minority rule that an insider, because of his position in the corporation, must disclose all material information regarding a stock transaction. The third view is that a corporate insider stands in a fiduciary relationship to a shareholder with whom he trades only under “special circumstances.”

Turning to the North Carolina case law, the court found that the supreme court decision in *Link v. Link* presented a situation closely analogous to *Lazenby*. In *Link* a wife transferred corporate securities to her husband as part of a separation agreement. Subsequently, she alleged that her husband, president and manager of the corporation, had fraudulently concealed the value of the stock. The court found a fiduciary duty on the part of the husband because of the family relationship, the wife’s inexperience in the business world, the emo-

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208. 40 N.C. App. at 492-94, 253 S.E.2d at 491-92.


211. 40 N.C. App. at 492, 253 S.E.2d at 491-92. See Annot., 7 A.L.R. 3d 500, 507 (1966); 19 AM. JUR. 2d *Corporations* § 1329 (1965); H. HENN. HANDBOOK OF THE LAW OF CORPORATIONS § 239 (2d ed. 1970). See also Strong v. Repide, 213 U.S. 419 (1909); Steinfield v. Nielsen, 15 Ariz. 424, 139 P. 879 (1913); Llewellyn v. Queen City Dairy, Inc., 187 Md. 49, 48 A.2d 322 (1946); Lightner v. W.H. Hill Co., 258 Mich. 50, 242 N.W. 218 (1932). The special circumstances exception to the majority rule was first announced by the United States Supreme Court in *Strong v. Repide*, 213 U.S. 419 (1909). In that case defendant-majority shareholder was negotiating the sale of corporate lands to the Philippine Government. Without informing plaintiff of the negotiations, defendant bought her stock through the use of an undisclosed agent. *Id.* at 426. The Court held that the defendant was under a legal obligation to disclose to the plaintiff both the substance of the negotiations with the Philippine Government and his interest in the transaction prior to his acquisition of her stock. *Id.* at 434.

212. 278 N.C. 181, 179 S.E.2d 697 (1971).

213. The court also discussed two other cases, but found neither to be controlling: Abbitt v. Gregory, 201 N.C. 577, 160 S.E. 896 (1931) (defendant-director misrepresented sale price of plaintiff’s stock and kept proceeds); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974) (once vendor assumes to speak he is under duty to make full and fair disclosure).

214. 278 N.C. at 187-91, 179 S.E.2d at 700-03.
tional strain on the wife and the stock's unlisted status. While the *Link* decision did not make clear which of the enumerated factors was controlling, the *Lazenby* court adopted the "special circumstances" approach, concluding that under circumstances such as those presented in *Link*, the corporate insider stands in a fiduciary relationship to a shareholder in the acquisition of the shareholder's stock. On the facts of *Lazenby*, the court found that special circumstances giving rise to a fiduciary obligation existed at the time defendant purchased plaintiffs' stock. Although plaintiffs were technically directors of the corporation, they did not take part in the management of the operation, but placed their trust in the business skills and judgment of defendant. Additionally, defendant initiated the stock sale by sending a letter to plaintiffs informing them that he was in ill-health and advising them to consider selling their interest. Therefore, defendant's failure to inform plaintiffs that he was involved in an attempt to sell the corporate assets represented a breach of his fiduciary duty.

The limits to which the court would be willing to extend the *Lazenby* special circumstances rule were soon tested in *Stone v. McClam.* Concentrating its analysis on plaintiffs' and defendants' equal access to information, the court refused to find that a fiduciary relationship existed between shareholders and corporate directors where both were businessmen dealing at arm's length.

In *Stone*, plaintiffs were the sole shareholders in a turkey raising and processing business, Stone Bros., Inc. Defendant, FCX, Inc., supplied Stone Bros. with feed and other supplies for its turkey operation. Over a period of years, Stone Bros. became indebted to FCX and gave a number of mortgages and deeds of trust to secure its debt obligations. Eventually FCX obtained liens on virtually all of Stone Bros.'s assets. In addition, on March 4, 1969, the individual plaintiffs, D. Lindwood Stone and J.A. Stone, guaranteed Stone Bros.' payment on a demand note and a bond executed in favor of FCX having a

\[\text{215. } \text{Id. at 193, 179 S.E.2d at 704.} \]
\[\text{216. } \text{See note 211 and accompanying text supra.} \]
\[\text{217. } \text{40 N.C. App. at 494, 253 S.E.2d at 492.} \]
\[\text{218. } \text{Id. at 494, 253 S.E.2d at 493.} \]
\[\text{219. } \text{Id. at 494-95, 253 S.E.2d at 493.} \]
\[\text{220. } \text{42 N.C. App. 393, 257 S.E.2d 78, cert. denied, 298 N.C. 572, 261 S.E.2d 128 (1979).} \]
\[\text{221. } \text{Id.} \]
\[\text{222. } \text{Id. at 394, 257 S.E.2d at 80.} \]
\[\text{223. } \text{Id.} \]
\[\text{224. } \text{Id.} \]
\[\text{225. } \text{Id.} \]
total value of $720,353.63. To secure these guarantees, plaintiffs executed a stock pledge agreement under which they transferred their Stone Bros. stock to FCX’s attorney as trustee, giving him the power to sell the stock in the event of a default by plaintiffs on the promissory note. Plaintiffs also appointed the trustee as their attorney-in-fact with power to vote the stock at all meetings of Stone Bros. stockholders.

Following a sharp drop in the price of turkeys in 1974 and a corresponding rise in the price of feed, it became clear that extension of further credit to Stone Bros. was inadvisable and FCX notified plaintiffs that their account was being closed. Subsequently, plaintiffs defaulted on their outstanding debt to FCX and, in accordance with power granted him under the March 4, 1969, stock pledge agreement, the trustee voted to remove the Stones as directors of Stone Bros. and to replace them with directors approved by FCX. The new directors’ efforts to continue Stone Bros. as a going concern were unsuccessful, however, and liquidation of assets was necessary to repay the FCX loans.

Among Stone Bros.’s assets was a twenty-five percent interest in the common stock of Raeford Turkey Farms, Inc., a turkey processing and selling operation. Plaintiffs were directors of Raeford and remained so even after their removal as directors of Stone Bros.

As the liquidation proceeded there were indications that the liabilities of Stone Bros. would far exceed the value of its assets. Facing these grim financial realities, plaintiffs signed an “Agreement and Release” transferring their Stone Bros. stock to FCX in exchange for FCX’s agreement to release plaintiffs from all personal liability on the Stone Bros. debt. Plaintiffs, no longer holding an interest in Raeford

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226. Id.
227. Id. at 394-95, 257 S.E.2d at 80.
228. Id. at 395, 257 S.E.2d at 80.
229. Stone Bros.’s financial statements showed a net operating loss for the 11 month period ending October 31, 1974 of $942,591.68 and total debt outstanding to FCX of $3.1 million. Id.
230. Representatives of FCX met with the Stones in Lumberton, N.C. on November 20, 1974 and demanded payment on the demand note executed on March 4, 1969. Plaintiffs responded that they were without funds to pay the indebtedness, thus defaulting on the note. Id. at 396, 257 S.E.2d at 81.
231. Id. The new directors installed themselves as officers of Stone Bros. and retained plaintiff D. Lindwood Stone as an employee. Id. Plaintiffs, however, remained the beneficial owners of Stone Bros. stock.
232. Id. at 398, 257 S.E.2d at 82.
233. Stone Bros. acquired its 25% interest in Raeford for an initial investment of $30,000. Id. at 394, 257 S.E.2d at 80.
234. Id. at 397, 257 S.E.2d at 81.
235. Id.
Turkey Farms, resigned as directors of that corporation. Shortly after plaintiffs relinquished their Stone Bros. stock and resigned from Raeford's board of directors, Raeford's assets were transferred to a newly formed cooperative at a sale price of $6.8 million. After collecting 25% of the proceeds from the sale of Raeford, Stone Bros.' balance sheet showed a net worth of $394,312.00.

Plaintiffs brought suit alleging that the individual defendants, as directors of Stone Bros., committed actual and constructive fraud when negotiating the release agreement signed by plaintiff-shareholders. The crux of plaintiffs' argument was that defendants breached a fiduciary duty owed plaintiffs by failing to disclose pertinent information concerning the Raeford reorganization. The court of appeals reversed the trial court's finding of constructive fraud, holding that the evidence was insufficient to support the jury's finding that a fiduciary relationship existed between plaintiffs and defendants at the time the parties executed the release agreement.

The Stone court carefully distinguished its earlier decision in Lazenby. Unlike plaintiffs in Lazenby, the Stones had actively man-

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236. Id. at 397, 257 S.E.2d at 82.
237. Id. at 398, 257 S.E.2d at 82.
238. Stone Bros.'s 25% share from the sale of Raeford's assets totaled $2,159,919, represented by $250,000 in cash, a note of the new cooperative for $1,522,419 and a revolving fund certificate for $387,500. Id. The Stone court pointed out, however, that despite the favorable balance sheet position after the sale of Raeford, at the time of trial FCX had not actually realized a profit from its dealings with Stone Bros. Any eventual profit on the Raeford note and the revolving fund certificate depended on many years of profitable operations by the newly formed cooperative, House of Raeford. Id. at 403, 257 S.E.2d at 85.
239. Id. at 393, 257 S.E.2d at 79.
240. The trial court submitted the following interrogatories to the jury:
  1. Did the defendants procure the execution of the Agreement and Release of March 5, 1975 by means of false and fraudulent representations?
     Answer: No
  2. Did a fiduciary relationship between plaintiffs and defendants exist with respect to the transaction between them of March 5, 1975?
     Answer: Yes
  3. If so, did the defendants exercise good faith and refrain from obtaining any advantage to themselves at the expense of the plaintiffs in connection with said transaction?
     Answer: No
  4. What amount of actual damages are plaintiffs entitled to recover of defendants, if any?
     Answer: $394,312.00
  5. What amount of punitive damages, if any, are plaintiffs entitled to recover of:
     (a) Defendant, FCX, Inc.?
     Answer: $368,312.00

Id. at 398-99, 257 S.E.2d at 82.
241. Id. at 400, 257 S.E.2d at 83.
aged Stone Bros. since its formation.\textsuperscript{242} Focusing on the Stone Bros.' interest in Raeford, the court noted that plaintiff Linwood Stone was on the Raeford board of directors when the release agreement was signed.\textsuperscript{243} He had attended a Raeford board meeting and discussed several reorganization alternatives for Raeford the week before the release to FCX was signed.\textsuperscript{244} The court concluded that plaintiffs "had equal or better access than did defendants to all information pertinent to determining the fair value of their shares."\textsuperscript{245} Therefore, there was no evidence of "special circumstances" that would give rise to placing defendants in a fiduciary relationship with plaintiffs in connection with the transfer of their stock in Stone Bros. . . . "\textsuperscript{246}

The conclusion of the court of appeals that a corporate insider owes a fiduciary duty to a shareholder in the acquisition of stock only under special circumstances is in accord with the modern trend in this area of the law.\textsuperscript{247} In both \textit{Lazenby} and \textit{Stone}, the court focused on the plaintiffs' access to material information pertinent to the decision to sell.\textsuperscript{248} The factual settings of these cases represent the extreme ends of the spectrum of knowledge found among stock traders. In \textit{Lazenby}, family members operated a business more closely resembling a limited partnership than a corporation, at least from the perspective of the shareholders. The court acknowledged, \textit{sub silentio}, this aspect of the situation by disregarding plaintiffs' nominal status as directors and finding a fiduciary relationship similar to that recognized among partners.\textsuperscript{249} This is appropriate because it is probable that many closely held businesses function internally as partnerships. At the other extreme, plaintiffs in \textit{Stone} were experienced businessmen dealing at arm's length with defendants in a typical debtor-creditor situation. Their access to material information was equal to that of defendants,

\textsuperscript{242} Id. at 402-03, 257 S.E.2d at 84. Plaintiff Linwood Stone was retained as an employee by the new Stone Bros. directors and was active in the daily management of the corporation on March 5, 1975 when the release agreement was signed. Id. at 403, 257 S.E.2d at 84.

\textsuperscript{243} Id. at 403, 257 S.E.2d at 84-85.

\textsuperscript{244} Id. at 403, 257 S.E.2d at 85.

\textsuperscript{245} Id.

\textsuperscript{246} Id.

\textsuperscript{247} See Annot., 7 A.L.R. 3d 500 (1966); 19 Am. Jur. 2d Corporations §§ 1328-29 (1965); H. Henn, supra note 211, § 239.

\textsuperscript{248} Cf. SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (access to information key element in determining whether certain employees needed protection stock registration provided).

\textsuperscript{249} See Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) (Judge Cardozo held partner not to a standard of mere honesty, but to "the punctilio of an honor most sensitive"); Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954). See also 60 Am. Jur. 2d Partnership § 123 (1972).
and the court properly refused to interfere with the contested transaction.

These cases provide valuable guidance to the practitioner advising a corporate insider with respect to the acquisition of stock from a shareholder. Clearly, the shareholder must have access to or be made aware of information material to his decision to trade. While future litigation may ensue concerning the definition of "material," the prudent attorney will advise corporate insiders to avoid this pitfall by making a good faith disclosure to the prospective seller of all arguably "material" information.

CHARLES LEE CAIN
JAMES P. MURRAY


251. In Morgan v. McLeod, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979), the court of appeals held that a shareholder has an absolute right, pursuant N.C. Gen. Stat. § 55-37 (1975), to receive upon request a true copy of the financial statement of his corporation. The defendant corporation argued that the G.S. 53-58 proviso of G.S. 55-38 that a shareholder may not examine books, records of account, the record of shareholders or minutes unless the requested information is for a "proper purpose", also applied to G.S. 55-37. See Outland v. Cooke, 265 N.C. 601, 144 S.E.2d 835 (1965). Rejecting this argument, the court reasoned that the financial statement information made available by G.S. 55-37 is so basic that every shareholder is entitled to a copy upon request. Additionally, the burden on the corporation of supplying a copy of the financial statement is minimal because sound business operations include preparation of such information annually. 40 N.C. App. at 473, 253 S.E.2d at 342. Conversely, the burden to the corporation is significant if it must allow an inspection of its minutes, records of account, and other voluminous records pursuant to G.S. 55-38, therefore, the legislature wisely limited inspection rights under G.S. 55-38 to those who can show a "proper purpose". Cf. Pillsbury v. Honeywell, Inc., 291 Minn. 322, 191 N.W. 2d 406 (1971) (desire to oppose Vietnam War not proper purpose necessary to compel examination of shareholder lists and records of munitions productions).

A further distinction supporting the court's holding is that the information available under G.S. 55-37 is of marginal value to business competitors, while the information obtainable under G.S. 55-38 could have significant commercial value. The result reached by the court is sound and is in accord with the anticipated interpretation of G.S. 55-37. See R. Robinson, N.C. Corporation Law and Practice § 8-2 (2d ed. 1974).
IV. CONSTITUTIONAL LAW

A. Commerce Clause

The North Carolina Court of Appeals resolved an issue arising under the Commerce Clause in In re Arcadia Dairy Farms, Inc. Arcadia Dairy Farms distributes reconstituted milk made with fluids and out-of-state milk powder. In 1976 Arcadia challenged the constitutionality of equalization payments it was then required to pay by order of the North Carolina Milk Commission, which was allegedly acting pursuant to statutory authorization. The amount of the equalization payments was the difference between the price Arcadia's competitors received from distributors for the milk they produced, and the price they would have received if Arcadia had purchased their milk rather than buying out-of-state powder and reconstituting it. The purpose of the payments was "to assure an adequate supply of fluid milk in North Carolina markets by providing for producers of natural fluid milk the same gross revenues they would have received had the distributor of the 'reconstituted' milk purchased from such producers natural, fluid milk and distributed it instead of the 'reconstituted' milk."

The Supreme Court said that a judicial construction authorizing equalization payments might make the statute unconstitutional because the payments would interfere substantially with the flow of out-of-state powder into North Carolina. Therefore, the court construed the statute as not authorizing the Commission to impose equalization payments. Subsequently, the general assembly enacted an amendment to the statute expressly granting the Commission the authority to impose equalization payments. Arcadia was again required to make equalization payments, and in 1979 it brought an action to challenge the amended statute's constitutionality. In In re Arcadia Dairy Farms, Inc. the court of appeals held that the amendment to the statute granting express authority to the Commission was unconstitutional, being in vi-

3. N.C. GEN. STAT. § 106-266.8 (1978) enumerates the powers granted to the Commission.
4. 289 N.C. at 470-71, 223 S.E.2d at 332.
5. Id. at 465, 223 S.E.2d at 328.
7. 289 N.C. at 469, 223 S.E.2d at 332.
olation of the Commerce Clause, for the same reasons given by the North Carolina Supreme Court in the 1976 decision.\footnote{9}

\section*{B. First Amendment—Freedom of Religion}

The court of appeals decided two cases in 1979 involving the constitutional authority of the state to license activities of religious organizations. In \textit{Heritage Village Church, Inc. v. State}\footnote{10} the court struck down three provisions of the Solicitation of Charitable Funds Act\footnote{11} because those provisions unconstitutionally restricted the freedom of religious organizations to lawfully solicit funds within the state.\footnote{12} The statutory provisions that charitable organizations must obtain a license before soliciting within the state,\footnote{13} and that the licensing officer "shall revoke, suspend or deny issuance of a license"\footnote{14} if he finds that "[a]n unreasonable percentage" of solicited contributions are not applied to a charitable purpose\footnote{15} combined to effect a prior restraint on the free exercise of religion in violation of the first and fourteenth amendments.\footnote{16}

The statutory exemption from licensing for a religious organization established for "religious purposes" and carrying on religious functions through a particular denomination\footnote{17} constituted an establishment of religion in violation of the first amendment because the statute,

\begin{itemize}
\item \textit{Heritage Village Church, Inc. v. State} (1976).
\item The court struck down three provisions of the Solicitation of Charitable Funds Act because those provisions unconstitutionally restricted the freedom of religious organizations to lawfully solicit funds within the state.
\item The statutory provisions that charitable organizations must obtain a license before soliciting within the state, and that the licensing officer "shall revoke, suspend or deny issuance of a license" if he finds that "[a]n unreasonable percentage" of solicited contributions are not applied to a charitable purpose combined to effect a prior restraint on the free exercise of religion in violation of the first and fourteenth amendments.
\item The statutory exemption from licensing for a religious organization established for "religious purposes" and carrying on religious functions through a particular denomination constituted an establishment of religion in violation of the first amendment because the statute,
\end{itemize}
irrespective of legislative intent, tended to advance or inhibit particular religious sects. Furthermore, the religious organization exemption, as well as exemptions for fraternal beneficiary societies, non-profit civic groups, and organizations soliciting only by and from their members, violated the equal protection clause because they were arbitrary and irrational, and because they favored secular organizations while restricting the first amendment rights of non-denominational religious groups.

In State v. Fayetteville Street Christian School the court of appeals considered whether the state could require the licensing of church operated day-care centers, pursuant to the Day-Care Facilities Act of 1977, without violation of the first amendment right to free exercise of religion. The state claimed that the licensing standards impose only "minimum standards of health and safety and do not interfere with any religious practice or contain any educational requirements for staff or children." Defendants refused to comply arguing that "the activ-

18. 40 N.C. App. at 446, 253 S.E.2d at 483. In other words, because only non-denominational churches must be licensed to solicit, the effect of the statute is to advance denominational religious groups.
19. N.C. GEN. STAT. § 108-75.7(a)(7) (1978). Also included in this exemption are veterans' organizations and volunteer fireman's associations. Groups in this subsection are exempt only if all solicitation is by uncompensated members.
20. Id. § 108-75.7(a)(8). These groups are exempt only if they comply with specified restrictions on the size, age, and use of funds.
21. Id. § 108-75.7(a)(5).
22. Restrictions on solicitation by religious groups infringe on religious freedoms protected by the first amendment, and these rights have a preferred status. "Restrictions upon First Amendment rights must be narrowly tailored to achieve legitimate State objectives . . . and where less intrusive means are available, they must be used." 40 N.C. App. at 448-49, 253 S.E.2d at 484-85.
23. Id. The court also held unconstitutional three statutory provisions that do not relate exclusively to solicitation by religious groups: (1) A mandatory revocation of license upon a finding by the issuing officer that the solicitor is engaged in fraud, or that an unreasonable percentage of solicited funds will not be used for charitable purposes, N.C. GEN. STAT. § 108-75.18(2)-(4) (1978), was held an impermissible delegation of legislative powers under the state constitution, N.C. CONST. art. I, § 6 & art. II, § 1, because the officer was given unfettered discretion in determining when to revoke. 40 N.C. App. at 442-44, 253 S.E.2d at 482; (2) The prohibition of solicitation within the state by one previously prohibited from soliciting in any jurisdiction without a prior opportunity to offer evidence of present fitness to solicit, N.C. GEN. STAT. § 108-75.20(b)(2) (1978), was held to be an irrebuttable presumption in denial of due process. 40 N.C. App. at 452-53, 253 S.E.2d at 487; (3) A licensing exemption for religious and other organizations that solicit primarily from their own members, N.C. GEN. STAT. § 108-75.7(a)(1), (5) (1978), was held void for vagueness because it failed to define "members." 40 N.C. App. at 453, 253 S.E.2d at 487.
26. See note 12 supra.
27. 42 N.C. App. at 667, 258 S.E.2d at 461.
28. Several church-operated day-care centers and their directors were defendants in this action brought by the state to obtain a declaratory judgment that the Child Day-Care Licensing Commission of the Department of Administration has the statutory authority to require defend-
ties of the centers are not compartmentalized into religious and secular components, and that to require licensing by the State would seriously violate defendants' religious liberty.\textsuperscript{29} The court held that the licensing requirement did not in any way affect the defendants' religious activities or beliefs,\textsuperscript{30} but only related to the physical condition of the centers, and that the statute is therefore constitutional.\textsuperscript{31}

\textit{Heritage Church} and \textit{Fayetteville School} reveal the inevitable tensions between freedom of religion and the state's interest in protecting all of its citizens from harm. Analysis should begin with a fundamental distinction: the first amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."\textsuperscript{32} The next step is to determine to what extent the protection of society justifies regulation of the free exercise of religion. The Supreme Court has developed a balancing test to provide guidance in this determination: If a statute is to withstand a constitutional challenge, "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."\textsuperscript{33} However, the statutory infringement will in any case be invalid if "the State may accomplish

\begin{itemize}
\item \textsuperscript{29} Id. at 667, 258 S.E.2d at 461.
\item \textsuperscript{30} Defendants did not claim that the act of being licensed was in itself contrary to their religious beliefs. \textit{Id.} at 671, 258 S.E.2d at 463.
\item \textsuperscript{31} \textit{Id.} at 672, 258 S.E.2d at 464.
\item \textsuperscript{32} Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). The court in \textit{Heritage Church} relied heavily on \textit{Cantwell} because it too involved a licensing solicitation statute under which an officer had total discretion to determine whether a cause was religious and, if it was determined not to be, to deny licensing.
\item \textsuperscript{33} Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (holding that the Amish must be exempted on religious grounds from a statutory requirement of compulsory education). The same test, stated in less concise form, was applied in \textit{Sherbert} v. Verner, 374 U.S. 398, 403 (1963) (unconstitutional to deny state unemployment benefits to woman who would not work on Saturday for religious reasons), and Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion upholding Sunday closing laws despite economic burden created for Sabbatarians). \textit{Yoder, Sherbert} and \textit{Braunfeld} are the leading cases in which this test was developed.
\end{itemize}
its purpose by means which do not impose such a burden.\textsuperscript{34}

The Heritage Church court engaged in a rather fragmented approach to the statutory provisions, applying a bewildering variety of legal precedent\textsuperscript{35} without a clearly expressed underlying theory. A straightforward analysis using the Supreme Court’s balancing test would have arrived at the same end by a less arduous route, as well as providing more definite guidance for future decisions.

It is evident that the court found plaintiffs’ free exercise of religious belief was infringed by the statute.\textsuperscript{36} Absent a holding that the statute is unconstitutionally overbroad, this finding triggers the application of the Supreme Court’s balancing test: is there a “state interest of sufficient magnitude to override the interest claiming protection?” The court found, almost incidentally, that the purpose of the Solicitation of Charitable Funds Act is “to protect the public from fraudulent practices in solicitation.”\textsuperscript{37} There was no discussion of the significance of this goal or of what weight it should properly be given when balanced against first amendment rights, but merely a conclusion, with respect to each challenged statutory section, that the infringement was constitutionally impermissible.\textsuperscript{38} Although the purpose of protection against fraud is certainly legitimate, whether this purpose would ever justify restricting free exercise of religion is not expressly addressed in Heritage Church.\textsuperscript{39} However, given its finding that less restrictive means


\textsuperscript{35} See note 33 supra.

\textsuperscript{36} See, e.g., notes 13-16 & 19-23 and accompanying text supra.

\textsuperscript{37} 40 N.C. App. at 449, 253 S.E.2d at 485.

\textsuperscript{38} See text accompanying notes 13-16 supra.

\textsuperscript{39} An interesting issue related to the question whether protection against fraud may justify restricting the free exercise of religion was considered in United States v. Ballard, 322 U.S. 78 (1944), aff’d on rehearing, 152 F.2d 941 (9th Cir.), rev’d, 329 U.S. 187 (1946). Defendants in Ballard had solicited funds by mail for a religious movement by representing themselves as “divine messengers” with supernatural curative powers and were indicted under federal mail fraud statutes. The Court held that the jury could not consider the truth of defendants’ religious beliefs, for “[m]en may believe what they cannot prove.” \textit{Id} at 86. The question submitted to the jury at defendants’ original trial was whether they in good faith believed their religious claims. \textit{Id} at 81. Although a dissenting justice in the first Ballard decision argued that an inquiry into the good faith of religious beliefs would be unconstitutional, \textit{Id} at 92-95 (Jackson, J., dissenting), the court never directly faced this issue. A fraudulent representation of religious beliefs, in which a person does not believe his own representations, for the purpose of soliciting funds might not be subject to constitutional regulation by a state if Ballard means that good faith of the solicitor’s religious beliefs cannot be tried. However, at least one Justice reads Ballard to favor inquiry into good faith: “We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this court indicated otherwise in United States v. Ballard . . . .” Braunfeld v. Brown, 366 U.S. 599, 615 (1961) (Brennan, J., concurring and dissenting).
could be employed to protect against fraud, the court could have properly concluded that the restrictions were invalid even if the state's purpose were of "sufficient magnitude." Thus, the court arrived at a proper conclusion in its holdings concerning the free exercise of religion, although its reasoning is unclear.

The court in Fayetteville School, on the other hand, applied the proper balancing test in an orderly fashion. The purpose of the Day-Care Facilities Act of 1977 is stated to be the protection of the "physical safety and moral environment" of children attending the centers. The court found this purpose to be both constitutional and compelling. Religious bodies may not endanger the peace, good order, and morals of society. Thus, regulation for purposes of health and safety could constitutionally restrict, at least to some extent, the free exercise of religion. However, since there was no evidence that the religious beliefs or actions of the defendants were in any way affected, let alone infringed upon, no balancing of interests was necessary to support the court's conclusion.

The Heritage Church court's analysis of the violation of the establishment of religion clause, like its analysis of the free exercise clause, does not accurately reflect the test in current use by the Supreme Court: "[i]n order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." The protection of society from fraudulent solicitations is undeniably a secular purpose, but the effect of the exemption for denominational religious groups as recognized by the

40. 40 N.C. App. at 449, 253 S.E.2d at 485. See text accompanying note 34 supra.
41. 42 N.C. App. at 672, 258 S.E.2d at 463 (quoting N.C. GEN. STAT. § 110-85(2) (1978)).
42. Id.
43. Id. at 665, 258 S.E.2d at 464.
44. The court's reasoning here is supported by substantial precedent. The state has generally been held to have the authority to protect the health of a child, even over religious protests by the child or his parents. See, e.g., State v. Perricone, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962) (state authority to protect child whose parents neglected his health for religious reasons by refusing consent to blood transfusions).
45. See note 30 and accompanying text supra.
46. See text accompanying note 18 supra.
47. Wolman v. Walter, 433 U.S. 229, 236-37 (1977). The test applied by the Heritage Church court to determine whether the establishment clause is violated was the following: if either the purpose or the primary effect of the statute "is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 40 N.C. App. at 446, 253 S.E.2d at 483 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
court\[48\] is clearly to advance religions of particular denominations. Furthermore, the issuing officer's wide discretion in the revocation, denial, and suspension of licenses on the basis of his finding that an "unreasonable" percentage of funds was used for noncharitable purposes\[49\] may well be "an excessive entanglement with religion." Any one of the three factors in the test will invalidate a statute. The advancement or inhibition of religion appears to be the most critical factor in this case. Although the Heritage Church court relied on this factor in its decision, it failed to consider the "excessive entanglement" factor and gave only brief recognition to the existence of the "secular purpose" factor. Once again, the court arrived at the proper conclusion but employed incomplete legal analysis along the way.

C. Fourth Amendment—Administrative Searches

North Carolina courts had two opportunities to consider the constitutionality of administrative searches, both with and without warrants, authorized by the Occupational Safety & Health Act (OSHA) of North Carolina.\[50\] Section 95-136(a)\[51\] of the Act authorizes warrantless administrative searches by OSHA inspectors. The wording of the section is nearly identical to a federal OSHA statutory section invalidated by the Supreme Court in *Marshall v. Barlow's, Inc.*\[52\] as violative of the fourth amendment. The North Carolina Court of Appeals in *Gooden v. Brooks*,\[53\] therefore, adopted the Barlow's reasoning and declared sec-

\[48\] See text accompanying note 18 *supra*.

\[49\] See text accompanying notes 14-16 *supra*; note 23 *supra*.


\[51\] (a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and (2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

*Id.* § 95-136(a).


\[53\] 39 N.C. App. 519, 251 S.E.2d 698 (1979). Plaintiffs were engaged in wood products businesses and brought this action to enjoin the Commissioner of Labor from conducting warrantless inspections of nonpublic areas of their business establishments, as well as to have warrantless inspections declared unconstitutional. Only plaintiff Ward Lumber Company, fined for refusing to allow inspections, was found to have standing to enjoin enforcement of the statute. The rights
tion 95-136(a) unconstitutional.\textsuperscript{54} The \textit{Barlow's} Court held that, while warrantless administrative searches may be reasonable in certain businesses,\textsuperscript{55} they usually cannot be justified in an ordinary business because the proprietor has a reasonable expectation of privacy,\textsuperscript{56} and the requirement of a warrant will not "impose serious burdens on the inspection system" or make enforcement of the statute ineffective.\textsuperscript{57}

Plaintiff in \textit{Gooden} also challenged the constitutionality of the statutory criteria governing the decision whether to issue a warrant by claiming that the criteria do not meet the requirements set forth in \textit{Barlow's}.\textsuperscript{58} Section 15-27.2(c)(1) of the statute provides that a warrant shall be issued when it is established that the property is to be "searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing" such a condition exists as to justify inspection.\textsuperscript{59} The Court established in \textit{Barlow's} that probable cause for an administrative search need not meet criminal law standards but may be based on either "specific evidence of an existing violation" or "a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"\textsuperscript{60} Specifically, the Court stated that due process would be satisfied when an OSHA warrant showed that a particular business was selected for inspection "on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources."\textsuperscript{61}

The \textit{Gooden} court held that section 15-27.2(c)(1) does comply with the \textit{Barlow's} standard by interpreting the section to require "a showing . . . that the general administrative plan for enforcement is based upon

\textsuperscript{54} of other plaintiffs were not immediately threatened, and the action was dismissed with respect to them. \textit{Id.} at 520-22, 251 S.E.2d at 701.
\textsuperscript{55} \textit{Id.} at 523, 251 S.E.2d at 701.
\textsuperscript{56} Such businesses include the liquor and firearms industries. "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." 436 U.S. at 313.
\textsuperscript{57} The right to be free from unwarranted governmental intrusion on one's private premises applies not only to residence dwellings, but also to nonpublic areas of commercial property. \textit{Id.} at 312.
\textsuperscript{58} 39 N.C. App. at 523, 251 S.E.2d at 702.
\textsuperscript{60} 436 U.S. at 320-21 (the latter alternative is quoted from Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).
\textsuperscript{61} \textit{Id.} at 321.
Plaintiff Gooden also contended that OSHA warrants authorized by the statute were "general warrants" of the kind prohibited by the North Carolina Constitution. The court did not reach this issue because it found that the specific warrant in question was invalid in that the affidavit did not contain information from which the issuing magistrate could determine (1) the existence of a legally authorized inspection program naturally including the property, (2) that the general administrative enforcement plan was based on reasonable standards, and (3) that the standards were being neutrally applied to plaintiff.

The "general warrant" theory was asserted again in Brooks v. Taylor Tobacco Enterprises, Inc., and again the issue was avoided by a finding, based on a fine technical point, that the warrant in question did not comply with statutory requirements. The warrant did not on its face specify the conditions expected to be found, as required by statute. However, the underlying affidavit, which was attached to the warrant, did specify such conditions. A warrant may be upheld if it incorporates by reference an attached affidavit containing the required showings. The warrant in question did refer to the affidavit for required statements of the property to be inspected, but failed to make specific reference to the affidavit's inclusion of statements regarding the conditions expected to be found. The supreme court held the warrant inva-

62. 39 N.C. App. at 524, 251 S.E.2d at 702 (quoting 436 U.S. at 320-21).
63. "General warrants whereby an officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. CONST. art. I, § 20.
64. 39 N.C. App. at 529, 251 S.E.2d at 704-05. The court noted that these requirements for the affidavits would impose a minimal administrative burden since the Department of Labor currently maintains neutral criteria which it uses to determine whether potential objects of administrative searches should in fact be inspected. Id. at 526-528, 251 S.E.2d at 703-04.
65. 298 N.C. 759, 260 S.E.2d 419 (1979). Plaintiffs also alleged that N.C. GEN. STAT. § 15-27.2(c)(1) (1978) is void for vagueness in its criteria for issuance of warrants. Id. at 760-61, 260 S.E.2d at 421. See text accompanying note 59 supra for the challenged language.
66. The supreme court opinion is unclear as to the presence of the required statements in the affidavit, but the court of appeals opinion reveals that the affidavit stated in great detail the objects and conditions that the "'inspection [was] intended to check or reveal.'" 39 N.C. App. 529, 538, 251 S.E.2d 656, 661 (1979) (quoting N.C. GEN. STAT. § 15-27.2(d)(3) (1978)).
67. The court of appeals read the affidavit and warrant together and found them sufficient. Id. It also held that administrative search warrants are not the type of general warrants prescribed by the state constitution. Id. at 534, 251 S.E.2d at 658. See note 63 and accompanying text supra.
lid even though it did incorporate the attached affidavit (in which all required showings were made), merely because it failed to explicitly incorporate the affidavit statements in the affidavit describing the conditions expected to be found.68

While it is an accepted principle of construction that a court will not address the constitutionality of a statute when the case may be settled on alternative grounds,69 it seems the court in Taylor Tobacco went to extreme lengths to find the warrant invalid. Had it wished to do so, the court could have addressed the general warrant question. By forestalling consideration of this issue, the court has needlessly invited further litigation and engendered uncertainty in the law.

D. Fourteenth Amendment—Equal Protection70

The court of appeals rejected an attack on the constitutionality of the "crime against nature" statute in State v. Poe.71 The statute simply prohibits committing "the crime against nature, with mankind or beast,"72 without any elaboration on the specific kinds of acts included. The adult male defendant was convicted of "the crime against nature" for engaging in fellatio with the prosecuting witness, an adult female.73 Defendant introduced evidence that the fellatio was performed in private by mutual consent.74 On appeal he argued that prosecution for heterosexual fellatio between consenting adults violated a constitutional right to privacy.75

Defendant sought to extend the right to privacy to include recognition of a constitutional right to engage in specific sexual acts in private by mutual consent. A prohibition on the use of contraceptives by mar-

68. 298 N.C. at 764, 260 S.E.2d at 423.
69. Id. at 761, 260 S.E.2d at 421.
70. The North Carolina Supreme Court upheld the constitutionality of the state's intestacy statute against an equal protection attack in Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979). For a discussion of this case, see this Survey, Property.
73. Defendant was also charged with rape, but that charge was dismissed after the State had presented its evidence. 40 N.C. App. at 386, 252 S.E.2d at 843.
74. The trial judge refused a request to charge the jury that defendant would not be guilty if the act occurred between two consenting adults in private. Id.
75. Id. at 387, 252 S.E.2d at 844. Defendant also argued that the statute was unconstitutionally vague. The court found, however, that judicial decisions clarified the statute and "persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by G.S. 14-177." Id. at 389, 252 S.E.2d at 845. See Wainwright v. Stone, 414 U.S. 21 (1973), in which a defendant convicted for a voluntary sexual act under a sodomy statute claimed the statute was unconstitutionally vague. The Court held it was not vague in the context of interpretive decisions.
ried couples was held violative of a constitutional right to privacy in *Griswold v. Connecticut*. In *Eisenstadt v. Baird* the Supreme Court struck down a similar prohibition on contraceptive use by unmarried persons as a violation of equal protection, recognizing that single persons also must be free from unwarranted governmental intrusion in their choice whether to bear children. Defendant in *Poe* argued that the state cannot prohibit "crimes against nature" between married persons without violating their *Griswold* right to privacy and that, under *Eisenstadt*, the same logic applies to single persons. The court of appeals rejected this line of reasoning by distinguishing the right to use contraceptives while engaged in sexual conduct, as addressed in *Griswold* and *Eisenstadt*, and the right to engage in the sexual conduct itself. The court's reasoning is clearly consistent with the current position of the Supreme Court, which has never recognized the freedom to perform specific sexual acts as a fundamental interest invoking constitutional protections.

The *Poe* court went further, however, and suggested that even if the state could not prosecute married couples for performing fellatio in

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76. 381 U.S. 479 (1965).
77. 405 U.S. 438 (1972).
78. In its equal protection analysis, the majority of the Court in *Eisenstadt* did not rely on a fundamental right versus compelling justification analysis, see note 84 infra, but it did recognize a right to privacy in unmarried persons analogous to the privacy right of married persons recognized in *Griswold*:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453 (emphasis in original).
79. Defendant's argument is not without precedential support. Several courts have held that the *Griswold* right to privacy of married persons overrules the state's right to impose criminal penalties on married couples who engage in consensual "crimes against nature." As a result, these courts have held sodomy statutes unconstitutional as applied to married persons. *E.g.*, Buchanan v. Batchelor, 308 F. Supp. 729 (D.C. Tex.), vacated, 401 U.S. 989 (1970); Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025 (1972); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973). The Supreme Court, however, has never directly addressed the issue.
80. 40 N.C. App. at 398, 252 S.E.2d at 845.
81. For example, in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), several restrictions on the marketing of nonprescription contraceptives were invalidated. The Court was divided in its opinion, but several justices indicated the importance of distinguishing the right to control contraceptives and the right to control sexual behavior, particularly with respect to minors. The legitimacy of a state purpose of discouraging sexual behavior among minors was not denied, but only the reasonableness of the means proposed to discourage such behavior. In *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976), the Court affirmed a dismissal of an attack by male homosexuals on the constitutionality of a state sodomy statute.
private, it could treat single persons differently without a violation of the equal protection clause. The court noted that restrictions on certain sexual acts that are performed only by certain classes of persons have not been held unconstitutional—fornication and adultery, for example.

The court's logic is unsound. At the very least, a restriction applicable only to single persons must survive a rational relationship test. Under that test a prohibition of heterosexual fellatio between unmarried consenting couples in private can be constitutional only if (1) the prohibition of fellatio is a constitutionally permissible objective, and (2) the creation of a class of unmarried persons is rationally related to the achievement of the elimination of acts of fellatio. There are strong arguments against the constitutionality of prohibitions against such "victimless crimes" as private sexual acts between consenting adults, but the present body of legal precedent does not demand a retreat from these traditional prohibitions.

Assuming the state's goal of restricting fellatio is legitimate, it is necessary to understand the reason for the restriction in order to evaluate the strength of the connection between the statute and the state's

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82. 40 N.C. App. at 388, 252 S.E.2d at 845.

A few courts have taken the opposite view and held that sodomy statutes are also unconstitutional as applied to acts between consenting unmarried adults in private. In State v. Pilcher, 242 N.W.2d 348 (Iowa 1976), the majority, in a 5-4 decision, held a sodomy statute unconstitutional "as an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex." Id. at 359. The court relied on Eisenstadt for the proposition that "[g]overnmental intrusion into 'fundamental matters' cannot be distinguished on the basis of marital status." Id. at 358. See note 78 supra. The Massachusetts Supreme Judicial Court held a sodomy statute constitutionally inapplicable to acts between consenting adults in private, irrespective of marital status, in Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974).

83. 40 N.C. App. at 388-89, 252 S.E. at 845.

The rational relationship test was the original equal protection standard and still applies to economic and social regulations, classifications that are not "suspect," and rights that are not "fundamental." See, e.g., Railway Express Agency v. New York, 336 U.S. 106 (1949); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). If unmarried persons were deemed to be a "suspect class," or if the right to freedom in sexual acts were deemed "fundamental," then strict scrutiny would be applied and the statute could be upheld only if it were necessary to achieve a "compelling" state purpose. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

84. The rational relationship test was the original equal protection standard and still applies to economic and social regulations, classifications that are not "suspect," and rights that are not "fundamental." See, e.g., Railway Express Agency v. New York, 336 U.S. 106 (1949); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). If unmarried persons were deemed to be a "suspect class," or if the right to freedom in sexual acts were deemed "fundamental," then strict scrutiny would be applied and the statute could be upheld only if it were necessary to achieve a "compelling" state purpose. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).


86. Among such victimless crimes is fornification, or unlawful sexual intercourse between unmarried persons. Since fornification statutes appear at this time to be within the constitutional powers of the state, the legislature could logically prohibit fellatio between unmarried adults as an act of fornification, rather than as a "crime against nature."
Fellatio is prohibited as a "crime against nature," which appears to include virtually all sexual acts that, given the physiological construction of man and beast, could never result in pregnancy. For this fundamental reason the prohibited acts seem to be viewed as unnatural, immoral, or both. Because it is something intrinsic in the acts themselves that makes them objectionable, it is not logical that they should be more or less objectionable according to the marital status of the actors. Of course, the legislature may take a piecemeal approach to eradicating evil, beginning with single persons, but the premise of the court's analysis is that a prohibition on married couples would be an unconstitutional infringement of their right to privacy. When the state forbids adultery, the discriminatory nature of the prohibition is not only a reasonable but an indispensable part of the scheme—the crime is definable only by reference to the marital status of the actors. "Crimes against nature," on the other hand, maintain their "unnatural" character irrespective of marital status, and if the Constitution demands that married couples not be forbidden these "unnatural" acts, it can only be in deference to an overriding right to privacy as first recognized in Griswold. In view of the Court's statements in Eisenstadt, there is probably no constitutionally permissible basis for denying extension of the same rights to single persons. Thus, if it were true that a prohibition on "crimes against nature" would be unconstitutional when applied to married persons, then it is unlikely that there could be a constitutionally rational relationship between the state's purpose and a prohibition applicable only to single persons.

In State v. Tanner defendant was a convicted felon whose parole period had ended a year before the offense at issue, resulting in restoration of all his rights, except his right to "purchase, own, possess, or have in his custody, care, or control any handgun." Anyone convicted of certain enumerated felonies who is found to possess a handgun within

88. The statute has been construed to include unnatural acts with animals, acts between humans per anum and per os, sodomy, buggery, and various other unnamed acts of a bestial character. See, e.g., State v. Joyner, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978); State v. Wright, 27 N.C. App. 263, 265, 218 S.E.2d 511, 513, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).
89. See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 489 (1955): "The legislature may select one phase of one field and apply a remedy there, neglecting the others."
92. The applicable crimes are felonious convictions under Articles 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, and 53 of Chapter 14 of the general statutes, and Article 5 of Chapter 90. Id. § 14-415.1(b)(1). These include, for example, felonious convictions for placing a burning cross on another's property, rebellion against the state, first and second degree murder, rape, malicious
five years after the end of his punishment is guilty of a felony under section 14-415.1 of the general statutes. Defendant owned a gun given to him by a relative and was convicted under section 14-415.1 after the gun was found in an automobile he was driving.

On appeal defendant challenged the constitutionality of the statute as a denial of equal protection because (1) it prohibits possession not by all felons, but only by those convicted of specified felonies, and (2) it further discriminates among the specified group of felons by making the length of the prohibition depend on the length and type of punishment imposed for the original felony.

The court, in a very brief opinion, responded to defendant's arguments with the following holdings. First, the purpose of the statute is the protection of citizens from violent acts. The defendant is a member of a class of persons convicted of violent crimes and there is a reasonable relationship between this classification and the statutory purpose. Second, there is nothing discriminatory in further defining the class as those whose particular punishment is still continuing or was terminated within the last five years, especially when the same standard is applied to all. This latter comment does not meet defendant's challenge, because equal treatment of all members of a class is not proof of the reasonableness of the class itself.

The boundaries of the class itself may be challenged on the ground that the enumerated felonies include some that are only "violent" in the broadest sense—for example, offenses against public safety, obstructing justice, at least some incidents of escape from prison, and the illegal sale of weapons.

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93. The end of punishment may be the date of conviction, discharge from a correctional institute or termination of probation, parole or a suspended sentence, whichever is later. Id. § 14-415.1(a).
94. 39 N.C. App. at 669, 251 S.E.2d at 705. Defendant did not deny his possession of the handgun, but in fact called the gun to the attention of the arresting officer. Id.
95. Id. at 670, 251 S.E.2d at 706.
96. Id. See note 93 and accompanying text supra.
97. 39 N.C. App. at 669, 251 S.E.2d at 706. The rational relationship test is appropriate here because no fundamental right or suspect class is involved. See note 84 supra.
98. 39 N.C. App. at 671, 251 S.E.2d at 706.
99. The Supreme Court established this point in Loving v. Virginia, 388 U.S. 1 (1967), in which a miscegenation statute was declared unconstitutional. The State had argued that there was no denial of equal protection because both white and black marriage partners were punished equally. The Court rejected "the notion that mere equal application of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." Id. at 8. Although Loving involved a suspect class, and hence strict scrutiny, the same logic should apply under a rational relationship test.
100. See note 92 supra.

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thermore, it is true that the length of the period of prohibition may vary greatly depending on the individual punishment imposed, which may be only tenuously related to a tendency toward future armed violence, thereby creating somewhat arbitrary results.

The question whether the connection between means and end is rational is also subject to the argument that the probability that an individual felon will repeat violent acts may be too uncertain to justify subjecting the entire group to special treatment. Finally, it may be argued that once his punishment is complete, the felon has paid his debt to society and is entitled to be treated as if totally rehabilitated, so that all his rights should be fully restored.

Despite the policy arguments that may be raised against the statute, the court appears to have been correct in upholding its constitutionality. These arguments may well have been appropriate considerations for the legislature before the statute was enacted, but the legislature has spoken and the fact remains that classifications in state criminal statutes, barring a suspect class or fundamental right, are merely subject to the rational relationship test. The challenged classification need only be "rationally related to a legitimate state interest," and the "rational distinctions may be made with substantially less than mathematical exactitude."104

Common sense reveals some rational connection between persons convicted of the enumerated felonies and the commission of violent crimes within a reasonable period following punishment. Furthermore, the statute is drawn so as to preserve the felon's right to a handgun in situations where he would be likely to use it in self-defense: "[n]othing

101. Note that there is not a fundamental right involved here, despite the provision of the second amendment that "[t]he right of the people to keep and carry Arms shall not be infringed." U.S. Const. amend. II. “This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.” United States v. Cruikshank, 92 U.S. 542, 553 (1875).

102. See note 84 infra.

103. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Dukes overruled Morey v. Doud, 354 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds," 427 U.S. at 306. Social legislation not involving a suspect classification or fundamental right has been treated with comparable liberality. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 8-7 (1978). Clearly a state legislature has very wide latitude in these areas and the judiciary will show great deference to legislative judgment.

104. New Orleans v. Dukes; 427 U.S. 297, 303 (1976). Furthermore, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Id.
in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.”

By allowing possession in situations where criminal acts of violence against the state’s citizens are least probable, the statute avoids sweeping too broadly. Precedent dictates that the equal protection clause is not violated when a nonsuspect classification is reasonably well-suited to achieving a legitimate end, and section 14-415.1 easily conforms to these minimal requirements.

The court of appeals held that a statute authorizing greater penalties for males convicted of assaulting females than for males assaulting other males, or for females convicted of assaulting adults of either sex under similar circumstances was not a constitutionally impermissible gender classification in violation of the fourteenth amendment’s equal protection clause. Defendant in State v. Gurganus was convicted of a misdemeanor assault on his wife under section 14-33(b)(2) of the general statutes, which provides a greater maximum punishment for an assault by a male over the age of eighteen when the only aggravating factor is that his victim is a female. On appeal defendant alleged that the gender-based difference in severity of punishment denies males equal protection of the laws.

The court analyzed the statute by applying the “middle-tier” scrutiny test for gender classifications set forth by the United States

105. N.C. GEN. STAT. § 14-415.1(a) (Cum. Supp. 1979). Defendant offered substantial testimony to show that he was moving his possessions to a new home on the day of his arrest. 39 N.C. App. at 669, 251 S.E.2d at 705. In addition to his equal protection challenges, defendant asserted on appeal that the statute is unconstitutional because it allows no way for a felon to transport a gun to his home or place of business, where he may legally possess it. Id. at 670, 251 S.E.2d at 706. The court dismissed this objection as frivolous. Id. at 671, 251 S.E.2d at 706. The statute does not put the felon in an awkward position, but imposes only a minor inconvenience—the felon should simply have someone else transport the gun for him. A similar conflict occurs between his right to possess a gun in his home or place of business and his inability to purchase a gun lawfully. Defendant may, as in this case, be given a gun, or he may have someone else purchase it on his behalf.

106. A statute may be invalidated if it prohibits activities that are constitutionally protected. However, because the state is not constitutionally required to allow unrestricted possession of firearms by citizens in good standing, see note 11 supra, the felon’s right to possess a firearm probably is not constitutionally protected under any circumstances.


108. Id.

109. The statute provides that a simple assault by anyone against anyone is punishable by a maximum fine of $50.00 and not more than 30 days imprisonment. N.C. GEN. STAT. § 14-33(a) (Cum. Supp. 1979). The maximum punishment, however, is two years imprisonment, a fine, or both, when (1) serious injury is actually inflicted or intended, or (2) a male over 18 assaults a female, or (3) a child under 12 years old is assaulted, or (4) a law officer is assaulted while discharging his official duties. Id. § 14-33(b).
Supreme Court in Craig v. Boren: To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. The court found that the purpose of the statute—the prevention of "bodily injury to the citizens of the State arising from assaults"—is "not only an important governmental objective," but also "the most important and fundamental objective of government." Turning to the question whether section 14-33(b)(2) is substantially related to achievement of this objective, the court answered in the affirmative, saying: "We base our decision . . . upon the demonstrable and observable fact that the average adult male is taller, heavier and possesses greater body strength than the average female." Therefore, an assault by a male upon a female logically carries a greater probability of serious injury, justifying greater punishment. The court reasoned that these "virtually immutable facts of nature" have not been altered by the Constitution and that the general assembly is permitted to take them into account.

110. 429 U.S. 190 (1976). "Middle-tier" scrutiny is so called because it is more rigorous than the rational relationship test, but less demanding than strict scrutiny. See note 84 supra.

111. 429 U.S. at 197. The Court added that prior decisions had "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." Id. at 198.

112. 39 N.C. App. at 400, 250 S.E.2d at 672.

113. Id. (emphasis in original). "Without such protection there can be neither government nor civilization."

114. Id. at 401, 250 S.E.2d at 672 (emphasis in original). The court noted that, in view of its decision, it was not necessary to rely on data indicating that men assault women more often and more violently than women assault men. Id. Had the court based its decision on that ground, it could have produced disturbing implications. For example, assume statistics show that poor people are significantly more likely to engage in certain crimes than other economic groups. Would not such logic justify more severe penalties for poor criminals, especially since wealth has not been held a suspect class, see, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1973), so that only a rational relationship between the statutory penalty and the prevention of crime would have to be established? Even if strict scrutiny were applied, "the most important" governmental objective would clearly provide a compelling purpose. This line of reasoning probably would not withstand scrutiny precisely because of such logical extensions. See notes 124 & 128 and accompanying text infra.

115. The court acknowledged that classifications based on average physical differences could be unconstitutional in some contexts, such as equal employment opportunities and sports participation, but found they were justified when used to distinguish criminal acts of violence with no productive purposes. 39 N.C. App. at 401 250 S.E.2d at 673.

116. Id. at 402, 250 S.E.2d at 673. Rejecting a request by defendant that it consider the potential impact of the pending Equal Rights Amendment in its decision, the court said that such issues will be addressed only after the amendment becomes part of the Constitution. Id. Proponents of ERA have said that under the amendment gender classifications can survive only if they work to protect a right to personal privacy, or if they are based on physical characteristics unique to one sex. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 618-19 (1978). Because the Gurganus decision is not based on unique characteristics attributable only to one sex,
No one would deny that the protection of the physical integrity of its citizens is at least an important governmental objective, and that a well-established means toward achieving that end is the imposition of greater degrees of punishment for crimes that result, or are intended to result, in greater physical harm.\textsuperscript{117} The court's defense of the statute suggests the following underlying rationale: when the aggressor in an assault is significantly stronger than the victim, the punishment should be correspondingly more severe. Although this principle could be applied on a case-by-case basis, the effect of section 14-33(b)(2) is to irrebuttably presume, before the crime occurs, 1) that each male attacker is stronger than his female victim, and 2) that an assault upon a female by a male will result in greater physical harm than will an assault on another male, or a female's assault on an adult\textsuperscript{118} of either sex.\textsuperscript{119}

Assuming that the physical superiority of the attacker over the victim is a valid basis for augmented punishment, it is nevertheless clear that not every male is stronger than every female. In \textit{Craig v. Boren} the Court invalidated a statute prohibiting the sale of 3.2\% beer to males between the ages of eighteen and twenty-one, while allowing sales to females in that age group.\textsuperscript{120} The State offered statistics showing that the class of males affected was more likely to become drunk and to drive while under the influence.\textsuperscript{121} The Court rejected the statistical disparity as insufficiently substantial to "form the basis for employment of a gender line as a classifying device,"\textsuperscript{122} and noted that it had "consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships" than the \textit{Craig v. Boren} data.\textsuperscript{123} It is not clear what degree of correlation, if any, would be viewed by the Court as sufficient "if maleness is to serve as a proxy for"\textsuperscript{124} a prohibited behavior such as

\begin{itemize}
\item[\textsuperscript{117}] Section 14-33(b) expressly takes into account the concept of greater punishment for greater intended harm. \textit{See} note 109 \textit{supra}.
\item[\textsuperscript{118}] The statute also provides greater punishment for an assault on a child under 12 by a person of either sex. \textit{See} note 109 \textit{supra}.
\item[\textsuperscript{119}] It may be argued that the sentencing procedures allow some discretion to take into account relative body strengths for assaults in these other gender combinations. If this is so, then there is even less need for the presumptions embodied in § 14-33(b)(2).
\item[\textsuperscript{120}] 429 U.S. at 192.
\item[\textsuperscript{121}] The statistics were claimed to be .18\% of females compared to 2.0\% of males. \textit{Id} at 201.
\item[\textsuperscript{122}] \textit{Id}.
\item[\textsuperscript{123}] \textit{Id} at 202.
\item[\textsuperscript{124}] "Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2\% must be considered an unduly tenuous fit." \textit{Id} at 201-02.
\end{itemize}
assault on a female but the Gurganus court might have attempted to set a standard for such a correlation. The court expressly refused to rest its decision on the statistical likelihood that males will assault females more often than females will assault males, resting it instead on the even more dubious ground that when a male does assault a female, the physical harm is likely to be greater than in other cases. The court's proposed justification for the statute means that a male who assaults a female is punished more severely based on a statistical prediction of his relative strength and size—nonbehavioral factors that are totally beyond his control and that are not integral to the crime itself. The court is, in effect, making maleness a proxy for strength. Strength is not a crime, but at most only a characteristic of a person who might commit a crime. Moreover, a person with greater physical strength will not necessarily use it; assuming two defendants who cause equal injury, it is not rational to mete out greater punishment to one merely because he is stronger than his victim. The questionable nature of this reasoning is clearly seen when one considers substituting a racial group that is statistically of larger or smaller average stature for the male or female categories in the statute. The Court in Craig v. Boren warned against the dangers of allowing "statistics . . . to govern the permissibility of state . . . regulation without regard to the Equal Protection Clause as a limiting principle."
The *Gurganus* court may be correct in asserting that the average greater body size of males is an "immutable fact of nature," but this immutability does not necessarily result in a "substantial" or even a rational relationship to a scheme of punishment designed to serve an important governmental objective.

**E. Fourteenth Amendment—Procedural Due Process**

In *In re Lassiter* the court of appeals considered whether a parent has a constitutional right to assistance of counsel in a proceeding to terminate parental rights. The Lassiter child had been adjudicated a neglected child and placed in foster care. A year later the child's unwed mother was convicted of second degree murder and was serving a sentence for that conviction at the time she was notified of the hearing on termination of her parental rights. The indigent mother was not represented by counsel at the hearing and apparently did not request counsel at that time. The court terminated her rights, and she appealed, claiming the trial court committed reversible error in failing to appoint counsel to represent her.

The *Lassiter* court summarily concluded that procedural due process was satisfied because the mother had notice of the hearing, was per-
sonally present, and was permitted to testify and cross-examine witnesses. The court then held that substantive due process was not violated because (1) state intervention on behalf of neglected children is a reasonable exercise of the state’s police power, (2) there was no evidence that appellant was treated unreasonably, particularly since she showed a continuing pattern of neglect, and (3) no criminal sanctions accompany the termination of parental rights. The court concluded that state intervention “does invade a protected area of individual privacy,” but “the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.” The court finally added that it would require appointment of counsel only if clearly directed to do so by the legislature.

Appellant in *Lassiter* did not challenge the power of the state to intervene to protect children from unfit parents, but only questioned the failure to appoint counsel, thereby raising an issue of procedural due process. Thus, the court’s discussion of substantive due process...

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135. *Id.*
136. *Id.* at 527, 259 S.E.2d at 337.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 527, 259 S.E.2d at 338. The court noted that the legislature has recently provided for appointment of counsel in neglect proceedings. See note 132 supra. The 1979 General Assembly enacted the following provision, effective January 1, 1980: “In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.” Law of June 7, 1979, ch. 815, § 1, 1979 N.C. Sess. Laws 401 (codified at N.C. GEN. STAT., § 7A-587 (Cum. Supp. 1979)). It perhaps gives too little credit to the legislature to presume that counsel was provided in neglect proceedings and intentionally denied in the far more drastic proceeding for termination of parental rights.

141. Although the fourteenth amendment literally protects only against deprivation by the state of “life, liberty, or property, without due process of law,” U.S. CONST. amend. XIV, § 1, the Supreme Court has recognized that procedural due process requirements must be met in child custody cases. *E.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (children were summarily removed from unwed father after mother’s death, on presumption of parental unfitness; held, convenience of proof is insufficient, under the due process clause, “to justify refusing a father a hearing when the issue at stake is the dismemberment of his family”). Recently the North Carolina Court of Appeals expressly confirmed this requirement of procedural due process in *In re Yow*, 40 N.C. App. 688, 253 S.E.2d 647 (1979), in which a parent whose location was unknown when a neglect proceeding was initiated alleged denial of due process because she was not notified of the hearing. The court held, in a case of first impression, that under the particular facts appellant was not arbitrarily deprived of custody, and that therefore her due process rights were not violated. An important factor relied on was that the deprivation was not irrevocable, but subject to review at specified intervals. A “dependent child” is one who needs placement, special care or treatment because his parent or guardian cannot provide such care, or because he has no parent or guardian. N.C. GEN. STAT., § 7A-278(3) (1969). See *id.* §§ 7A-278 to -287 (procedures for declaring a child dependent). § 7A-286 provides that the court may, upon motion, review a court order
does not address the issue raised, and the summary conclusion that procedural due process was satisfied appears to be based on the unsupported assumption that appointment of counsel is not a constitutionally required procedural safeguard.\textsuperscript{142}

The United States Supreme Court, in \textit{Mathews v. Eldridge},\textsuperscript{143} constructed a balancing test requiring consideration of the following three factors to determine whether procedural due process has been satisfied: (1) the type of private interest that is affected; (2) the risk of erroneous deprivation of the private interest through the procedures currently used and the probable value (if any) of alternative or additional safeguards; (3) the nature of the governmental function involved and the potential financial and administrative burdens of substitute or additional procedures.\textsuperscript{144} The test is a flexible one\textsuperscript{145} and likely to generate inconsistent results;\textsuperscript{146} nevertheless, it does delineate the important areas of concern. The court of appeals in \textit{Lassiter} did not refer to the \textit{Mathews} test, although it did touch upon each factor to some degree in the context of substantive due process.

The \textit{Lassiter} court characterized the private interest involved as “family integrity” and acknowledged it as a fundamental right;\textsuperscript{147} yet the court implied that termination of parental rights is not a very serious interference with this fundamental right.\textsuperscript{148} It is hard to imagine an intervention more destructive of family integrity than the irrevocable severance of the legal parent-child relationship. The absence of crimi-
nal penalties against the parent does not conclusively demonstrate lack of seriousness. Deprivation of liberty, even when accompanied by some degree of social disapprobation, is not inevitably more severe than permanent separation from a child.

The court did not consider the extent of the risk of erroneous termination of parental rights occasioned by present procedures, except to indicate that the termination was not erroneous in this case, nor did it consider the probable value of appointed counsel in reducing the risk of erroneous termination. The statutory procedures for termination of parental rights are relatively uncomplicated, and it may well be that the presence of counsel would provide little additional protection. On the other hand, the guidance of someone familiar with the grounds for parental termination could help focus an indigent parent's defenses and protect against the potential for confusion and manipulation that may be created by the often fine line between poverty and undereducation and neglect.

The third factor in the Mathews test, the nature of the governmental function, was mentioned only once, again in the context of substantive due process: "It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse." Clearly the protection of children from harmful parenting is a very important governmental function, but the court did not consider the possibility that financial and administrative burdens created by requiring appointment of counsel for indigents might be insubstantial.

The procedural due process issue raised by appellant is not without merit, and a truly responsive court would have given it greater con-

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149. "Certainly no unreasonableness or arbitrariness appears on the instant record where the evidence brought forward . . . demonstrated a pattern of neglect of her child by respondent substantially predating her present incarceration, and no evidence of any rehabilitation of respondent or amelioration of her attitude towards her child was adduced." Id. Statements such as this indicate that the court was more influenced in its decision by the particularly egregious conduct of the appellant than by the constitutional principles involved.

150. A summons is served on the parent, if known, and certain other interested parties. N.C. GEN. STAT. § 7A-289.27 (Cum. Supp. 1979). If respondents fail to answer in writing within a specified period, a termination order may be issued after a hearing on the petition. Id. § 7A-289.28. If the respondents answer, an adjudicatory hearing is conducted at which the judge takes evidence and determines whether any of certain statutory conditions exist so as to provide grounds for termination. Id. §§ 7A-289.30, .32. If any one factor is found to exist, the judge then has discretionary authority to order termination or, in the best interests of the child, to deny termination. Id. § 7A-289.31. Any party to the hearing may appeal the disposition by the district court. Id. § 7A-289.34.

151. 43 N.C. App. at 527, 259 S.E.2d at 337.
sideration. The intent of the legislature should not be determinative of the constitutional right to due process, but is only useful as an indication of the importance of the governmental function and the potential burdens caused by the proposed safeguard.

DESTIN SHANN TRACY
V. CRIMINAL LAW

A. Mental Capacity

In *State v. Potts* the North Carolina Court of Appeals considered the type of hearing required to satisfy G. S. 15A-1002(b)(3), which provides that a court must hold a hearing to determine the defendant's mental capacity to stand trial when his capacity is questioned "by the prosecutor, the defendant, the defense counsel, or the court."3 G. S. 15A-1002(b)(1) and (2) further provide that the court in its discretion may either appoint an impartial medical expert to examine the defendant or commit the defendant to a state mental health facility for observation and treatment when a motion questioning the defendant's capacity to proceed is made.4 Although the appellate courts of North Carolina have considered whether a hearing on a motion to direct a third-party examination of the defendant's capacity pursuant to G. S. 15A-1002(b)(1) and (2) implicitly satisfies G. S. 15A-1002(b)(3),5 prior to *Potts* the courts had not addressed the sufficiency of a mandatory hearing.

Defendant in *Potts* was indicted for uttering a forged check. While the jury was being selected, defendant's attorney moved that defendant be declared mentally incompetent to stand trial and that the

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1. In 1979 the North Carolina General Assembly amended N.C. GEN. STAT. § 122-56 (1974), effective July 1, 1979, to allow the voluntary admission of an inmate who is in the custody of the Department of Correction to one of the regional mental health facilities. Law of May 11, 1979, ch. 547, § 1, 1979 Sess. Laws 564 (codified at N.C. GEN. STAT. § 122-56.10 (Cum. Supp. 1979)). Voluntary admission under this provision may be sought by any inmate who believes he needs treatment for mental illness or inebriety. It will only be allowed, however, when both the Secretary of Human Resources and the Secretary of Correction or their designees jointly agree to the inmate's request. To minimize the potential hazards of this procedure, the legislature directed the Department of Correction to assume responsibility for "the security and costs of transporting inmates to and from regional psychiatric facilities." Existing statutory procedures for voluntary admissions into treatment facilities, set forth in N.C. GEN. STAT. § 122-56.3 (1974), also apply to inmates, except that the Department of Correction retains custody of the inmate upon his discharge from the treatment facility if his "term of incarceration has not been completed."


3. N.C. GEN. STAT. § 15A-1002 (1978). A motion questioning defendant's capacity to proceed may be raised at any time. The motion, however, must "detail the specific conduct that leads the moving party to question the defendant's capacity." Id.

4. Id. § 1002(b)(1) & (2) (1978).

5. See State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977) (motion for commitment and psychiatric examination); State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978) (motion for continuance to allow for psychiatric examination). These cases indicated that the requirement of a hearing in G.S. 15A-1002(b)(3) is satisfied when the court hears any evidence on capacity that the defendant is prepared to present and makes a judgment accordingly. See 293 N.C. at 62-64, 235 S.E.2d at 49-50; 38 N.C. App. at 188-89, 247 S.E.2d at 623.
court "inquire into the basis of the motion." Defense counsel offered no medical evidence to support the motion, but stated that defendant was unable to concentrate during jury selection, was hearing voices, was schizophrenic and was receiving Social Security payments for mental disability. Defense counsel admitted, however, that defendant had cooperated with him and in his opinion understood the nature of the circumstances surrounding the charge. The trial court denied this motion, but allowed defendant to put on evidence in support of the motion after the state had rested its case. After hearing the evidence, the court concluded that defendant was competent to stand trial. Defendant was convicted and sentenced to prison.

On review, defendant contended that the trial court had failed to hold the hearing on his capacity to proceed that is required by G.S. 15A-1002(b)(3). With little discussion, the court of appeals held that the trial court had complied with the statute by entertaining defense counsel's statement, which, taken as a whole, supported the court's denial of the motion. In affirming the conviction, the court of appeals noted that any error there may have been was cured when the trial court subsequently allowed evidence on the motion.

The court of appeals' holding that the consideration of defendant's motion by the trial court satisfied the requirements of the mandatory hearing statute is sound. The court heard all the evidence on the motion defendant was prepared to present, both at the time the motion was made and when the state rested its case. Furthermore, defense counsel's statement in support of the motion and the subsequent evidence supported the trial court's denial of the motion. Mental incapacity is defined by statute as a defendant's inability "to understand the nature and object of the proceedings, comprehend his own situation in reference to the proceedings, or assist in his defense in a rational or reasonable manner." Defense counsel in Potts provided evidence to support each of these elements when he stated that defendant understood the nature of the circumstances surrounding the charge.

6. 42 N.C. App. at 358, 256 S.E.2d at 498.
7. Id.
8. Defendant's mother testified that he was "mentally sick" and had "been in mental institutions several times." A former instructor of defendant's testified that defendant had passed all tests the instructor had given while defendant was in his class. Id.
9. Id. at 358, 256 S.E.2d at 499.
10. Id. at 359-60, 256 S.E.2d at 499.
and had cooperated with him. Therefore, any hearing, no matter how informal, that elicits evidence on which to base a judgment on defendant's competence to stand trial should satisfy G.S. 15A-1002(b)(3).

B. Homicide

The North Carolina Supreme Court in *State v. Scott* clarified the distinction between sufficient and insufficient evidence to withstand a motion for nonsuit when the only evidence connecting defendant with a crime is his fingerprints. Defendant in *Scott* was tried and convicted of first degree murder in the Superior Court of Cabarrus County. The victim's body had been found by his niece when she returned home from work. The house had been ransacked, and a small metal box containing personal papers had been moved from its storage place onto a desk. The box was used only by "immediate family members" who opened it about once every three months. The only evidence connecting defendant with the murder was his partial thumbprint on this box.

The prosecution attempted to establish by circumstantial evidence that defendant's fingerprints could have been impressed only at the time the murder was committed. The victim's niece testified that she lived in the house, that she had never seen defendant, and that he had never visited the house to her knowledge. She also testified that she had been working in Charlotte five days a week for about a year before her uncle's death and that she did not ordinarily see her uncle between seven a.m. and six p.m. At the close of the state's evidence defendant moved for a nonsuit. The trial court denied this motion, and defendant rested without offering evidence in his own behalf. The jury found defendant guilty of first-degree murder.

- 12. In 1979, the General Assembly amended N.C. GEN. STAT. § 15A-2000(e), effective May 14, 1979, to add that an aggravating circumstance that a judge may consider in a capital case when determining the appropriate sentence is whether "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." Law of May 14, 1979, ch. 565, § 1, 1979 N.C. Sess. Laws 596 (codified at N.C. GEN. STAT. § 15A-2000(e)(11) (Cum. Supp. 1979)). A second amendment to the section, effective January 1, 1980, allows a concurrent sexual offense to be considered an aggravating circumstance. Law of May 29, 1979, ch. 682, § 9, 1979 Sess. Laws 725 (codified at N.C. GEN. STAT. § 15A-2000(e)(5) (Cum. Supp. 1979)).
- 14. *Id.* at 520-21, 251 S.E.2d at 415-16.
- 15. *Id.*
- 16. *Id.* at 521, 251 S.E.2d at 416.
- 17. *Id.* The jury also found defendant guilty of attempted armed robbery.
On appeal of right, the North Carolina Supreme Court, holding that the evidence was insufficient as a matter of law to withstand defendant's motion for nonsuit, reversed the conviction and remanded the case to the trial court for entry of a judgment of nonsuit. In so holding, the court followed the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury.

Applying the rule, the court found that deceased's niece could not have known who visited her uncle when she was at work and that it was therefore reasonable to infer that defendant's fingerprint might have been impressed prior to the homicide. The court concluded that the evidence was "sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove the issue from the realm of suspicion and conjecture."

In its decision, the supreme court distinguished several previous cases in which it had upheld convictions on similar facts. In State v. Tew, the closest case on point, the defendant was convicted of breaking and entering and larceny because his fingerprints were found on a broken window pane through which the perpetrator had gained access to a gas station. In addition to this evidence, the proprietor of the gas station testified that she alone operated the station and was always there when it was open, except when she went into town, and that she

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18. Id. at 526, 251 S.E.2d at 417. "What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury." Id. (quoting State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956)).
19. 296 N.C. at 526-27, 251 S.E.2d at 419.
20. State v. Miller, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (emphasis added). "Such evidence logically tends to show that the accused was present at and participated in the commission of the crime." Id.
21. 296 N.C. at 526, 251 S.E.2d at 418.
22. Id. The court's suspicion of defendant's guilt was enhanced by a "letter of confession" written by a then inmate in a South Carolina prison in which the inmate had confessed to the murder of the victim in this case, stating that he had "committed" the murder with the use of defendant Scott's truck. See State v. Vaughn, 296 N.C. 167, 170, 250 S.E.2d 210, 212 (1978), cert. denied, 441 U.S. 935 (1979) (affirming defendant Vaughn's conviction for first degree murder of the victim in Scott).
24. 234 N.C. 616, 68 S.E.2d 291 (1951). Justice Sharp, who wrote the Scott opinion, sat as a Special Judge at the trial of the Tew case in superior court.
25. The reported decision does not indicate the frequency or duration of the proprietor's trips.
had never seen defendant before. The defendant offered no evidence and moved for nonsuit. The trial court denied this request and found defendant guilty as charged. The supreme court affirmed the conviction, holding the evidence sufficient to withstand the motion for nonsuit. The court in *Scott* distinguished *Tew* on the strength of the proprietor's testimony, reasoning that the victim's niece in *Scott* was not in a position to know who visited the deceased during the day, whereas the proprietor in *Tew* could testify of her own knowledge that defendant had never visited the station.

The *Scott* court distinguished two other similar cases, *State v. Miller* and *State v. Foster*, on the basis of the defendants' testimonies therein. As in *Scott* and *Tew*, fingerprints of the defendants in *Miller* and *Foster* were found at the scenes of their alleged crimes. Unlike *Scott* and *Tew*, the defendants in *Miller* and *Foster* took the stand and denied ever having been on the premises where their fingerprints were found. Neither defendant could explain the presence of his fingerprints at these premises, and both were subsequently convicted. On appeal, the supreme court in both cases held the evidence sufficient to warrant submission of the cases to the juries. The supreme court in *Scott* explained its holdings in *Miller* and *Foster*, stating that a defendant's "inability to offer a plausible explanation for the presence of his fingerprints is some evidence of guilt," which, coupled with evidence of defendant's fingerprints, may be sufficient to send the case to the jury. But neither the court nor the jury can infer from a defendant's decision not to testify that his fingerprints could have been impressed only while committing the alleged crime. Thus, because the deceased's niece in *Scott* was not in a position to know everyone who visited the deceased

to town. It states simply that the proprietor would get someone to stay at the station when she went to town. *Id.* at 613, 68 S.E.2d at 292.

26. *Id.* at 617, 68 S.E.2d at 295.
27. 296 N.C. at 525-26, 251 S.E.2d at 418. The weight to be attributed to this testimony was for the jury to decide. *Id.*
30. Defendant in *Miller* was convicted of breaking and entering a local laundry; officers "lifted" defendant's fingerprint from the padlock on the door of the laundry. 289 N.C. at 2-3, 220 S.E.2d at 573. Defendant in *Foster* was convicted of first-degree burglary; officers took his fingerprint from a flower pot on the violated premises. 282 N.C. at 191-92, 192 S.E.2d at 322.
32. The *Miller* court upheld the conviction, 289 N.C. at 6, 220 S.E.2d at 575, and the *Foster* court granted a new trial on other grounds, 282 N.C. at 198-200, 192 S.E.2d at 326-27.
33. 296 N.C. at 524, 251 S.E.2d at 417.
34. *Id.*
during the day and no inference could be drawn from defendant's refusal to testify, the Scott court ruled that defendant's motion for nonsuit should have been granted.

The supreme court's distinction in Scott of its prior decision in Tew indicates that before the court will find sufficient evidence to send the case to the jury fingerprint evidence must be accompanied by testimony from a witness who states that he has never seen defendant before, but would have seen defendant if he were ever lawfully on the premises where the fingerprints were found. The Scott decision also teaches a lesson in tactics: in a case in which the only evidence connecting defendant with the crime is his fingerprints at the scene, unless strong corroborating evidence that defendant could not have been at the scene at any other time exists, defendant's best defense may be no defense at all. By not testifying, defendant can avoid the pitfall of Miller and Foster.

In another homicide case, State v. Holsclaw, the North Carolina Court of Appeals found that the discontinuance of extraordinary means to prolong a person's life once brain death has occurred, provided for in G.S. 90-322, is not to be considered the proximate cause of death. The court in Holsclaw held that the lower court had erred in instructing the jury on brain death and the physician's act of terminating the life support systems in the context of the proximate cause of death. The court stated that G.S. 90-322 did not apply to the case, noting that the purpose of the statute is to protect physicians who terminate life support systems from civil and criminal liability.

C. Defenses

1. Self-Defense

Numerous cases in 1979 dealt with challenges to trial court instructions on defenses to charges of assault or homicide. In these cases,
the appellate courts clarified the law in North Carolina on the proper instructions for self-defense, defense of an arrestee, and defense of the home.

In *State v. Clay*, the North Carolina Supreme Court declared that the use of a deadly weapon in self-defense is justified only when a person is threatened with "deadly force." In setting forth this rule, the court noted that two prior supreme court cases, *State v. Anderson* and *State v. Fletcher*, "may [have left] the impression that a defendant may assault another with a deadly weapon if it reasonably appears that such assault is necessary to protect [himself] from bodily injury or offensive physical contact." In both *Anderson* and *Fletcher* the supreme court had held that a jury instruction implying that defendant could not lawfully use force in self-defense unless threatened with death or great bodily harm was prejudicial error. The *Clay* court pointed out that these cases hold only that nondeadly force may be used to resist a nonfelonious assault and are clearly consistent with the principle recognized by North Carolina courts that one may use only such force as is reasonably necessary to protect oneself from bodily injury or offensive physical contact. The *Clay* decision reiterates this principle, making it clear that the use of deadly force is justified only when it reasonably appears necessary to prevent death or great bodily harm. The reasonableness of defendant's apprehension is to be determined by the jury's consideration of all the facts and circumstances as they appeared to the defendant at the time of the assault. This rule of law conforms with that of the majority of jurisdictions.

40. Id. at 563, 256 S.E.2d at 182. The court defined deadly force as "force likely to cause death or great bodily harm." Id.
41. 230 N.C. 54, 51 S.E.2d 895 (1949).
42. 268 N.C. 140, 150 S.E.2d 54 (1966).
43. 297 N.C. at 562, 256 S.E.2d at 182.
44. 268 N.C. at 142, 150 S.E.2d at 56; 230 N.C. at 56, 51 S.E.2d at 897.
46. To make this rule explicit, the *Clay* court prescribed a change in the pattern jury instructions on self-defense. In cases involving a deadly weapon per se, the instruction will no longer include a reference to "bodily injury or offensive physical contact." In cases in which no deadly weapon per se is used, the instruction should state that if the jury finds that defendant assaulted the victim but does not find that he used a deadly weapon, that assault [should] be excused as being in self defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from "bodily injury or offensive physical contact."

297 N.C. at 565-66, 256 S.E.2d at 183-84 (emphasis in original).
47. *State v. Ellerbe*, 223 N.C. at 774, 28 S.E.2d at 522.
48. "One cannot carry his right of self-defense to the extent of using a deadly weapon upon
In a second self-defense case considered by the North Carolina Supreme Court, *State v. Spaulding,* the court reversed for erroneous failure to instruct on self-defense. Defendant Spaulding was charged with the first-degree murder of a fellow inmate. At trial, defendant offered evidence showing that the victim had threatened defendant while both were in the cell block and that defendant believed the victim meant to stab him when they went into the recreation yard. Before going into the yard, defendant armed himself with a homemade knife and placed it in his pocket. In the yard, defendant told the victim that he wanted no trouble with him. The victim approached defendant with his hand "jammed" into his pocket in such a way that led defendant to believe he had a knife. The victim backed defendant up to a fence, whereupon defendant stabbed him. The victim had not in fact been armed and never made a show of deadly force. At trial the judge refused defendant's request to instruct the jury on self-defense; defendant was convicted of first-degree murder and subsequently sentenced to death.

On appeal of right, the supreme court reversed and remanded for failure to instruct on self-defense, distinguishing two prior cases that the court had affirmed in which no instructions on self-defense had been given. Defendants in both of the previous cases had feared an attack from their victims. Unlike defendant Spaulding, however, they had aggressively sought out their victims and provoked the assault. Thus, because Spaulding was not the aggressor, the court held that Spaulding was entitled to an instruction on self-defense according to the principle of apparent necessity. The court explained that if Spaulding reasonably believed himself to be in imminent danger of death or great bodily harm, then a show of deadly force by the aggres-

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50. *Id.* at 153-55, 257 S.E.2d at 394-95.
52. 298 N.C. at 155, 257 S.E.2d at 395.
53. *Id.* at 156, 257 S.E.2d at 395-96. "[A] person may kill even though to kill is not actually necessary to avoid death or great bodily harm if he believes it to be necessary and has a reasonable ground for that belief." *Id.* (quoting *State v. Gladden,* 279 N.C. 566, 572, 184 S.E.2d 249, 253 (1971)). The reasonableness of defendant's belief is a question for the jury to be determined from the facts and circumstances as they appeared to defendant at the time of the killing. *See State v. Kirby,* 273 N.C. 306, 313, 160 S.E.2d 24, 29 (1968).
sor was not necessary to invoke the self-defense privilege.\textsuperscript{54}

2. Defense of an Arrestee

In cases of assault on a police officer, the privilege of defense of an arrestee has troubled many courts. In \textit{State v. Anderson}\textsuperscript{55} the North Carolina Court of Appeals prescribed a rule of law concerning the right of a bystander to come to the defense of an arrestee when it appears that an arresting officer is using excessive force in making a lawful\textsuperscript{56} arrest. The court balanced the desire to prevent serious and unprovoked injury to citizens caused by overzealous police officers in conducting arrests against the need to protect officers and bystanders from injury as a result of a potentially escalated confrontation caused by the intervention of a bystander.\textsuperscript{57} The court determined that both needs would best be met by adherence to the following rule of law: "[O]ne who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers."\textsuperscript{58}

Defendant in \textit{Anderson} fought with a police officer who was attempting to handcuff defendant's girlfriend pursuant to her arrest for disorderly conduct. According to the State's evidence, the arresting officer had forced the arrestee's face to the ground when he tried to handcuff her, and defendant came to her aid. Although the evidence is in substantial conflict, it is clear that a fight developed between defendant and the arresting officer, and two officers had to aid the arresting officer in subduing defendant and his girlfriend. Defendant was charged and convicted of assault on a police officer, but the trial court gave no instruction on the privilege of defense of an arrestee.\textsuperscript{59}

On review, defendant sought to have the court of appeals adopt the rule of reasonable appearance in defense of another and to reverse

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{54} 298 N.C. at 157, 257 S.E.2d at 396. \textit{See} State v. Goode, 249 N.C. 632, 107 S.E.2d 70 (1959); State v. Ellerbe, 223 N.C. 770, 28 S.E.2d 519 (1944); State v. Barrett, 132 N.C. 1005, 1008, 43 S.E. 832, 833 (1903). \textit{See also} State v. Finch, 177 N.C. 599, 608, 99 S.E. 409, 411-12 (1914) (requiring instruction on self-defense when victim acted as if he were reaching for weapon).
\item \textsuperscript{55} 40 N.C. App. 318, 253 S.E.2d 48 (1979).
\item \textsuperscript{57} 40 N.C. App. at 323, 253 S.E.2d at 51.
\item \textsuperscript{58} \textit{Id.} at 324, 253 S.E.2d at 52.
\item \textsuperscript{59} \textit{Id.} at 319-21, 253 S.E.2d at 49-50.
\end{itemize}
\end{footnotesize}
for failure to give such an instruction. This rule is typically employed by North Carolina courts in assault cases involving a purported defense of a third party. The rule allows a person to interfere with an assault when he has a well-grounded belief or apprehension that one party is attempting to kill or do great bodily harm to another.\textsuperscript{60} The court rejected this rule for arrest situations, however, for the same reasons that California courts had previously rejected it, stating that in arrest situations, "lack of knowledge and understanding of the facts and law by such person would unduly interfere with the vital public interest surrounding law enforcement. . . . [P]ublic policy discourages forceful intervention in arrests by third party bystanders because . . . the probabilities are that such intervention would only exacerbate the situation."\textsuperscript{61}

Instead of the rule of reasonable appearance, the court prescribed that one who comes to the aid of an arrestee will be privileged only when the arrestee himself would be justified in using self-defense against the arresting officers.\textsuperscript{62} Applying this rule to the facts of\textit{Anderson}, the court reversed the conviction and ordered a new trial for failure to instruct on defense of an arrestee, holding that the evidence presented by defendant could reasonably be considered by the jury as justifying defendant in coming to the aid of the arrestee,\textsuperscript{63} and thus impliedly finding that the evidence could reasonably be construed to authorize the arrestee to defend herself.

The rule announced by the court accords with that applied by the majority of jurisdictions in both arrest and nonarrest situations;\textsuperscript{64} but in nonarrest situations, however, the trend appears to favor the rule of reasonable appearance that is used by North Carolina courts.\textsuperscript{65} The rule prescribed by the\textit{Anderson} court, however, does not comport with


In another 1979 case, the court of appeals reaffirmed that only persons in a family relation or that of master and servant have the right to come to the defense of one who is faced with simple assault; the relationship of boyfriend and girlfriend does not invoke this reciprocal right. Therefore, unless a family or master-servant relationship is involved, one only has the right to interfere with an assault if he reasonably believes that death or serious bodily injury is imminent. State v. Bullock, No. 793SC630 (N.C. App., filed Dec. 18, 1979).

\textsuperscript{61} 40 N.C. App. at 324-25, 253 S.E.2d at 52 (quoting People v. Booher, 18 Cal. App. 3d 331, 335, 95 Cal. Rptr. 857, 859 (1971)).

\textsuperscript{62} Id. at 324, 253 S.E.2d at 52.

\textsuperscript{63} Id. at 325, 253 S.E.2d at 52-53.

\textsuperscript{64} See 6A C.J.S. Assault and Battery § 93 (1975).

the manner in which a reasonable person would react to an arrest situation when it appears to him that the officer is using excessive force. One reacts to situations according to his own perceptions and not those of the victim. Some courts, however, impose even stricter requirements than the Anderson court. Courts have held that a bystander is only justified in interfering with an arrest involving excessive force if the arrestee was in fact about to be seriously injured,\(^6\) that the use of force against a known police officer is always unjustified even if the arrest is unlawful,\(^7\) and that the good faith use of force on one who is not known to be a police officer is unjustified.\(^8\) Such results reflect the special problem that arises from third-party interference in arrests. To apply the normal rule of reasonable appearance to such situations would severely hamper orderly law enforcement because it would put the intervenor’s judgment on the same level as that of the arresting officer who has the authority to enforce the law. On the other hand, to severely restrict citizens’ rights to come to the aid of an arrestee when an officer is using excessive force would punish those who protect arrestees against serious and wanton injury from police misconduct. Although the rule of the Anderson court will not protect those who mistakenly but in good faith intervene in arrests, it will excuse those who first make certain that such intervention is warranted. The rule creates the reasonable presumption that an arresting officer’s use of force is legitimate.

3. Defense of the Home

In 1979, the courts narrowed and clarified the circumstances in which instructions on the right to defend one’s home are appropriate. In *State v. McCombs*,\(^69\) the North Carolina Supreme Court held for the first time that the privilege of defense of habitation ceases once an assailant has gained entry into the home; after entry, the rules of self-defense apply with the exception that there is no duty to retreat.\(^70\)

Defendant McCombs shot and killed a plain clothes police officer who had gained entry to defendant’s apartment by breaking down a


\(^67\) Id. at 157, 253 S.E.2d at 910, (citing 40 Am. Jur. 2d Homicide § 174 (1968)).
door. Upon hearing a knock at the door, defendant went to the front window and saw a man whom he did not know at the door. Defendant went into a bedroom to ask his roommate if he knew the person. He then heard a banging on the door and obtained his pistol. The officer had broken the door down when it was not opened promptly and was proceeding down the hallway when defendant shot him at a distance of three feet. At trial, the court instructed on self-defense but not on defense of home. Defendant was subsequently convicted of second degree murder as well as several drug offenses.\(^7\)

On review, the court of appeals granted a new trial on the ground that the trial court had erred in its failure to give a full instruction on defense of home and property.\(^7\) The State petitioned the supreme court for discretionary review.\(^7\) The court granted the petition and affirmed the trial court's refusal to instruct on defense of habitation, reversing the court of appeals. The supreme court held that the right to defense of habitation ceases once an assailant has gained entry. After entry the usual rules of self-defense apply except for the duty to retreat.\(^7\) The court stated that previous cases had indicated that “the use of deadly force in defense of the habitation is justified only to prevent a forcible entry into the habitation” when the occupant “reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony.”\(^7\)

Applying this narrow rule on defense of habitation, the court held that the trial court did not err in refusing to so instruct. The officer had entered the apartment, walked across the living room and was within three feet of defendant when he was killed. Thus, only the rules of self-defense were applicable.\(^7\)

In announcing this rule on defense of home, the court's reliance on *American Jurisprudence 2d*, from which it derived the rule, is misplaced

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\(^7\) *Id.* at 152-53, 253 S.E.2d at 907-08 (possession of marijuana with intent to distribute, manufacture of marijuana, and possession of LSD).
\(^7\) 38 N.C. App. 214, 247 S.E.2d 660 (1978).
\(^7\) 297 N.C. at 157, 253 S.E.2d at 910 (citing 40 Am. Jur. 2d Homicide § 174 (1968)).
\(^7\) *Id.* at 156-57, 253 S.E.2d at 910. See State v. Miller, 267 N.C. 409, 148 S.E.2d 279 (1966) (torn screen; jury question whether defendant shot victim to punish or to prevent entry); State v. Spruill, 225 N.C. 356, 34 S.E.2d 142 (1945) (attempted forcible entry; entitled to instruction on defense of habitation).
\(^7\) 297 N.C. at 158-59, 253 S.E.2d at 911.
because that source fails to support its narrow statement of the rule. Nevertheless, the rule is both logical and sound because after one has entered a home, although illegally, an occupant has no right to kill the intruder for the act of entry already committed. Further, the rules governing one's right to defend his home are substantially the same as those governing the right to defend oneself. Finally, the cases have held that in one's home the right of self-defense is buttressed by the absence of a duty to retreat. Given these three factors, a defendant is denied little by the lack of an instruction on defense of habitation when he has assaulted the victim after his entry, so long as the proper instruction on self-defense with no duty to retreat is given.

The McCombs court's rationale for delineating the entry as the point at which an instruction on defense of home is no longer required is also persuasive. The major justification for the rule on defense of habitation is that it allows occupants to protect themselves when they might not be able to see their assailant or know his purpose. But once the assailant has gained entry, the occupant is better able to ascertain what danger the assailant poses and can use appropriate force to combat the threat. Therefore, requiring the instruction on defense of home before entry allows the occupants to protect themselves without having to wait until the would-be assailant enters the home; but once the person gains entry and can be seen, the additional protection of the rule on defense of habitation is either nonexistent or unnecessary. Thus, the McCombs court has set out the narrow instances in which instructions on defense of habitation should be required.

The narrowness of the right to defend one's home is made explicit by the court of appeals decision in State v. Jones. In Jones the victim

77. The only case footnoted in the Am. Jur. 2d citation, supra notes 69 & 73, does not support this proposition. See State v. Brookshire, 368 S.W.2d 373 (Mo. 1963).
81. 297 N.C. at 157, 253 S.E.2d at 910. The court also noted that the privilege of defense of property is limited by the principle that in the absence of felonious use of force by the aggressor, human life must not be endangered or great bodily harm inflicted. Id. at 157, 253 S.E.2d at 911.
chased defendant and three other youths and was daring anyone to fight him. Defendant went into his house, obtained a .22 rifle and came back outside. The victim ran up to the house and began beating on the front door. Defendant’s mother and three others were inside the house. Defendant’s brother then came around the house with a shovel and hit the victim three times with it to stop him from beating on the door. The victim turned menacingly towards defendant’s brother, and defendant shot him three times. The man died from the wounds, and defendant was convicted of second-degree murder.

The court of appeals held that the trial court did not err in failing to instruct on defense of home because the evidence showed that defendant shot only after the victim had turned away from the house and towards defendant’s brother. Thus, the court held that the instruction on defense of home is only required when the assailant is killed at the time that he is trying to force his way into the house. Judge Webb dissented from this holding, stating that the deceased did not have to be in the act of trying to force his way into the house at the very moment that defendant fired the gun to require the instruction. The instruction does conform to the rationale of the defense of home privilege in another way, however, because defendant saw the victim and knew his purpose, thus he could judge what force was necessary.

*Jones* and *McCombs* together make explicit the circumstances in which the instruction on defense of habitation will be required. *Jones* requires that the intruder be trying to force his way into the house when the assault is committed; *McCombs* requires that the intruder must not have entered when the assault is committed. Thus an instruction on defense of habitation is appropriate only if the victim was in the act of trying to force his way into the house at the time of the assault, but had not yet gained entry, and the occupants reasonably believed that the intruder intended to commit a felony or cause serious bodily harm.

83. *Id.* at 466-68, 255 S.E.2d at 234-35.
84. *Id.* at 469, 255 S.E.2d at 235.
85. *Id.* at 472, 255 S.E.2d at 237 (Webb, J., dissenting).

In another part of his dissent, Judge Webb disagreed with the majority’s decision that the defendant was not entitled to a charge in regard to acting in the heat of passion. *Id.* The court noted that defendant fired warning shots before the deceased began beating on the house to get him to leave and that he shot the deceased to protect his brother, indicating that his actions were reasoned rather than the result of some sudden passion. *Id.* at 471, 253 S.E.2d at 236. But see 40 Am. Jur. 2d *Homicide* § 62 (1968) (authorities agree that the killing or assaulting of a relative will amount to sufficient provocation to reduce the ensuing killing to a manslaughter).
D. Double Jeopardy

The fifth amendment prohibition against double jeopardy is applicable to the states through the fourteenth amendment. The most obvious result of the double jeopardy principle is the prohibition of multiple trials against the same defendant for the same crime. The clause also prevents a defendant from being convicted twice in the same trial for essentially the same offense. When the defendant is prosecuted for separate statutory crimes the "same elements test" is employed to determine if the right against double jeopardy is violated; if each offense contains an essential element that is not included in the other, then a trial on both offenses ordinarily does not violate the double jeopardy principle. Even when both offenses contain unique elements and thus satisfy the "same elements test," conviction on both offenses may be a double jeopardy violation under the "behavioral test." According to the "behavioral test," if the same facts violate two statutes a defendant cannot be twice punished without violating the double jeopardy principle. In other words, if the single act of a defendant violates two similar statutes, to convict the defendant of both crimes would violate his right against double jeopardy.

Several 1979 cases applied the "same elements" and "behavioral tests" to determine whether a defendant's protection against double jeopardy had been violated. Often these cases analyzed the principle of lesser included offenses. The principle of lesser included offenses is an application of the "same elements" test. The principle holds that if the offense contains all of the elements of the other plus one or more additional elements, then the latter is a lesser included offense of the former. Double jeopardy prevents a defendant from being convicted for both offenses.

In State v. Hardy the Supreme Court of North Carolina reiterated that resisting arrest and assaulting an officer are separate of-

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88. State v. Summrell, 282 N.C. 157, 173, 192 S.E.2d 569, 579 (1972); State v. Raynor, 33 N.C. App. 698, 701, 236 S.E.2d 307, 309 (1977). See also State v. Birkhead, 256 N.C. 494, 500-02, 124 S.E.2d 838, 843-45 (1962). The Birkhead and other courts have referred to what is here called the "same elements test" as the "additional facts" test and to what is here called the "behavioral test" as the "included offenses rule."
fenses and that the former is not a lesser included offense of the latter. The court did find, however, that the facts of the case fit the "behavioral test" because defendant's act of assault was the same act that constituted his resisting arrest; but the court held that the trial court's erroneous submission of both charges to the jury as lesser included offenses cured the potential double jeopardy violation because defendant could not have been convicted of both.

In the case defendant Dennis Hardy intervened when an officer attempted to arrest his brother, defendant Ernest Hardy, for driving under the influence. The officer told Dennis that he was under arrest for obstructing an officer, and Dennis responded by jumping on the officer's back. A fight ensued between the two defendants and the officer, with the defendants repeatedly threatening to kill the officer. Two other officers arrived and helped the first officer subdue the two defendants.

At trial each defendant was charged and convicted on two counts of threatening an officer. Defendants were also charged with assault on the first officer and resisting arrest. Dennis Hardy was further charged with assault on the other two officers, while Ernest Hardy was charged with assault on only one of the other officers. Although defendants were charged with resisting arrest only against the first officer, the trial judge submitted the charge of resisting arrest as a lesser included offense of each of the five charges of assault on an officer. Defendants were acquitted of the assault charges and convicted of resisting arrest. The court of appeals affirmed the judgments, and the supreme court granted defendants' petition for discretionary review.

The supreme court first held that the trial court had erred in submitting the assault on an officer and resisting arrest charges as lesser included offenses. Applying the "same elements test," the court reasoned that violence or direct force is not a necessary element of resisting arrest as it is of assault, and also that the purpose of the offense of assaulting an officer is to protect the safety of law enforcement officers rather than to preserve order and uphold the dignity of the law,

93. 298 N.C. at 197-98, 257 S.E.2d at 431.
94. Id. at 199-200, 257 S.E.2d at 432.
95. Id. at 192-95, 257 S.E.2d at 427-29.
96. Id. at 195, 257 S.E.2d at 429.
99. 298 N.C. at 199, 257 S.E.2d at 431.
which is the purpose of the resisting arrest offense. Because the charges did not contain lesser included offenses, the court reversed the judgments against the defendants for resisting the two officers who had aided the first because defendants had been charged only with assault against those two officers and the court therefore had no jurisdiction to convict them of resisting arrest.

With regard to the arresting officer, the defendants had been charged with both assault on an officer and resisting arrest; therefore, the trial court did have jurisdiction to convict on both offenses. The supreme court could draw no difference in the facts underlying the two charges, however, and ruled that they must be treated as one offense under the "behavioral test." But because the charges were erroneously submitted to the jury as lesser included offenses, thus preventing defendants from being convicted on both charges, and because defendants were convicted of the "lesser" charge, the court found no prejudicial error in the submission of both charges.

Prior to Hardy, the North Carolina courts had held that the charge of resisting arrest and the charge of assaulting an officer were separate and distinct offenses and that the failure to merge the two did not subject a defendant to double jeopardy. When no factual distinction could be drawn between a defendant's resistance of arrest and assault on an arresting officer, however, the courts had also held that the State must be required to elect between the two charges at the close of the State's evidence. Conviction of a defendant for both offenses in this situation violates his constitutional right not to be put in jeopardy twice for the same offense regardless of whether concurrent sentences are imposed. Thus Hardy appears consistent with prior case law.

The remedy applied by the North Carolina courts in Hardy and previous cases is subject to question, however. When the defendant's right not to be put in jeopardy twice for the same offense has been violated under the "behavioral test," the remedy applied by the appellate courts has been to arrest the judgment on the assault charge, but to

100. Id. at 197, 257 S.E.2d at 430-31.
102. 298 N.C. at 199-200, 257 S.E.2d at 432.
sustain the conviction on the charge of resisting an officer. The court's failure to require the State to elect between the charges has been deemed "cured" by this remedy. Hardy adds a new twist to this remedial principle by holding that a jury's forced choice under the erroneous lesser included offense charge cures any double jeopardy violation. Both "remedies" share the presumption that the prevention of two convictions will cure any harm caused by the double jeopardy.

While theoretically the double jeopardy is eliminated by these remedies, prejudice could still remain. It has been observed that the "Double Jeopardy principle provides a sensible way of limiting arbitrary discretion" and that the consistent refusal to remand for a new trial in cases in which a defendant is convicted of one offense or convicted of both offenses prejudices a defendant. Clearly, the greater psychological weight of the two charges increases the likelihood that a defendant will be convicted of at least one in a marginal case. Curing the double jeopardy violation by arresting one of the judgments does not cure this prejudicial effect. Therefore, if trial courts consistently repeat this violation of double jeopardy, the North Carolina Supreme Court might need to reexamine the accepted remedy in this regard and require new trials for these defendants on grounds of prejudice or abuse of discretion by the State and the court, if not on the grounds of double jeopardy alone.

In a second double jeopardy case, State v. Evans, the court of appeals considered double jeopardy in relation to the offenses of communicating a threat and assault by pointing a gun. Defendant

110. Communicating threats.—(a) A person is guilty of a misdemeanor if without lawful authority:
(1) He willfully threatens to physically injure the person or damage the property of another;
(2) The threat is communicated to the other person, orally, in writing, or by any other means;
(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
(4) The person threatened believes that the threat will be carried out.
(b) A violation of this section is punishable by a fine of not more than five hundred dollars ($500.00), imprisonment of not more than six months, or both.
111. Assaulting by pointing gun.—If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be punishable by a
Evans had engaged in an argument with an ambulance driver in a parking lot. As the argument became heated, defendant pulled out a gun, pointed it at the ambulance driver, and said, "I'm going to kill you." Defendant was charged with communicating a threat and assault by pointing a gun. At trial, defendant moved to require the State to elect between the two charges as having arisen out of the same act. The motion was denied, and defendant was convicted of both offenses.112

On review by certiorari, the court of appeals found that although one may communicate a threat "by any . . . means" and both offenses carry the same penalties,113 the convictions for both charges did not subject the defendant to double jeopardy.114 Reasoning that the offenses were separate and distinct, the court stated that the act of pointing a gun was not a necessary element to the offense of communicating a threat and that assault by pointing a gun did not require evidence that the "threat" would be carried out.115 Thus, neither offense contained all of the elements of the other. The court further found that evidence showing "bad blood" between defendant and the person threatened, combined with the presence of the gun, satisfied the element that a reasonable person would believe that the threat communicated would likely be carried out.116 Based on this reasoning, the court held that there had been no double jeopardy violation.117

The court has drawn an extremely fine line. The defendant's oral threat occurred at the same time that he pointed the gun. Further, an assault is effectively a threat to do further harm. The question, therefore, should be whether the oral "threat" and the "assault" were separate threats or a single threat. This question is not adequately

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112. 40 N.C. App. at 730-32, 253 S.E.2d at 591-92.
113. See notes 110 & 111 supra.
114. 40 N.C. App. at 734, 253 S.E.2d at 593.
115. Id. at 733, 253 S.E.2d at 593. The court also refuted the defendant's contention that the court had erred by instructing the jury that the threat must be communicated "orally" and refusing to instruct that it could be communicated "by any other means," thus foreclosing the jury's right to decide that only one offense was committed. Id.
116. 40 N.C. App. at 733, 253 S.E.2d at 593. The court based this statement on a case in which defendant was convicted of communicating a threat because she had picked up a rock and threatened, "If you come any closer, I'll hit you with it." State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978). No double jeopardy question was involved in that case, however, since the statutes do not make it an offense to "point a rock." See generally 4 STRONG'S NORTH CAROLINA INDEX 3D Criminal Law § 26.5 (1976).
117. Id. at 734, 253 S.E.2d at 593.
answered by applying a mechanical test or by determining that one act was oral while the other was physical. Had the court applied the "behavioral test," as in *Hardy*, the case would have been decided differently. It was the pointing of the gun and the oral threat combined that acted as one powerful threat to kill. There was only one action. The court's use of the presence of the pointed gun to establish an essential element of communicating a threat makes this clear. By affirming Evans' convictions on both offenses, the *Evans* court allowed defendant's right against double jeopardy to be violated. *Evans* thus illustrates the courts' inconsistent application of the "behavioral test" of double jeopardy.

**E. New Crimes**

In 1979, the North Carolina General Assembly amended the state's criminal child abuse statute, G.S. 14-318, to make intentional child abuse that results in serious injury a felony.118 Child abuse and child neglect have been misdemeanors in North Carolina since 1971.119 This amendment leaves the misdemeanor statutes intact; the felony statute will apply to the more serious child abuse cases. The amendment was introduced to make abuse of a child resulting in serious bodily injury a felony without requiring the presence of a deadly weapon or an intent to kill.120 The statute provides that

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:


120. Felonious assault charges under which serious child abuse cases could be tried require one of these two elements. *See* N.C. GEN. STAT. §§ 14-28 to -34.2 (1969 & 1979 Cum. Supp.).

The originators of the law stated that in child abuse cases there was frequently no middle ground between misdemeanor child abuse and homicide. They maintained that many types of child abuse do not fit the traditional definition of assault, and those that do are difficult if not impossible to prove. They felt that the felony statute would allow the introduction of broad evidence of separate injuries inflicted at different times to show the cumulative effect of "battered child syndrome" in order to prove a unified case of child abuse. NORTH CAROLINA POLICE EXECUTIVES ASSOCIATION & NORTH CAROLINA ASSOCIATION OF CHIEFS OF POLICE, [1979] Legis. Program 5-6 (Jan. 1979) (privately published program available in the University of North Carolina at Chapel Hill School of Law Library).

As originally introduced, the bill did not require the element of "intent," and it would have created a felony if the parent or caretaker passively allowed serious injury to be inflicted, with the maximum sentence being 10 years imprisonment. NORTH CAROLINA INSTITUTE OF GOVERNMENT, 36 DAILY LEGIS. BULL. 355 (Feb. 28, 1979).
(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child.

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.\(^{121}\)

Both the misdemeanor and felonious child abuse offenses theoretically could be prosecuted under various assault charges. However, in light of case history, the specific legislative intent expressed by the child abuse statutes is essential for effective prosecution of even the most serious child abuse cases. Historically, it has been difficult to convict a parent or supervisor of assaulting his child. "[B]ecause of the special privilege or authority accorded by law to a parent, a person in loco parentis, or a teacher to punish children in their charge, liability is not imposed in every case where a conviction would be required or sustained in absence of that special relationship."\(^{122}\) The legislative intent to make child abuse a crime, evidenced by the felony and misdemeanor provisions of G.S. 14-318, accords less weight to this privilege and thus provides the vehicle for effective prosecution of child abuse cases.

Although the misdemeanor statute has been effective,\(^{123}\) a second specific statute was necessary to make serious cases felonious. Serious child abuse rarely fits the present felonious assault offenses.\(^{124}\) For example, although a parent's hands and feet can do as much damage to a child as one adult can do to another with a deadly weapon,\(^{125}\) in a case

123. Several child abuse cases have been appealed under N.C. Gen. Stat. § 14-318.2 since it was enacted in 1971. See, e.g., State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Heiser, 36 N.C. App. 358, 244 S.E.2d 170 (1978); State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973) (upholding the constitutionality of the statute against a challenge for vagueness). Only two child abuse cases could be found for the period 1903-71. But see State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956) (affirming a conviction of father for assault with a deadly weapon with intent to kill a three year old child and the mother for aiding and abetting when the issue whether a belt with a buckle was a deadly weapon was an issue for the jury); State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955) (stepmother maliciously poked out her stepdaughter's eye with her thumb).
125. N.C. Gen. Stat. § 14-32 (Cum. Supp. 1979). The closest case in North Carolina is one upholding the jury's decision that a belt and buckle were a deadly weapon under the circumstances of the case. State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956).
of assault with a deadly weapon it is quite difficult to prove that hands and feet are deadly weapons, especially given the normal parental punishment privilege. Also, for a case of assault with intent to kill, it would usually be very difficult to prove an intent to kill in even the most serious child abuse cases because of the traditional role of parental punishment. Under the felony child abuse statute it should not be so difficult to prove the intentional infliction of serious injury on the child. In states that have enacted felonious child abuse statutes requiring this element, intent has often been implied from the kind of instrument used, the extent or nature of the use, or the severity or extent of the injuries. Thus, the new statute should fill the gap between misdemeanor and homicide.

The felony statute will also aid the prosecution of other child abuse crimes. When the child’s injuries result in death, the statute will provide a basis for a felony murder charge. The law should also provide an adequate vehicle for misdemeanor child abuse convictions in serious cases because it will give the prosecutor leverage in plea bargaining.

Whether the new statute will effectively deter the crime of child abuse is altogether another question. Because child abuse is a crime of passion, the deterrent effect is likely to be minimal. Also, the most pressing need is to combat the complex problems that are the source of child abuse, but this law merely deals with the symptoms. It does not help those who become child abusers because they were abused children.

The law should do more than provide for its own effective prosecution, however. The law should help to identify child abusers for counseling and should physically separate the chronically abused children from their abusers.

In 1979, the North Carolina General Assembly also created the crime of altering court documents or entering unauthorized judgments. The law resulted from “a case involving a lawyer who im-
proved his success ratio by forging court judgments to reflect a favorable disposition for his clients.130 That lawyer was tried and convicted on the less specific charge of forgery.131 Under the new law, anyone convicted will be charged with a felony; however, no sentence is specified.132

F. Burglary

The elements of first133 and second134 degree burglary are identical except that a first degree burglary conviction requires proof of actual occupancy of the premises at the time of the illegal entry.135 If the evidence supports an inference that the premises were unoccupied at the time of the illegal entry, the trial court must instruct the jury that second degree burglary is a possible verdict; failure to so instruct is reversible error.136

In the 1979 case of State v. Jolly137 the North Carolina Supreme Court considered the requirement of actual occupancy of the premises. Defendant in Jolly forced the complainants into their motel room at gunpoint, robbed them, tied them up and fled the scene.138 At defend-

131. State v. Vann, Durham Morning Herald, Feb. 9, 1979, § A, at 1 (N.C. Super. Feb. 8, 1979) (noting also the suspended sentence given for 11 counts of forgery and that two false pretense charges were dropped pursuant to a plea bargaining arrangement).
133. Id. § 14-51 (1969).
134. The essential elements of the crime of first-degree burglary set forth in G.S. 14-51 can be summarized as: (1) breaking into, see, e.g., State v. Wilson, 289 N.C. 531, 538-39, 223 S.E.2d 311, 316 (1976) (any force used to enter through usual or unusual place of ingress, whether open or closed, is a "breaking"); (2) and entering, see, e.g., State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979) (placing hand through broken window into home is sufficient "entry"); (3) during the night, see, e.g., State v. Frank, 284 N.C. 137, 145, 200 S.E.2d 169, 175 (1973) ("The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight"); see also State v. Cox, 281 N.C. 131, 187 S.E.2d 785 (1972) (burglary conviction reduced to felonious breaking and entering because offenses committed in afternoon); (4) a dwelling house or sleeping apartment, see, e.g., State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949) (purpose of statute is to protect places where persons sleep); (5) that is then occupied; (6) intending to commit a felony therein, see, e.g., State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977) (state must allege and prove specific felony intended).
138. Id. Defendant approached the victim as the victim was unlocking his motel room. As the victim was stepping inside the room, defendant pushed him across the threshold and into the room. The victim's wife then came to the room, heard scuffling, and entered to find defendant and his accomplice holding a pistol on her and her husband. The victims were told to lie face down on the floor where they were tied up. Defendant robbed the victims of jewelry and other possessions.
ant's trial for first degree burglary and armed robbery the jury returned verdicts of guilty on both charges. The supreme court held that no substantial evidence existed to support the jury's finding of actual occupancy of the motel room at the time the breaking and entering occurred and that the trial judge committed reversible error by submitting a charge of first degree burglary to the jury as a possible verdict. Nevertheless the supreme court considered the jury's verdict sufficient to sustain a conviction of the lesser included offense of second degree burglary because the jury properly found all elements of burglary present except the element of actual occupancy.

Prior authority makes it clear that first degree burglary is a proper charge if a person is standing inside the door of his residence when a burglar forcefully enters. In Jolly, however, the victim was standing outside the door to his motel room when defendant forced him inside. The victim therefore became an occupant of the motel room only after defendant exercised the force necessary to perpetrate the illegal entry. The Jolly court thus makes a fine distinction in determining when premises are "occupied" under the first degree burglary statute. This distinction, nevertheless, is necessary to maintain the dichotomy between first and second degree burglary that exists to deter entry into dwellings likely to be occupied by sleeping persons.

G. Felonious Breaking or Entering

In confirming the view that an owner's consent constitutes a defense to a charge of felonious breaking or entering, the Supreme Court of North Carolina, in State v. Boone, held that a retail store could not be feloniously entered during business hours, even if a person

139. Id. at 124, 254 S.E.2d at 3.
140. Id. at 129, 254 S.E.2d at 7.
141. Id. at 130, 254 S.E.2d at 7. See also State v. Cox, 281 N.C. 131, 187 S.E.2d 785 (1975) (second degree burglary conviction reduced to felonious breaking and entering). Jolly is factually similar to State v. Rodgers, 216 N.C. 572, 5 S.E.2d 831 (1939), in which the victims were approached by armed robbers while outside their residence, forced to enter their residence, tortured, robbed and later locked in a smokehouse. The Rodgers court held that there was sufficient evidence of a "breaking" to sustain a conviction for second-degree burglary, id., but did not discuss whether first-degree burglary would have been appropriate under the circumstances.
142. See, e.g., State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976) (victim opened door slightly to see who was outside, defendant forced way in).
143. 297 N.C. at 129, 254 S.E.2d at 6-7.
enters to steal merchandise, because the owner of the store implicitly consents to the entry by holding the premises open to the public.\textsuperscript{146} Defendant in Boone briefly entered a retail clothing store during normal business hours, presumably to survey the store before committing a crime, and asked a clerk for directions to a nearby town.\textsuperscript{147} Defendant soon left the store, but as he waited outside several accomplices entered and stole a number of expensive sweaters.\textsuperscript{148} All the suspects were apprehended in an automobile a short time later.\textsuperscript{149} On appeal from his subsequent conviction of felonious larceny\textsuperscript{150} and felonious entry,\textsuperscript{151} defendant contended that he could not properly be convicted of felonious entry of a store when he entered the store during normal business hours through a door open to the public because such an entry is authorized by the owner of the store.\textsuperscript{152} The supreme court agreed, holding as a matter of law that a felonious entry conviction under these circumstances is improper because the store owner implicitly consents to the entry.\textsuperscript{153} Although the court overturned defendant's conviction for felonious entry, it did not remand the case for resentencing because the charges against defendant had been consolidated for judgment and his sentence was appropriate for a conviction of felonious larceny, of which he was also convicted.\textsuperscript{154} A sentence may be sustained by an appellate court under such circumstances.\textsuperscript{155}

\textsuperscript{146} Id. at 659, 256 S.E.2d at 687. Breaking into or entering a building with the intent to commit a felony, N.C. GEN. STAT. § 14-54(a) (1969), as amended by Fair Sentencing Act, ch. 760, § 5, 1979 N.C. Sess. Laws 850, is a lesser included offense within the charge of burglary. N.C. GEN. STAT. § 14-51 (1969). See, e.g., State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973). See also State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979) (instruction on lesser included offense necessary only when evidence present from which jury could conclude that lesser included offense committed). An indictment charging burglary may, therefore, sufficiently charge a defendant with felonious entry. See, e.g., State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975) (first-degree burglary indictment sufficiently alleged misdemeanor breaking and entering). See also State v. Cox, 281 N.C. 131, 187 S.E.2d 785 (1972) (second-degree burglary conviction reduced by court to felonious entry when offense committed during daylight hours). North Carolina courts generally state that a conviction for felonious entry must be supported by proof that defendant entered a building with the intent to commit a felony. See, e.g., State v. Vines, 262 N.C. 747, 138 S.E.2d 297 (1965) (per curiam); State v. Lassiter, 15 N.C. App. 265, 189 S.E.2d 798, cert. denied, 281 N.C. 761, 191 S.E.2d 358 (1972).

\textsuperscript{147} 297 N.C. at 653, 256 S.E.2d at 684.

\textsuperscript{148} Id.

\textsuperscript{149} Id.


\textsuperscript{151} See id. § 14-54(a) (1969).

\textsuperscript{152} 297 N.C. at 655, 256 S.E.2d at 685.

\textsuperscript{153} Id. But see State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979) (defendant negated storeowner's consent by concealing himself on premises until after closing hours).

\textsuperscript{154} Id. at 659, 256 S.E.2d at 687.

\textsuperscript{155} N.C. GEN. STAT. § 15A-1447(e) (1978).
To support its conclusion that consent to enter a building is a defense to a felonious entry charge, the Boone court engaged in a novel statutory analysis.\textsuperscript{156} G.S. 14-54(a) states that a felonious entry occurs when one "breaks or enters any building with intent to commit any felony or larceny therein."\textsuperscript{157} It is well-settled that this statute is disjunctive so that either breaking\textsuperscript{158} or entering\textsuperscript{159} with the requisite intent violates the statute.\textsuperscript{160} The statute contains no explicit provision making consent to enter a defense for an individual charged with entering a building with the requisite criminal intent. Nevertheless, the Boone court found a statutory basis for this defense by reading G.S. 14-54(a) in conjunction with G.S. 14-54(b),\textsuperscript{161} which labels as a misdemeanor "wrongfully" breaking into or entering any building.\textsuperscript{162} The court inserted the qualifying term "wrongfully" found in G.S. 14-54(b), into G.S. 14-54(a), reasoning that misdemeanor entry is a lesser included offense of felonious entry, lacking only the requisite felonious intent,\textsuperscript{163} and that a greater offense must include all elements of a lesser included offense.\textsuperscript{164} The court thereby construed "wrongfully" to modify "breaks or enters" for purposes of the felonious entry offense even though that term does not appear in the definition of felonious entry.\textsuperscript{165} The Boone court concluded that "wrongfully" means "without consent," and that, therefore, the offense of felonious entry is committed when one "breaks or enters" any building with intent to commit a felony or larceny and without the consent of the owner of the building.\textsuperscript{166}

The Boone court also cited precedent\textsuperscript{167} to support its conclusion that a consensual entry is a defense to a charge of felonious entry despite criminal intent at the time of the entry.\textsuperscript{168} In State v. Goffney\textsuperscript{169}

\textsuperscript{156} See 297 N.C. at 655-59, 256 S.E.2d at 685-87.
\textsuperscript{157} N.C. GEN. STAT. § 14-54(a) (1969).
\textsuperscript{158} See, e.g., State v. Wilson, 289 N.C. 531, 539, 223 S.E.2d 311, 316 (1976) (any force used to enter through usual or unusual place of ingress, whether open or closed, is sufficient "breaking").
\textsuperscript{159} See, e.g., State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979) (extending hand through window into dwelling is sufficient entry).
\textsuperscript{161} N.C. GEN. STAT. § 14-54(b) (1969).
\textsuperscript{162} 297 N.C. at 657-8, 256 S.E.2d at 686.
\textsuperscript{165} 297 N.C. at 658, 256 S.E.2d at 686.
\textsuperscript{166} Id.
\textsuperscript{167} State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).
\textsuperscript{168} 297 N.C. at 656-57, 256 S.E.2d at 686.
\textsuperscript{169} 157 N.C. 624, 73 S.E. 162 (1911).
the supreme court overturned a conviction for felonious entry by an employee suspected of dishonesty because the owner, in an effort to catch the defendant in the act of stealing, had, through an agent, induced the defendant to burglarize the store. The *Goffney* court held that the defendant's entry was not criminal because it had been made "with the consent and at the instance of the owner of the property." In *State v. Friddle* the defendants asserted that the store owner had participated in the burglary of and theft from his own store under a prearranged plan to avoid war-time ration allotment problems with governmental authorities. Because the trial court in *Friddle* failed to adequately instruct the jury that the owner's complicity would have negated the defendants' criminal intent, the supreme court granted defendants a new trial.

To supplement its analysis of the statutes and cases, the *Boone* court observed that defendant should be subject only to larceny charges as a matter of policy. If defendant were subject to multiple charges, said the court, it would render the felonious entry statute virtually meaningless because defendants could have charges against them multiplied whenever any crime is committed in any building. The better approach, noted the court, is to convict defendant only for the principal crime committed when there is a basis for concluding that defendant had permission to be on the premises.

Many jurisdictions have considered the question whether an owner's consent to enter is a defense to an illegal entry charge despite the entrant's unlawful intent. When business premises are open to the

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170. *Id.* at 625-26, 73 S.E. at 164. The owner of the store told another employee to persuade defendant to join the agent in burglarizing the store. On the night of the burglary the owner waited in hiding with police outside the store.

171. *Id.* at 628, 73 S.E. at 164. Earlier in its opinion the *Goffney* court had reasoned that it would be improper to convict defendant because the store owner would thereby be guilty of aiding and abetting the illegal entry of his own store, which would be a "legal absurdity." *Id.* at 626, 73 S.E. at 163.

172. 223 N.C. 258, 25 S.E.2d 751 (1943).

173. *Id.* A clerk employed by the store owner allegedly offered to sell sugar to defendants if they came in and removed it at night. The clerk told defendants that the store owner had an excess of sugar that would have to be surrendered to governmental authorities unless ration coupons, which the owner lacked, were surrendered. The clerk stated that if the sugar were reported as stolen, ration coupons need not be surrendered to the government. Finally, the clerk assured defendants that the store owner knew of and consented to the plan.

174. *Id.* at 261, 25 S.E.2d at 753.

175. 297 N.C. at 658-59, 256 S.E.2d at 687.

176. *Id.* The court listed as examples a witness entering a courthouse to commit perjury or a man entering his own home or office intending to file a fraudulent tax return. *Id.*

177. *Id.*

178. See, e.g., People v. Sipult, 234 Cal. App. 2d 862, 44 Cal. Rptr. 846 (1965), *cert. denied*, 381
public, as in Boone, jurisdictions reach conflicting results.\(^{179}\) This split is generally explainable by differences in statutory language in the respective jurisdictions.\(^ {180}\) States that deny a defendant the consent defense, under the so-called "California rule,"\(^ {181}\) generally have statutes that prohibit the mere "entry" or "entering" of a building with the intent to commit larceny or any felony,\(^ {182}\) while states that recognize the consent defense\(^ {183}\) typically have statutes that include a qualifying term modifying "entry" such as "unlawful,"\(^ {184}\) "without consent,"\(^ {185}\) or "unauthorized,"\(^ {186}\) thus providing a specific statutory basis for concluding

\(^{179}\) See, e.g., People v. Weaver, 41 Ill. 2d 434, 243 N.E.2d 245 (1968) (no defense because owner's invitation extends only to those entering for purposes for which invitation extended); State v. Taylor, 17 Or. App. 499, 522 P.2d 499 (1974) (defense recognized because statute required that entry be made "unlawfully," defined to exclude persons who enter when premises open to public). See generally Annot., 93 A.L.R. 2d 531 (1964).


\(^{182}\) See, e.g., CAL PENAL CODE § 459 (West Supp. 1980) ("Every person who enters any . . . building . . . with intent to commit . . . larceny or any felony is guilty of burglary."). See also ARIZ. REV. STAT. § 13-1506 (1978) ("A person commits burglary in the third degree by entering . . . with the intent to commit any theft or any felony therein."); NEB. REV. STAT. § 28-533 (1943) ("Whoever willfully and maliciously . . . enters . . . any building with intent to rob or steal . . . [is guilty of felonious entry]"); id. § 205.060 (1973) ("Every person who . . . enters any . . . store . . . with intent to commit . . . larceny, or any felony, is guilty of burglary."); S.D. COMPIL. LAWS ANN. § 22-32-3 (1979) ("Any person who enters . . . an occupied structure with intent to commit any crime . . . is guilty of second degree burglary"). But see ILL. ANN. STAT. ch. 38, § 19-1(a) (Smith-Hurd 1977) ("A person commits burglary when without authority he knowingly enters or without authority remains within a building . . . with intent to commit therein a felony or theft.").


\(^{184}\) See, e.g., OR. REV. STAT. § 164.215(1) (1979) ("A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein."); id. § 164.205(3)(a) (definition of "enter or remain unlawfully" specifically excludes persons who enter when the premises are open to the public). See also N.Y. PENAL LAW § 140.20 (McKinney 1975) ("A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein."); id. § 140.00(5) (definition of "enter or remain unlawfully" specifically excludes [a] person who, regardless of his intent, enters or remains in or upon premises . . . open to the public.")

\(^{185}\) See, e.g., Wis. STAT. ANN. § 943.10(1)(1958) ("Whoever intentionally enters any [building] without the consent of the person in lawful possession and with intent to steal or commit a felony [is guilty of burglary]."); id. § 943.10(3) ("[E]nter into a place during the time when it is open to the general public with consent.").

\(^{186}\) See, e.g., N.M. STAT. ANN. § 30-16-3 (1978) ("Burglary consists of the unauthorized en-
that consent is a defense.187

The North Carolina statute, G.S. 14-54(a), appears to fall within the category of statutes that have generally been interpreted to deny the consent defense because it fails to include a term qualifying "breaks or enters" in the definition of felonious entry.188 The Boone court, however, placed the North Carolina statute within the category of statutes that have been interpreted to grant a defendant the consent defense by reading "wrongfully" in 14-54(b) as a qualifier of "breaks or enters" in 14-54(a).189

Although the Boone court's reading of "wrongfully" into the felonious entry definition is a reasonable construction of the statute, its analysis is questionable because: first, an entry with criminal intent should be recognized as "wrongful" in itself; second, factual differences make the court's reliance on Goffney and Friddle unconvincing; and third, the court's policy considerations operate to deprive the prosecutor of a measure of charging discretion in the absence of any proof that such discretion is abused. Underlying the Boone court's novel statutory analysis is its assumption that "wrongfully" means "without consent."190 The legislature, however, may have intended "wrongfully" to refer only to a criminal purpose on the part of a defendant191 that does not rise to the level of felonious intent under G.S. 14-54(b).192 The Boone court dismissed this possibility in its reliance on Goffney and Friddle, which the court stated supported the proposition that an entry with consent could not be punished despite the entrant's felonious in-

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187. See authorities cited in notes 183-86 supra. But see COLO. REV. STAT. § 18-4-203 (1973) ("A person commits second degree burglary, if he knowingly breaks an entrance into, or enters, or remains unlawfully in a building . . . with intent to commit therein a crime against a person or property"). People v. Carstensen, 161 Colo. 249, 420 P.2d 820 (1966) (entry of premises open to public raises a defense based on consent).

188. See text accompanying notes 178-82 supra.

189. See text accompanying notes 183-87 supra.

190. 297 N.C. at 658, 256 S.E.2d at 686.

191. See, e.g., State v. Baker, 183 Neb. 499, 161 N.W.2d 864 (1968), cert. denied, 394 U.S. 949 (1969) (defendant's intent to commit crime makes entry unlawful even though defendant had key to premises and was authorized to do custodial work there).

tent. The Boone court's reliance on Goffney and Friddle as binding precedent is questionable because, unlike the storeowner in Goffney and allegedly in Friddle, the storeowner in Boone lacked knowledge of and offered no encouragement to defendant's theft of the owner's merchandise. This circumstance renders Goffney and Friddle inapposite to Boone because the owner's consent to an illegal purpose in Goffney and Friddle negated the defendant's criminal intent. In Boone, the storeowner's consent could not negate defendant's criminal intent, in the absence of any knowledge of defendant's illegal purpose because a storeowner's implicit consent to enter is reasonably extended for lawful purposes only.

This distinction between Goffney, Friddle and Boone did not trouble the Boone court because it believed that defendant, as a matter of policy, should be subject only to larceny charges. The court observed that otherwise the prosecutor could multiply charges against one who enters a building to commit a crime, regardless of the nature of the crime, thus rendering the statute meaningless. This determination is questionable, however, because the statute clearly seeks to deter persons from entering buildings to commit crimes by unequivocally forbidding entry of "any building" with the intent to commit "any felony or larceny." Bringing multiple charges against defendants who commit separable crimes arising out of a particular criminal act is ordinarily a matter of prosecutorial discretion. Although the Boone court's misgivings about the prosecutor's ability to bring multiple charges against defendant under relatively innocuous circumstances may be

193. 297 N.C. at 657, 256 S.E.2d at 686.
194. See text accompanying notes 167-74 supra.
197. See, e.g., People v. Barry, 94 Cal. 481, 29 P. 1026 (1892) (one who commits larceny not considered part of invited public).
198. 297 N.C. at 658-59, 256 S.E.2d at 687.
199. Id. See text accompanying notes 175-77 supra.
justified under the facts in *Boone,*²⁰² depriving the prosecutor of this discretion, in the absence of constitutional violations, may be unwise. A prosecutor might believe it necessary to multiply charges for a number of valid reasons.²⁰³ For example, the prosecutor may bring multiple charges to secure a plea bargain agreement,²⁰⁴ to provide a basis for obtaining a harsher sentence against a repeat offender,²⁰⁵ or to ensure that a particularly egregious crime is adequately punished.²⁰⁶

The supreme court's decision in *Boone* that criminal intent is irrelevant to the existence of consent²⁰⁷ may produce the undesirable consequence in future cases of allowing persons who enter a building not open to the public to raise the consent defense. The *Boone* court ignored defendant's misrepresentation of himself as a member of the buying public, to whom a storeowner's implicit invitation to enter extends,²⁰⁸ when it determined that defendant's criminal intent was irrelevant to the efficacy of the storeowner's consent. It is therefore possible that one who secures consent to enter any building, whether open to the public or not, by whatever means, may have a defense to a felonious entry charge regardless of the crimes intended and actually committed.²⁰⁹ The recent case of *State v. Joyner*²¹⁰ illustrates why the court's

²⁰². The *Boone* decision nevertheless operates to deprive the prosecutor of the ability to bring multiple charges against defendants who commit violent crimes, such as armed robbery, in stores that are open to the public. See N.C. Gen. Stat. § 14-87 (Cum. Supp. 1979), as amended by Fair Sentencing Act, ch. 760, § 5, 1979 N.C. Sess. Laws 850.


²⁰⁴. See, e.g., *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (not improper for prosecutor to add recidivist charge to charge of check forgery after defendant refused to plead guilty to check forgery).


²⁰⁶. See, e.g., id. Certain facts in *Boone* may have convinced the prosecutor that multiple charges were warranted. Unlike the typical shoplifter, defendant in *Boone* acted in concert with a group of individuals under a prearranged plan to steal from the store. See text accompanying notes 15-17 supra. Evidence also indicated that defendant and his accomplices were professional shoplifters because they had in their possession a device for concealing stolen merchandise commonly used by professional shoplifters. 297 N.C. at 653-55, 256 S.E.2d at 684-85.


²⁰⁸. See, e.g., *People v. Barry,* 94 Cal. 481, 29 P. 1026 (1892) (thief not one of public invited inside).

²⁰⁹. Such consent, however, would have to be given by an individual empowered to give consent, generally the owner of the premises. See, e.g., *State v. Friddle,* 223 N.C. 258, 25 S.E.2d 751 (1943) (employee may be agent of owner); *State v. Rowe,* 98 N.C. 629, 4 S.E. 506 (1887); *State v. Tolley,* 30 N.C. App. 213, 226 S.E.2d 672 (1975), cert. denied, 291 N.C. 178, 229 S.E.2d 691 (1976) (defendant could not have believed in good faith that child had authority to consent to entry of home to steal parent's property).

disregard of defendant’s criminal intent should not be applied to situations that do not involve premises open to the public. Defendant in Joyner, accompanied by four companions, went to a woman’s home and asked to use her telephone. The woman refused but defendant and his friends forced their way into her home where they committed savage sexual acts upon her and robbed her at gunpoint. The prosecutor enhanced charges of first degree rape and armed robbery with other charges, including felonious entry. If the facts of Joyner were changed slightly so that the woman consented to defendant’s entry, defendant could possibly argue successfully that the victim’s consent negated the criminal aspect of the entry, thereby depriving the prosecutor of the opportunity to add felonious entry to the principal charges against defendant. Other jurisdictions have characterized apparent consent as ineffective because it was either gained by fraudulent misrepresentation or was of a limited scope and did not extend to criminal activity. Although the Boone court could have used either of these theories to render the storeowner’s implicit consent to enter ineffective, it failed to do so. The court, however, should not extend Boone to include situations like those presented in the hypothetical based on Joyner.

H. Possession of Burglary Tools

Possession of an “implement of housebreaking” without lawful excuse is itself a criminal offense and is often added to a charge of burglary or felonious entry. In defining what a prohibited bur-

211. Id. at 351, 255 S.E.2d at 392.
212. Id. at 351-53, 255 S.E.2d at 392-93. Defendant was indicted for first degree rape, armed robbery, felonious entry, crime against nature and assault inflicting serious injury. Id. at 350, 255 S.E.2d at 391-92.

Defendant was sentenced to life imprisonment for the first degree rape and armed robbery convictions which were consolidated for judgment. The felonious entry and crime against nature convictions were also consolidated for judgment, for which defendant received an additional 10 year sentence, which was to begin after the life sentence expired. Defendant received another two year sentence for his conviction for assault inflicting serious injury. Id.


217. Id. § 14-51.

glary tool is, North Carolina courts have proceeded on a case-by-case basis, resulting in occasionally inconsistent results.219 Contrary to prior decisions by the North Carolina Supreme Court and Court of Appeals, the recent decision of the court of appeals in State v. Bagley220 established that an automobile tire iron may in some circumstances be considered a burglary tool. In Bagley the court followed the analysis of the North Carolina Supreme Court in State v. Boyd221 and emphasized that the Boyd test should be utilized as a rule of law whenever an item is alleged to be a prohibited burglary tool.222

In Boyd, the supreme court, relying primarily on a Connecticut case,223 distinguished items specifically designed for224 and items sometimes used for housebreaking.225 To fall within the latter classification the item must be reasonably adaptable for use as a burglary tool and must either be intended for use as a burglary tool or actually used during a burglary.226 Prior courts utilizing the Boyd test have determined that prohibited “other implements of housebreaking” under the burglary tool statute227 include a crowbar,228 a big screwdriver,229 chisels,230 and bolt-cutters.231 Despite the similarity of an automobile tire iron to the preceding items, the supreme court and the court of appeals have both refused in the past to find that a tire iron is a prohib-

221. 223 N.C. 79, 25 S.E.2d 456 (1943).
222. 43 N.C. App. at 175-76, 258 S.E.2d at 430-31.
225. N.C. GEN. STAT. § 14-55 (1969) also prohibits the possession of “other implements of housebreaking.” This broad statutory delineation makes the second classification necessary because many items that can be used to effect an illegal break-in also have legitimate uses. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966). See, e.g., State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965) (automobile tire iron); State v. McCall, 245 N.C. 146, 95 S.E.2d 564 (1956) (mechanic's or carpenter's tools).
229. See, e.g., id.
ited burglary tool within the second classification. In *State v. Garrett*, the supreme court so held despite the arrest of defendant with a tire iron in his hand twelve feet from a door obviously damaged by a tire iron. The *Garrett* court characterized a tire tool as "a part of the repair kit" included with all automobiles and thus possessed with lawful excuse by virtually every motorist. The court of appeals followed this rationale in *State v. Godwin*, even though it was "reasonably clear" that the seized tire irons were used to effect the break-in for which the defendants were charged.

Under substantially similar facts, the *Bagley* court, however, questioned and declined to follow the *Garrett* and *Godwin* decisions. Defendant in *Bagley* was arrested as he left a burglarized store. Police discovered a tire iron inside the store. At defendant's trial for felonyous entry and possession of burglary tools, the jury was allowed to decide whether the tire iron was a prohibited "implement of housebreaking." Defendant subsequently argued to the court of appeals that this was error under *Garrett* and *Godwin*. The *Bagley* court rejected defendant's contention, however, on the ground that *Garrett* and *Godwin* were inconsistent with the "preponderant and better-reasoned authority." In essence, the *Bagley* court could find no distinguishing factor that would justify immunizing tire irons from the *Boyd* analysis because tire irons are items with common and legitimate uses that can also be used in housebreaking under particular circumstances. The court noted that crowbars, screwdrivers and chisels have common and legitimate uses but have been condemned as prohibited burglary tools under the *Boyd* analysis in appropriate circumstances and reasoned that tire irons should likewise be subjected to the

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234. *Id.* at 774, 140 S.E.2d at 316.
235. *Id.* at 775-76, 140 S.E.2d at 317.
236. 3 N.C. App. 55, 164 S.E.2d 86 (1968).
237. *Id.* at 56-58, 164 S.E.2d at 88. One defendant was arrested as he exited from a burglarized building with a tire tool in his hand. A second tire tool was discovered near a safe inside the building. The court stated that there was sufficient evidence for the jury to find that the tire tools were utilized to force open the front door to the building. *Id.*
238. 43 N.C. App. at 176, 258 S.E.2d at 431.
239. *Id.* at 173-74, 258 S.E.2d at 429.
240. *Id.*
241. *Id.* at 174, 258 S.E.2d at 430.
242. *Id.*
244. 43 N.C. App. at 175-76, 258 S.E.2d at 430-31.
Boyd analysis when they are alleged to be a prohibited burglary tool. The Bagley court thus upheld the jury's finding that the tire iron was an "implement of housebreaking" prohibited by the statute because it was reasonably adaptable for use as a burglary tool and was apparently utilized without lawful excuse to facilitate the break-in.

I. Robbery

In State v. Thompson the Supreme Court of North Carolina criticized and overruled the rule that a judge must instruct a jury on common law robbery when the victim expresses uncertainty on the

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245. Id. at 176-77, 258 S.E.2d at 431.
247. 43 N.C. App. at 176-77, 258 S.E.2d at 431.
248. In State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979), decided subsequent to Bagley, the court of appeals implied that it would use the interpretive principle of ejusdem generis, ("of the same kind, class or nature," BLACK'S LAW DICTIONARY 464 (5th ed. 1979); see, e.g., State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965)), in applying the Boyd analysis. In Puckett, defendant used a three-foot stepladder and an acetylene torch to remove a heavy mesh screen from the window of a building. The Puckett court concluded that neither the stepladder nor the acetylene torch was "reasonably adaptable" for use in housebreaking and that the actual use of those items to facilitate defendant's break-in therefore did not make the items prohibited burglary tools. 43 N.C. App. at 598-99, 259 S.E.2d at 311-12.
249. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980), is the first case to construe the General Assembly's 1975 amendments to the statutory definition of the crime of obtaining property by false pretenses, Act of June 24, 1975, ch. 783, § 1, 1975 N.C. Sess. Laws 1109 (effective Oct. 1, 1975) (current version at N.C. GEN. STAT. § 14-100 (Cum. Supp. 1979)). The supreme court held that the crime of obtaining property by false pretenses required only an "intent to deceive" rather than an "intent to cheat or defraud." The supreme court defined the crime as: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." 299 N.C. at 240-42, 262 S.E.2d at 285-86. The supreme court's formulation represents little change from pre-1975 precedent. See, e.g., State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); State v. Houston, 4 N.C. App. 484, 166 S.E.2d 881 (1969). The supreme court in Cronin also made clear that a defendant can be convicted of obtaining property by false pretenses despite the victim's receipt of compensation. 299 N.C. at 238-40, 262 S.E.2d at 283-84.
250. This rule is an extension of the established principle that if a robbery victim cannot testify from his own knowledge whether a defendant charged with armed robbery actually carried a firearm or other dangerous weapon, although defendant acted as if he were carrying one, defendant is entitled to an instruction to the jury on common-law robbery. See, e.g., State v. Keller, 214 N.C. 447, 199 S.E.2d 620 (1973) (weapon not seen); State v. Jackson, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975) (rob-
witness stand about whether the firearm carried by the robber was real or only a toy. The Thompson court reasoned that a victim could positively identify an apparently real weapon as real only if the robber fired a shot, a circumstance the court did not want to encourage.

In Thompson a robbery victim testified positively that the firearms used by defendants to commit the robbery for which defendants were charged appeared to be real. On cross-examination, however, the victim admitted that she could not be positive whether the weapons used were real or fake. The trial court refused to submit an instruction to the jury on common law robbery based on the victim’s uncertainty, and the jury subsequently found defendants guilty of armed robbery. On appeal, defendants argued that the victim’s uncertainty concerning the nature of the firearms required a common law robbery instruction under the authority of State v. Bailey, which held that a judge must instruct on common law robbery when the victim cannot testify with certainty whether an apparently real weapon is, in fact, a

Armed robbery, which is defined by statute, N.C. GEN. STAT. § 14-87(a) (Cum. Supp. 1979), as amended by Fair Sentencing Act, ch. 760, § 5, 1979 N.C. Sess. Laws 850, differs from common-law robbery in two ways: an attempted, as opposed to an actual, taking is sufficient, see, e.g., State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); see also State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971) (attempted armed robbery occurs when defendant commits overt act intended to bring about robbery, thereby endangering or threatening person’s life with weapon); see generally Annot., 76 A.L.R.3d 842 (1977), and, most importantly, armed robbery is committed by the use or threatened use of “any firearm or other dangerous weapon” that threatens or endangers the life of a person, while common-law robbery can be committed without the use of a weapon. See, e.g., State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Bailey, 278 N.C. 80, 87, 178 S.E.2d 809, 813 (1971), cert. denied, 409 U.S. 948 (1972) (“critical and essential” difference between armed robbery and common-law robbery is threat with dangerous weapon). See also State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006 (1971) (victim’s testimony that he was “scared” sufficient to show fear); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971) (objective standard of fear arising from actual use of weapon sufficient when victim not in fear of life).


253. 297 N.C. at 288-89, 254 S.E.2d at 528.

254. Id.

255. Id. Of the three victims in Thompson, one did not waiver on cross-examination and the other two stated that, although the weapons appeared to be real, they did not know whether the weapons were real, fake or toys. Id.

256. Id. at 287, 254 S.E.2d at 527.

"real or toy pistol." The Thompson court expressly overruled Bailey and held that a defendant is not entitled to a common law robbery instruction only on the strength of a victim’s uncertainty on cross-examination about the nature of a firearm that appeared to be real. The Thompson court stated,

When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.

The court’s decision in Thompson has the practical effect of significantly restricting defense counsel’s ability to challenge a witness’ perception of a weapon. There is scant case authority in North Carolina to aid in rebutting the Thompson presumption that an apparently real weapon, brandished in full view of the victim during a robbery, is real. Defense attorneys may look to other jurisdictions, however, which have held that armed robbery cannot be committed with an apparently real “starter’s pistol” capable of firing only blanks or a “toy pistol” incapable of firing any projectiles.

J. Kidnapping

The recent cases of State v. Wilson and State v. Silhan illustrate the situations in which, under the rationale of the significant 1978 decision in State v. Fulcher, North Carolina’s kidnapping statute
does not permit a defendant to be convicted more than once for the same offense in violation of the constitutional prohibition against double jeopardy.\textsuperscript{269}

In \textit{Fulcher}\textsuperscript{270} the North Carolina Supreme Court considered whether G.S. 14-39(a)(2), which provides that one who unlawfully restrains, removes, or confines another for the purpose of facilitating a felony is guilty of kidnapping,\textsuperscript{271} violates the prohibition against double jeopardy. The \textit{Fulcher} court acknowledged that certain felonies cannot be committed without some confinement, restraint, or removal and stated that when the action allegedly constituting the kidnapping is an "inherent, inevitable feature" of the underlying felony, punishment for both offenses would violate the constitutional prohibition against double jeopardy.\textsuperscript{272} To avoid such violation, the court construed the statute to require that the action constituting the kidnapping be "separate, complete . . . , independent and apart from the other felony."\textsuperscript{273}

\textsuperscript{268} N.C. GEN. STAT. § 14-39 (Cum. Supp. 1979) provides:

(a) Any person who shall unlawfully confine, restrain or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

\textsuperscript{269} U.S. CONST. amend. V. The North Carolina Constitution does not contain an express prohibition against double jeopardy; the state courts invoke this prohibition as part of its common law. \textit{See} State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954).


\textsuperscript{272} 294 N.C. at 523, 243 S.E.2d at 351.

\textsuperscript{273} \textit{Id.} at 524, 243 S.E.2d at 352. In its holding the court referred only to restraint. In \textit{Silhan}, however, the supreme court acknowledged that its holding in \textit{Fulcher} applied to confinement and removal as well as restraint. 297 N.C. at 673, 256 S.E.2d at 710.

The supreme court in \textit{Fulcher} rejected the approach of the court of appeals. The court of appeals read the common-law requirement that the confinement, restraint or removal be substantial before kidnapping could occur, \textit{see} State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973), into G.S. 14-39, the kidnapping statute. 34 N.C. App. 233, 240, 237 S.E.2d 909, 914 (1977). The supreme court rejected this interpretation on the
The court concluded that this requirement eliminated the possibility of multiple punishments for the same offense.\textsuperscript{274}

Defendant in \textit{Fulcher} had forced his way into a hotel room, bound the hands of the two women in the room and, by threatened use of a deadly weapon, forced each to perform oral sex. Defendant was convicted on two counts of committing a crime against nature and two counts of kidnapping for restraining his victims.\textsuperscript{275} Applying its requirement that the acts constituting the kidnapping and the underlying felony be separate and independent, the court found that “[t]he restraint of each of the women was separate and apart from, and not an inherent incident of the commission upon her of the crime against nature. . . .”\textsuperscript{276} Defendant’s conviction on all four counts, therefore, did not violate the prohibition against double jeopardy.\textsuperscript{277}

In \textit{Wilson} and \textit{Silhan} the supreme court was forced to delineate conduct it considered separate and apart from an underlying felony. Defendants in both \textit{Wilson} and \textit{Silhan} were convicted of kidnapping and the felony allegedly facilitated by the kidnapping.\textsuperscript{278} Both claimed that the action found to constitute the kidnapping was an inherent, inevitable feature of the underlying felony and that under the \textit{Fulcher} analysis they could not be punished for both offenses.\textsuperscript{279}

In \textit{Wilson}, defendant tricked a female pedestrian into entering his car and drove her approximately six blocks to a public school ground where, by force and threatened use of a knife, he raped her. The court held, without discussion, that “[t]he restraint accompanying the rape was not an inherent, inevitable feature of the kidnapping” and that the kidnapping was a separate, complete act, independent of the later com-

\textsuperscript{274} Because the double jeopardy prohibition is against multiple punishments for the same offense, the crucial determination is what constitutes the “same offense.” Various tests have been developed by the courts in making this determination. These tests can be grouped into two basic categories, evidentiary and behavioral. The evidentiary approach focuses on the elements of the crime while the behavioral approach focuses on the criminal conduct. The theory behind the latter approach is that “multiple punishment will be barred if the defendant’s conduct constituted a single act or transaction.” Comment, \textit{Twice in Jeopardy}, 75 YALE L.J. 262, 276 (1965).

\textsuperscript{275} The \textit{Fulcher} court adopted a behavioral approach to the double jeopardy problem presented by North Carolina’s kidnapping statute. \textit{Fulcher} focused on the alleged criminal conduct and whether the conduct allegedly constituting the kidnapping and the conduct allegedly constituting the underlying felony were only “a single act or transaction.”

\textsuperscript{276} 294 N.C. at 505-08, 243 S.E.2d at 341-42.
\textsuperscript{277} \textit{Id.} at 524, 243 S.E.2d at 352.
\textsuperscript{278} 296 N.C. at 300, 309, 250 S.E.2d at 623, 628.
\textsuperscript{279} 297 N.C. at 662, 672, 256 S.E.2d at 705, 710.
mitted rape.280

Defendant in Silhan, by threatened use of a gun, forced a husband
and wife who had been fishing in a deserted locale and were returning
to their car into his van, drove a short distance away, blindfolded,
gagged and bound the hands of the husband, and forced the wife to
perform oral sex. The supreme court found, again without discussion,
that the confinement, restraint and asportation of both husband and
wife were separate from the sexual assault on the wife.281

While Wilson and Silhan emphasize the supreme court's contin-
ued adherence to Fulcher, the conclusory approach taken by the court
does little to illumine the line between activities that are separate from
underlying felonies and those that are inherent in the felony. The deci-
sion may even have frustrated the ultimate intention of the Fulcher
holding. In apparently limiting findings of inherency and inevitability
to those situations in which the defendant confines, restrains or
removes his victim only insofar as is absolutely necessary for the com-
misson of the underlying felony, the supreme court has rendered Fulcher's
purported protection of defendants from double jeopardy
minimal.

280. 296 N.C. at 310, 250 S.E.2d at 628.
281. 297 N.C. at 673, 256 S.E.2d at 710.
K. Narcotics

G.S. 90-95(a)(1) provides that it is unlawful to “manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver a controlled substance.” “Manufacture” is defined in G.S. 90-87(15) as the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and ‘manufacture’ further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use.

In State v. Childers the North Carolina Court of Appeals held that the excepting proviso of G.S. 90-87(15) modifies only “preparation” and “compounding” and does not modify the other manufacturing activities listed in the definition. The holding overruled a prior construction of G.S. 90-87(15) under which the proviso modified all the manufacturing activities. The effect of the prior construction was to require the state to prove the manufacturer's intent to distribute the

282. In State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979), the court of appeals considered the question whether the crime of possession of a controlled substance with intent to sell that substance, set forth in N.C. GEN. STAT. § 90-95(a)(1) (1975), required knowledge of the specific type of controlled substance possessed when the alleged offender knew that the substance was illegal. In rejecting defendant's argument that because he thought the substance he possessed was “chocolate mescaline” when it was actually “lysergic acid diethylamidine,” he did not have the requisite knowledge and, thus, could not be convicted of violating G.S. 90-95(a)(1), the court of appeals held that knowledge of “the scientific name or the actual chemical composition of the controlled substance” is not necessary. 42 N.C. App. at 147-48, 256 S.E.2d at 409.

The court's holding did not produce an unjust result. The controlled substance the defendant thought he possessed and the substance he actually did possess were both Schedule I controlled substances and carried the same penalties. N.C. GEN. STAT. § 40-89 (1975 & Cum. Supp. 1979) (penalties for possession of controlled substances vary according to the schedule to which the substance belongs. Id. § 90-95 (1975 & Cum. Supp. 1979)).

Application of Mendez to the situation in which the penalty for the substance the defendant thinks he possesses is less severe than the penalty for the substance he actually possesses raises some interesting questions. In support of limiting Mendez to its facts is the unfairness of subjecting the defendant to the harsher penalty since he knowingly incurred only the risk of the lesser penalty. On the other hand, the defendant who unknowingly possesses an illegal substance arguably assumes the risk of the harsher penalty. Furthermore, application of Mendez to this situation is necessary to prevent defendant from avoiding a deservedly harsh penalty by falsely describing his knowledge as to the identity of the substance.

284. Id. § 90-87(15) (emphasis added).
286. Id. at 732, 255 S.E.2d at 656.
manufactured substance to establish a *prima facie* violation of G.S. 90-95(a)(1). By limiting the scope of the proviso *Childers* greatly reduces the state's burden in establishing that a defendant is guilty of manufacturing a controlled substance. Under *Childers*, only when the defendant's manufacturing activity consists of preparation or compounding is the state required to prove his intent to distribute.

*Childers* is the fifth in a line of cases in which the court of appeals has considered whether G.S. 90-95(a)(1) requires proof of an intent to distribute the manufactured substance. The defendants in all of these cases had been convicted under G.S. 90-95(a)(1) for manufacturing controlled substances. In *State v. Elam*, the first in the line, the court construed G.S. 90-95(a)(1) and, specifically addressing the question whether the clause "intent to distribute" qualified the word "manufacture" as well as "possess," concluded that the manufacture of controlled substances was a felony regardless of the defendant's intent.

In *State v. Baxter* and *State v. Whitted*, both decided in 1974, the court shifted its focus from G.S. 90-95(a)(1) to G.S. 90-87(15). In these cases the court stated that G.S. 90-87(15) defined "manufacture" in such a way that it [could] only mean manufacture with the intent to distribute as opposed to manufacturing for one's own use." In overturning the defendants convictions for manufacturing controlled sub-

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Despite the inconsistent holdings in this line of cases, see notes 282-81 and accompanying text *infra*, the North Carolina Supreme Court has repeatedly refused to grant certiorari and resolve the inconsistency.


290. The *Elam* court did not consider G.S. 90-87(15), the statute specifically construed in *Childers*.

291. The real question was whether the phrase "intent to distribute" applied to "manufacture," "distribute," "dispense" and "possess," or only to "possess."

292. 19 N.C. App. at 455, 199 S.E.2d at 48.


In both cases the court stated that there was evidence that the defendants had been manufacturing controlled substances by packaging them. The evidence introduced at trial was that police had searched defendants' residences and in *Baxter* discovered marijuana, plastic bags containing...
stances, the court implicitly based its holdings on the absence of any proof of the alleged offenders' intent.

In State v. Wiggins, the fourth case in this group, defendant's manufacturing activity consisted of growing marijuana. The court of appeals affirmed the defendant's conviction under G.S. 90-95(a)(1) even though the state had not offered any evidence of the defendant’s intent to distribute. Stating "[t]hat portion of G.S. 90-87(15) which allows 'preparation or compounding of a controlled substance' for one's own use in certain instances has no application to the facts of this case," the court retreated from the former broad interpretation of the excepting proviso of G.S. 90-87(15) and restricted the proviso’s scope to “preparation or compounding.”

In Childers the court of appeals clarified its holding in Wiggins, analyzed the definition of “manufacture” in G.S. 90-87(15) and eliminated the inconsistencies in this line of cases. Defendant in Childers had, admittedly, grown marijuana for her “personal use.” Citing Baxter and Whitted, defendant argued on appeal that because the state had failed to prove her intent to distribute, her conviction could not be sustained. Relying on the established rule of statutory construction that the plain meaning of the language of a statute governs its interpretation, the court stated that the only manufacturing activities modified by the excepting proviso were preparation and compounding.

marijuana seeds, cigarette papers, small brown envelopes and tape; and in Whitted discovered packaged heroin, items used in cutting heroin and glassine bags.

297. Id. at 295, 235 S.E.2d at 269.
298. Id. The court attempted to minimize its change of position rather than to acknowledge it, declaring that its Baxter-Whitted "statements" did not apply to the facts of Wiggins because of distinctions between the cases. The manufacturing activity of defendant in Wiggins consisted of growing marijuana, as in Elam, while in Baxter and Whitted the defendants had been "packaging" controlled substances. Without explanation, the court found the activities of the Wiggins defendant to be neither preparation nor compounding while the activities of the Baxter and Whitted defendants were within the ambit of these terms. Even under Wiggins' restrictive constriction of the excepting proviso, therefore, the state would have to prove intent to distribute to establish that the defendants in Baxter and Whitted had violated G.S. 90-95(a)(1).
301. The court looked to Webster’s New International Dictionary (2d ed. 1959) as a definitional source:

"Preparation" is defined by Webster's . . . as being "the action or process of making something ready for use or service." The same source provides, in addition, definitions for the following terms: (1) propagation: causing to continue or increase by natural reproduction; (2) compounding: the putting together of elements, ingredients or parts to form a whole; (3) conversion: changing [of a substance] from one form, state or character into another; (4) processing: to subject [something] to a particular method, system or
Preparing or compounding a controlled substance “by an individual for his own use” is excepted from the statutory definition of manufacture and cannot, therefore, support a charge that a defendant has been manufacturing controlled substances in violation of G.S. 90-95(a)(1). The court then addressed its Baxter-Whitted construction of G.S. 90-95(a)(1) and suggested that it was not inconsistent with its Wiggins-Childers construction because the facts of Baxter and Whitted are distinguishable from those of Wiggins and Childers. To the extent that the Wiggins-Childers interpretation of G.S. 90-87(15) conflicts with the Baxter-Whitted construction, the court in Childers expressly overruled Baxter and Whitted.

The court’s construction of G.S. 90-87(15) in Childers accords more with the plain meaning of the language of the statute than the Baxter-Whitted construction. If the excepting proviso were intended to apply to all the specified manufacturing activities, the proviso should have used the term “manufacture” or should have listed all the manufacturing activities to which it applied. Instead, the proviso uses only the terms “preparation” and “compounding” to identify the manufacturing activities it covers.

In addition to complying more with statutory language than Baxter or Whitted, the Childers construction of “manufacture” is a better reflection of legislative intent. As the Childers court recognized, the legislature “has chosen, in its wisdom, to impose a higher penalty for manufacturing even small quantities of controlled substances than for merely possessing them.” Under Childers, the excepting proviso in-
creases the likelihood that those guilty of manufacturing controlled substances in violation of G.S. 90-95(a)(1)\textsuperscript{307} and G.S. 90-87(15)\textsuperscript{308} will be subjected to a higher penalty, while those guilty only of possession will be subjected to a lesser one.

Finally the Childers construction arguably achieves more equitable results than the Baxter-Whitted construction. Manufacturing activities which contemplate a lesser degree of activity involving a controlled substance should arguably be punished less severely than those contemplating a higher degree of such activity. Childers distinguishes the less involved activities listed in G.S. 90-87(15) from the more involved activities listed therein in terms of proof the state must marshal. This distinction makes it more likely that those offenders who have had less involvement with the controlled substance will be subject only to a possession penalty while those who have been more involved will be subject to the manufacturing penalty.

L. Rape

The 1979 North Carolina General Assembly enacted a new rape and sex offenses statute, effective January 1, 1980.\textsuperscript{309} The new statute differs significantly from its predecessor in a number of respects: It prohibits more kinds of sexual conduct\textsuperscript{310} and groups this conduct into two categories; provides that males as well as females can be victims of

\textsuperscript{307} The Baxter-Whitted construction placed an additional burden on the state of proving defendant's intent to distribute in establishing "manufacture." Absent proof of intent to distribute, defendant could only be convicted of a possession offense. Wiggins and Childers eliminate this burden of proof in all cases in which the defendant has been charged under G.S. 90-95(a)(1) except those in which the manufacturing activity consists of preparation or compounding.

The burden will, of course be upon the State to prove the evidence beyond a reasonable doubt that, in cases where the defendant is charged with the manufacture of a controlled substance and the activity constituting the manufacture is preparation or compounding, that the defendant intended to distribute the controlled substance. . . . In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant either to distribute or consume personally, will be irrelevant and does not form an element of the offense.

\textit{Id.} at 732, 255 S.E.2d at 656-57.

\textsuperscript{308} In G.S. 90-87(15) the legislature broadly defined the term "manufacture" to include every conceivable type of activity, short of actual use, that can be taken with respect to controlled substances. The definition will often encompass the activities of a person already in possession of a controlled substance in making the substance ready for his use. The Wiggins-Childers interpretation of the statute shields a mere possessor from the higher manufacturing penalty by requiring the state to establish his intent to distribute.


\textsuperscript{310} See text accompanying notes 344-46 infra.
this prohibited sexual conduct;\textsuperscript{311} removes the minimum age requirement for first degree offenders;\textsuperscript{312} lightens the burden of establishing the aggravating factors that make prohibited sexual conduct a first degree offense;\textsuperscript{313} replaces the crime of assault with attempt to commit rape with the crime of attempted rape;\textsuperscript{314} specifically designates sexual conduct between certain persons as illegal;\textsuperscript{315} sets forth limited circumstances in which husbands and wives may be prosecuted for rape or sexual act against each other;\textsuperscript{316} and eliminates the offense of carnally knowing a virtuous female between the ages of twelve and sixteen years.\textsuperscript{317} The new statute also includes a definitional section explaining new terminology.\textsuperscript{318}

The act classifies prohibited sexual conduct into first degree rape, § 14-27.2 and second degree rape, § 14-27.3. Unlike the old act, the only gender requirement imposed under the new provisions is defined by the nature of the prohibited sexual conduct.\textsuperscript{315} Parties must be of opposite sexes to engage in the requisite vaginal intercourse, but either a male or female may be prosecuted for rape. Former law specified that the victim be female. The new act also removes the minimum age requirement of an assailant for prosecution of first degree rape. Previously, an assailant was required to be "more than 16 years of age" before he could be prosecuted.\textsuperscript{320} In addition to these general changes, the new act is significantly different from the former act in a number of specific respects. An examination of the various sections of the new act provides a basis for noting these distinctions.

1. First Degree

Section 14-27.2 of the new act establishes two categories of the crime of first degree rape and sets out the elements of each. In the first category, a person is guilty of first degree rape if that person engages in

\begin{itemize}
  \item \textsuperscript{311} Law of May 29, 1979, ch. 682, 1979 N.C. Sess. Laws 725.
  \item \textsuperscript{313} See text accompanying notes 326-33 infra.
  \item \textsuperscript{314} See text accompanying notes 347-50 infra.
  \item \textsuperscript{315} See text accompanying notes 351-55 infra.
  \item \textsuperscript{316} See text accompanying notes 354-55 infra.
  \item \textsuperscript{317} This offense prohibited a male person from carnally knowing or abusing "any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person." Law of March 3, 1923, ch. 140, 1923 N.C. Sess. Laws 430.
  \item \textsuperscript{318} N.C. GEN. STAT. § 14-27.1 (Cum. Supp. 1979).
  \item \textsuperscript{319} Law of April 8, 1974, ch. 1201, § 2, 1973 N.C. Sess. Laws 323. The same categorization existed under the former statute.
  \item \textsuperscript{320} Id.
forced vaginal intercourse and

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

The new law enumerates three aggravating factors, one of which must be present before the forced vaginal intercourse is deemed first degree rape. The first of these factors is the assailant's employment or display of "a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." The comparable provision under the former act required the assailant's "use" of a deadly weapon to overcome the rape victim's

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321. Under both the old statute, Law of April 8, 1974, ch. 1201, § 2, 1973 N.C. Sess. Laws 323 and the new one, N.C. GEN. STAT. § 14-27.2(1) (Cum. Supp. 1979), the assailant must engage in the prohibited sexual conduct "by force and against the will" of the victim. The new act makes no attempt to define this phrase. Presumably, therefore, the content given to this element under the prior rape law will apply to § 14-27.2. See Home Security Life Ins. Co. v. McDonald, 277 N.C. 283, 177 S.E.2d 291 (1970). Prior case law established that "the mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force." Actual physical force is not required. State v. Roberts, 293 N.C. 1, 13, 235 S.E.2d 203, 211 (1977) (emphasis in original). While consent is a perfect defense to a charge of rape, no legal consent exists when the consent is induced by violence or threats of violence. See, e.g., State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

In the recent case of State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979), the North Carolina Supreme Court stated that while consent, initially given, can be withdrawn, the concept of consent ordinarily applies "to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused." When only one act of sexual intercourse to which the complaining witness initially consented occurs, consent cannot be legally withdrawn in the middle of the act. "If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape." Id. at 296-97, 254 S.E.2d at 761-62.


323. N.C. GEN. STAT. § 14-27.2(a)(1) (Cum. Supp. 1979). The corresponding offense under the former statute was:

Every person who ravishes and carnally knows any female of the age of twelve years or more by force and against her will [shall be guilty of first degree rape if the assailant] is more than sixteen years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her.


325. Id.
resistance or to procure her submission. "Employ," the term adopted by the new act to describe the assailant's exercise of control of the weapon, operates synonymously with the prior statute's "use." The addition of the word "display" by the new law, however, clearly minimizes the action the assailant must take with respect to the weapon. For example, proof that the assailant had a "dangerous or deadly weapon" visibly on his person or in his car appears to satisfy section 14-27.2's first requirement for first degree rape, while under former law the state would have had to demonstrate either that the weapon procured the victim's submission or overcame the victim's resistance.

The 1979 legislation further provides that the weapon employed or displayed must be "dangerous or deadly" or the victim must reasonably believe it to be dangerous or deadly. The former law characterized the weapon only as "deadly" and made no allowances for the victim's reasonable yet mistaken beliefs regarding the nature of the weapon. The new act does not define the term "dangerous or deadly." Courts will presumably examine judicial interpretations of similar terms in other statutes as an aid in applying 14-27.2. By modifying "weapon" with "dangerous" in addition to "deadly," the legislature has apparently included in the first aggravating circumstance weapons previously omitted.

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328. First degree rape could be committed by an assailant carrying a toy pistol if that toy pistol looked like a real gun or the circumstances of its use kept the victim from discerning that it was not real, or by an assailant with no weapon at all if the circumstances made it reasonable for the victim to conclude that the assailant carried a concealed weapon.

329. By modifying "weapon" with "dangerous," the legislature has apparently included in the first aggravating circumstance weapons previously omitted.

330. The North Carolina Supreme Court has recently relied upon its definition of "serious injury" under the assault statute to define "serious bodily injury" under the prior rape statute. State v. Roberts, 293 N.C. 1, 13-15, 235 S.E.2d 203, 211-13 (1977).
Forced vaginal intercourse is also a first degree offense if the assailant inflicts "serious personal injury upon the victim or another person."\textsuperscript{331} The equivalent factor under the prior statute was the assailant's "infliction of serious bodily injury" to the rape victim that had the effect of overcoming her resistance or procuring her submission.\textsuperscript{332} Under the new act the state will be able to establish this aggravating factor in a greater number of cases than was previously possible. Prior law demanded that the serious injury be "bodily." Section 14-27.2 provides that this injury must be "personal." The Legislature's change arguably supports a finding by the courts that "serious bodily injury" includes a mental as well as bodily injury.

Unlike its predecessor, section 14-27.2 requires no proof that the injury occurred while resisting the assailant and thus prior to the forced sexual act for a charge of first degree rape. Under the wording of the new statute, if infliction of serious personal injury accompanies forced vaginal intercourse the assailant can be charged with first degree rape even if the injury is inflicted after the intercourse. In addition, the person injured need not be the person raped. Prior law required the injured person to be the rape victim.

The third aggravating factor, "one or more persons aiding and abetting the assailant in committing the prohibited sexual conduct," has no counterpart in the former statute. The established common law definition of aiding and abetting probably will be relied upon in determining the establishment of this factor.\textsuperscript{333}

The second category of first degree rape states that a person is guilty of the offense if that person "engages in vaginal intercourse [w]ith a victim who is a child of the age of 12 years or less and the

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  \item 291 N.C. 586, 593, 231 S.E.2d 262, 266 (1977) (indictment charging use of "dangerous" but not "deadly" weapon not charge of first degree rape).
  \item 331. N.C. GEN. STAT. § 14-27.2(a)(1)(b) (Cum. Supp. 1979). "Serious personal injury" is not defined in the new act. The courts will, therefore, presumably look for guidance in construing this term to prior relevant judicial interpretation. See note 330 supra. The North Carolina Supreme Court recently declined an opportunity to detail the substance of the phrase "serious bodily injury," noting that "[w]hether such serious injury has been inflicted must be determined according to the facts of each case." State v. Roberts, 293 N.C. 1, 13-14, 235 S.E.2d 203, 211 (1977) (quoting State v. Jones, 258 N.C. 89, 126 S.E.2d 1 (1962)).
  \item 333. Crowell, supra note 309, at 4.
\end{itemize}

'A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.'

defendant is four or more years older than the victim." Several of
the differences between this category of first degree rape and its coun-
terpart under former law parallel the differences between the first cate-
gory of first degree rape and its predecessor: "Vaginal intercourse" as
opposed to "carnal knowledge" is the prohibited sexual conduct, the
only gender requirement imposed upon the assailant and the victim is
that they be of opposite sexes, and no minimum age is required of the
assailant.

Aside from these differences, section 14-27.2 makes other changes
in the elements of this aggravating factor. The virginity of the rape
victim is not in issue under the new law. The language of the prior
statute made the victim's virginity an essential element of the crime.
Also, the legislature's change in the wording of the age requirement
for this offense from "under 12 years of age" "12 years or less" clouds the
previously settled position that the victim could not have passed her
twelfth birthday. The legislature's rewording of this phrase seems to
indicate a child is 12 years or less until the child reaches his thirteenth
birthday. Under this argument, the new statute would extend by a year
the age of the victim with whom vaginal intercourse is first degree
rape.

While the assailant need no longer be more than 16 years of age,
he must be four or more years older than the victim. If this age
difference is not met, the elements of first degree rape cannot be estab-
lished and no lesser offense is applicable. This situation is arguably a

the prior statute provided that any person "more than 16 years of age" who carnally knows and
abuses "a virtuous female child under the age of 12 years" shall be guilty of first degree rape. Law

335. No case decided under the prior statute specified that the State must establish, inter alia,
the victim's virginity in order to establish a prima facie case of first degree rape. (The requirement
that the victim be virtuous was added to the statute in 1973.) A case construing former G.S. 14-26
did, however, make such a specification. This statute prohibited the carnal knowledge of "any
female child, over 12 and under 16 years of age, who has never before had sexual intercourse with
any person." The North Carolina Supreme Court held that under this statute the victim's "former
chastity is a material part of the crime and must be proved." State v. Barefoot, 241 N.C. 650, 654,
86 S.E.2d 424, 427 (1955). Because the victim's virginity need not be proved under the new law,
the State's burden in establishing this category of first degree rape may be carried more easily.

336. One commentator notes that, while there is no relevant North Carolina case law on this
issue, in those states that have decided the issue, "of the age of 12 years or less" means until the
twelfth birthday is reached. Crowell, supra note 309, at 5.

337. Although it is not specified in the statute, presumably this difference will be measured
from the birthdays of the assailant and the victim.

Under the former statute a four year minimum age difference was also required. The assail-
ant had to be more than 16 years of age and the victim had to be under the age of 12. Law of
deficiency in the new law. Under the former statute a person who engaged in sexual intercourse with a female under 12 years of age was guilty of second degree rape if the first degree elements could not be established. Now, many of those assailants cannot be prosecuted.

2. Second Degree

Section 14-27.3 sets forth the elements of second degree rape. A person is guilty of second degree rape if that person "engages in vaginal intercourse with another person [b]y force and against the will of the other person; or [w]ho is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know" of the other person's condition. Second degree rape, like first degree rape, may now be committed by either a male or female upon a person of the opposite sex. The new statute prohibits, as did its predecessor, forced intercourse for which the aggravating factors of first degree rape are not present. Omitted from the 1979 legislation is the formerly included offense of sexual intercourse with a child under 12 when the first degree elements are not satisfied. The new statute provides additional grounds, though, for charging an assailant with second degree rape. Intercourse with a person who is mentally defective, mentally incapacitated or physically helpless is now second degree rape provided the assailant knows or has reason to know of the person's condition.

3. First and Second Degree Sexual Offenses

The 1979 legislation creates a new category of prohibited sexual

338. Id.
339. N.C. GEN. STAT. § 14-27.3 (Cum. Supp. 1979). Under the prior law a person was guilty of second degree rape if he carnally knew "any female of the age of 12 years or more by force and against her will," or carnally knew "any female child under the age of 12 years." Law of April 8, 1973, ch. 1201, § 2, 1973 N.C. Sess. Laws 323.
340. See text accompanying note 338 supra.
341. An assailant can defend a charge under G.S. 14-27.3 on the ground that he did not "reasonably know the other person [to be] mentally defective, mentally incapacitated, or physically helpless." N.C. GEN. STAT. § 14-27.3 (Cum. Supp. 1979).
342. Id. § 14-27.1. These terms include victims who are incapable of resisting or communicating their resistance to the assailant's conduct. Id.
343. N.C. GEN. STAT. §§ 14-27.4 & .5 (Cum. Supp. 1979). While the pre-1979 rape statute did not prohibit the sexual conduct treated as a sexual offense under the new act, such conduct was prohibited as crime against nature. Id. § 14-177 (1969). See generally STRONG'S NORTH CAROLINA INDEX 3D, Crime Against Nature (1976).
conduct—"sexual offense." The elements of first and second degree sexual offenses are set forth in sections 14-27.4 and .5 respectively. These offenses differ from first and second degree rape only with respect to the prohibited sexual conduct. For rape, the prohibited sexual conduct is vaginal intercourse; for sexual offense, the assailant must commit a "sexual act." "Sexual act" is defined in section 14-27.1 as "cunnilingus, fellation, analingus or anal intercourse," and includes "the penetration, however slight, by any object into the genital or anal opening of another person's body" without their consent.

4. Attempted Rape

Section 14-27.6 replaces the former crime of assault with intent to rape and prohibits attempted rape or attempted sexual offense. An attempt to commit a crime consists of two elements: an intent to commit that crime and an act that goes beyond mere preparation to commit it, but falls short of its actual commission.

Under both the old and new statutes the assailant's intent to commit the prohibited sexual conduct is an essential element of the offense. The 1979 legislation, however, requires only an intent to commit the crime and does not, as did its predecessor, additionally require that this intent be present at "all events, and notwithstanding any resistance" by the victim. Thus intent which would not have satisfied the intent

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344. The only gender requirement imposed upon the assailant and the victim is that imposed by the nature of the sexual act.

345. Engaging in a "sexual act" as defined in N.C. GEN. STAT. § 14-27.1(4) (Cum. Supp. 1979) is also a crime against nature. If the "sexual act" is by force and against the will of the victim, the assailant can be charged with either first or second degree sexual offense depending on whether the aggravating factors which make the crime first degree can be established. If the assailant commits the sexual act with the consent of the victim and the victim is more than 12 years old, first degree sexual offense cannot be charged. The assailant can, however, be charged with crime against nature because consent is no defense to that crime. Law of May 29, 1979, ch. 682, § 1, 1979 N.C. Sess. Laws 725 (codified at N.C. GEN. STAT. §§ 14-27.1 to -27.10 (Cum. Supp. 1979)).


Prior law required the state to establish (1) an assault and (2) the assailant's intent to gratify his passion on his victim "at all events, and notwithstanding any resistance on her part." State v. Hudson, 280 N.C. 74, 77, 185 S.E.2d 189, 191 (1971), cert. denied, 414 U.S. 1160 (1974).

349. 280 N.C. at 77, 185 S.E.2d at 191. The courts alleviated the burden placed on the prosecution in establishing this degree of intent by finding the intent if the assailant at any time during the assault had an intent to gratify his passion, notwithstanding any resistance on the victim's part. State v. Dais, 22 N.C. App. 379, 206 S.E.2d 759, appeal dismissed, 285 N.C. 664, 207 S.E.2d 758 (1974). Despite this reduction of the prosecution's burden of proof, it was still possible that the
requirement under the prior law will now be sufficient. In addition, the new act removes the burdensome requirement of demonstrating an "assault." To be guilty of assault a defendant must have offered or attempted by force or violence to injure another person.\textsuperscript{350} The crime of attempt requires only an act which goes beyond mere preparation toward the commission of a crime. Clearly conduct that falls short of an assault will constitute "beyond mere preparation," and expand the scope of prohibited conduct.

5. Sexual Conduct by a Substitute Parent

Section 14-27.7 provides that "[i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the person is guilty of a felony."\textsuperscript{351} This sexual conduct was not prohibited under prior law. The statute prohibits both vaginal intercourse and sexual acts. It does not require that the vaginal intercourse or sexual act be forced upon the victim and specifically states that consent is not a defense. Like rape and sexual offense, no gender requirements are imposed upon the victim or the assailant. Section 14-27.7 does, however, impose other requirements upon the parties involved. It provides that the assailant must have \textit{assumed} the position of a parent, but does not detail what action constitutes such an assumption. It is not clear, therefore, whether such assumption must be a "legal" one such as a court-appointed guardian, or whether an actual parent's live-in mate would satisfy this requirement. Because the statute requires that the parent position be assumed, presumably an actual parent could not be prosecuted under this section.

6. Sexual Conduct by a Custodian

Section 14-27.7 creates another new category of prohibited sexual conduct. Under this category "a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age [who] engages in vaginal intercourse or sexual act with such victim" is guilty of a felony.\textsuperscript{352}

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assailant would claim that his intent to rape his victim was not "at all events and notwithstanding any resistance" by the victim. The new act eliminates this possibility.
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\textsuperscript{350} State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975) (citations omitted).
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\textsuperscript{352} \textit{Id.}
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Rape and sexual offense are both prohibited. Force is not an essential element and the victim's consent does not provide an assailant a defense. No age or gender requirements are imposed upon the victim or assailant. The crucial element of this offense is that the victim be in the custody of the assailant, the assailant's principal or his employer. The meaning of "custody" is not explained. The extent and type of control which the assailant, his principal or his employer must exercise over the victim before the victim is in their custody is left to judicial definition.

7. Prosecution of a Spouse

Section 14-27.8 provides an exception to the general rule that a victim's spouse may not be prosecuted for otherwise illegal sexual conduct. This section states that when the victim and the victim's spouse are living separate and apart pursuant to a written agreement or a judicial decree the spouse may be prosecuted for rape or sexual offense. Previously, a spouse could be prosecuted only under a theory of aiding and abetting and not as a result of the spouse's own sexual conduct. The new law sets forth no requirements with respect to the written agreement such as that it be court-approved or notarized. Apparently, an agreement executed and signed by the husband and wife will be sufficient. If the husband and wife are living separate and apart, but there is neither a written agreement nor a court order, vaginal intercourse or a sexual act between them will be legal.

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353. Id. § 14-27.8.
354. A husband who counsels, aids, abets assists or forces another person to have sexual intercourse with his wife, or forces her to submit to sexual intercourse with another is guilty of rape. State v. Martin, 17 N.C. App. 317, 318-20, 194 S.E.2d 60, 61-62, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973). Presumably, the aiding and abetting approach will be available under the new law as a means of prosecuting a person for rape or sexual offense when the victim is his spouse.
VI. CRIMINAL PROCEDURE

A. Inventory Searches

In *State v. Nelson*\(^1\) the North Carolina Supreme Court considered the constitutionality of an inventory search of defendants' military billets, conducted pursuant to standard military procedure while defendants were not on the military base but were in custody of civilian authorities.\(^2\) Applying the rationale of *South Dakota v. Opperman*,\(^3\) the court held that the search did not violate defendants' fourth amendment rights.\(^4\)

Six days after the rape and robbery involved in *Nelson*, defendants were arrested and jailed in Cumberland County in connection with another crime.\(^5\) Pursuant to regulations,\(^6\) military personnel took an inventory of their belongings located in their military billets and then secured them. Upon reading accounts of the rape and robbery in a newspaper, defendants' Battery Commanders\(^7\) viewed the secured property and found that it fit the newspaper descriptions of the items allegedly stolen from the victims. After reporting the similarities to their superiors, the officers turned over the items to civilian authorities.\(^8\)

The court held that the initial inventory search was justified, because the circumstances of this case were analogous to those of *South Dakota v. Opperman*. Although the court recognized that an "initial permissible intrusion into a constitutionally protected zone does not *per se* validate a subsequent intrusion,"\(^9\) it found that the comparison of defendants' secured property with the newspaper description of stolen items was not a second intrusion, but merely a "second look at items already discovered."\(^10\)

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2. *Id.* at 578-79, 260 S.E.2d 635.
3. 428 U.S. 364 (1976). In *Opperman*, police conducted an inventory search of defendant's automobile when it was impounded after receiving two parking tickets. The search was initiated pursuant to standard police procedures after a number of valuables were viewed on the seat of defendant's car. *Id.* at 365-66. See text accompanying notes 11-13 infra.
4. 298 N.C. at 580, 260 S.E.2d at 636.
7. The initial inventory was not conducted by either of the Battery Commanders, but by other military personnel. 298 N.C. at 579, 260 S.E.2d at 635.
8. *Id.* at 578-80, 260 S.E.2d at 635-36.
10. 298 N.C. at 583, 260 S.E.2d at 638. See notes 25-29 & accompanying text infra. The court also found no merit in defendants' claim that error had been committed when their
In *Opperman* the United States Supreme Court held that the conduct of police, who, following standard police procedures, inventoried the contents of an impounded automobile, was not unreasonable under the fourth amendment. In making its decision the Court observed: (1) that there exists a diminished expectation of privacy in an automobile; (2) that inventories of impounded automobiles, conducted pursuant to standard police procedures and without investigative motives, have become increasingly routine; and (3) that inventories protect police from possible danger and potential civil liability for property loss, while also protecting the owner from property loss. According to *Opperman*, a valid inventory search is a neutral, noninvestigatory, administrative activity carried out in accordance with standard police procedures.

In drawing its analogy to *Opperman*, the *Nelson* court pointed out that while a soldier may have a greater expectation of privacy in his billet than in an automobile, his expectation is not absolute and must

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11. 428 U.S. at 376.
12. Id. at 367-69.
13. 428 U.S. at 375-76. In State v. Phifer, 297 N.C. 216, 254 S.E.2d 586 (1979), the North Carolina Supreme Court refused to apply the inventory search rationale of *Opperman* because the officers had not acted pursuant to authorized police procedures and the court recognized a clear investigatory motive on their part. *Id.* at 224, 254 S.E.2d at 590. In State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979), the court of appeals upheld a non-inventory search of defendant's automobile because there was no apparent motive ulterior to that of safeguarding the property. *Id.* at 433-34; 250 S.E.2d at 708.
necessarily yield to certain governmental interests. Furthermore, noninvestigatory searches pursuant to standard military procedures have been justified for the same protective purposes stated in *Opperman*. For these reasons, the court found little difference between the inventory search conducted in *Opperman* and the one conducted in the present case and, consequently, held that the initial search and seizure were constitutionally reasonable.

The court's analogy is a good one. While a soldier may have a greater expectation of privacy in his military billet than the Supreme Court has found justifiable in an automobile, this expectation is arguably not as great as one's expectation of privacy in his home. It would also seem logical that the protective purposes discussed in *Opperman* are just as relevant in the context of an inventory search of a military billet as in a similar search of an abandoned automobile.

In addition to the three general observations listed above, which are applicable to all inventory searches, the United States Supreme Court listed five specific factors that contributed to the reasonableness of the *Opperman* search. First, the Court noted that the caretaking search had been conducted while the automobile was legally impounded. In *Nelson*, since the billets were located on a military base, military personnel had a legitimate interest in seeing that defendants' property was properly accounted for in their absence. Moreover, an inventory was required by military regulations. Second, in *Opperman* defendant's car had been impounded only after multiple traffic violations. In *Nelson* defendants' billets were searched only after defendants had been jailed and were, consequently, absent from the base for two days. Third, in *Opperman* the owner was not present to make arrangements for the safekeeping of his belongings at the time the automobile was impounded. Similarly, in *Nelson* defendants were jailed.

14. 298 N.C. at 582, 260 S.E.2d at 637.
16. 298 N.C. at 582, 260 S.E.2d at 637.
17. *See* United States v. Hines, 5 M.J. 916, 919 (A.C.M.R. 1978). Indeed, soldiers would seem to have more notice of the possibility of a protective search than would automobile drivers because they would be more familiar with military regulations than drivers are with police procedures. Therefore, soldiers would appear to have less of an expectation of privacy in their billets than drivers do in their automobiles.
18. 428 U.S. at 375.
20. 428 U.S. at 375.
21. 298 N.C. at 578-79, 260 S.E.2d at 635.
22. 428 U.S. at 375. In *Opperman* defendant's car was ticketed twice between 2 A.M. and 10
and, therefore, unable to properly secure their own property. Fourth, in Opperman the officers' observation of certain valuables in plain view, prompted them to take the precaution of conducting the inventory search of defendant's automobile. In Nelson defendants' absence, which was bound to be noticed by other soldiers on the base, created the risk that their personal property might be stolen or damaged. Finally, in Opperman the Court noted the absence of an investigatory police motive. There is no indication in Nelson of any motive other than a desire to safeguard defendants' property and to protect the military against liability for lost items. Thus, the United States Supreme Court's rationale for constitutionally upholding the validity of certain inventory searches seems as well fitted to the fact situation in Nelson as it does to that of Opperman.

In support of its holding that a second look at items already seized is constitutional, the court cited several cases, including United States v. Edwards. In that case, the United States Supreme Court found nothing unreasonable about the warrantless laboratory examination of clothing that was in police custody pursuant to the lawful arrest of the defendant and seizure of his clothing. The North Carolina court admitted, however, that the holding in Edwards must be read in light of United States v. Chadwick, in which the Supreme Court held that the Constitution required police to obtain a search warrant before opening and searching a lawfully seized footlocker. Nevertheless, the two cases are distinguishable, the court observed, because in Edwards the second examination was of "items already once legitimately seen," while, in Chadwick the contents of the footlocker had not yet been examined. The distinction seems to have merit. Once items have been examined, the defendant has little continued expectation of privacy. In Chadwick, however, there remained an expectation of privacy in the contents of the footlocker, and there was no reason to extend the search beyond the limits justified by the exigencies of the circumstances.

A.M. and then impounded. Defendant retrieved his automobile late that afternoon. There was no indication in the opinion of where defendant was at the time his car was impounded or of the exact time when he discovered that it had been impounded.

23. Id. at 375-76.
24. Id. at 376.
26. Id. at 806.
28. Id. at 15-16.
29. 298 N.C. at 584, 260 S.E.2d at 639.
30. The footlocker in Chadwick was seized pursuant to the automobile exception to the
B. Warrantless Entry into Buildings

The North Carolina Supreme Court decided two cases concerning warrantless entries into buildings. The first, *State v. Allison*,\(^3\) dealt with a warrantless entry into a mobile home for the purpose of making an arrest. *State v. Taylor*\(^2\) involved exigent circumstances that made a limited, warrantless search of a "shot house," incident to a lawful arrest, reasonable under the United States Constitution.

In *Allison*, police arrived at the scene of a slaying to find the victim lying in her front yard. The victim's son informed a policeman that defendant had shot the victim and indicated that defendant was in his trailer, located approximately 150 to 200 feet away. He failed to inform the policeman that he had heard a car door slam and an engine crank or that he had already been to the trailer looking for the suspect. The first policeman to arrive at the scene then instructed a second officer to investigate the trailer and the area near the trailer, from which the fatal shot had been fired. The second officer proceeded to the trailer, knocked on the door, and, receiving no response, tested it and found it unlocked. He then entered the trailer and immediately found and seized a rifle. The officer then announced both his presence and authority and proceeded to search the trailer for the suspect. Failing to locate him, the officer left the premises.\(^3\)

In considering whether the warrantless entry of defendant's trailer violated his fourth amendment right to be free from unreasonable searches and seizures, the court noted that the United States Supreme Court had not yet decided what limitations are constitutionally imposed on an officer making such an entry for the purpose of arresting a suspect.\(^4\) Citing dicta in *Coolidge v. New Hampshire*,\(^3\) however, the court suggested that "the Supreme Court will eventually hold that the Fourth Amendment imposes upon a warrantless entry for the purpose of searching for a suspect a search warrant requirement. Once the footlocker was seized, however, its mobility was eliminated and consequently there was no basis for searching inside. Further, a person has a greater expectation of privacy in luggage than in an automobile. *403 U.S. at 13.*

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\(^{33}\) 298 N.C. at 137-38, 257 S.E.2d at 419.
\(^{34}\) Id. at 140, 257 S.E.2d at 420.

The North Carolina Supreme Court could have upheld the search in *Allison* based on the "hot pursuit" doctrine which was set forth in *Warden v. Hayden*, 387 U.S. 294 (1967). In *Warden*, as in *Allison*, police had been informed that the suspect was in the residence and entered it to make an arrest shortly after the crime had been committed. For a discussion of the "hot pursuit" doctrine and *Warden v. Hayden*, see note 58 infra.

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\(^{35}\) 403 U.S. 443, 477-78 (1971).
of making an arrest limitations comparable to the strictures on residential searches and seizures. 36 The ultimate limitation on warrantless searches, observed the court, is that they be reasonable under the circumstances. 37 A warrantless search is constitutionally reasonable if probable cause to search exists and if the situation presents exigent circumstances that make it imperative that the search be conducted without a warrant. 38

Having recognized that the Supreme Court has adopted no standards for determining the validity of a warrantless entry to make an arrest, the court adopted the analysis set out in Dorman v. United States. 39 In that case the Court of Appeals for the District of Columbia Circuit listed seven factors that should be weighed in order to determine whether a warrantless entry to make an arrest was reasonable under the circumstances:

(1) [T]he gravity and violent character of the offense; (2) the reasonableness of the belief the suspect is armed; (3) the degree of probable cause to believe the suspect committed the crime involved; (4)

36. 298 N.C. at 140, 257 S.E.2d at 420-21. In fact, the Supreme Court has subsequently equated entry of a residence to make an arrest with entry to search. See Payton v. New York, 100 S. Ct. 1371 (1980). Payton involved the consolidated cases of two defendants who objected to the introduction of evidence found when police entered their homes without a warrant for the purpose of making an arrest. Two days after the murder of a gas station manager, police obtained probable cause to believe that Payton had committed the crime. The next day, officers went to his apartment without a warrant with the intent of arresting him. Receiving no response to their knock, they requested assistance, and thirty minutes later broke open the door with crowbars. Payton was not home, but the officers found and seized a .30-caliber shell casing which was later admitted into evidence. Id. at 1375-78.

Defendant Riddick was arrested in March of 1974 for a crime that had been committed in 1971. He had been identified in 1973 and police had learned his address by January of 1974. Following their knock, officers were admitted to Riddick's house by his son. Riddick was placed under arrest, but because he needed to dress, the officers opened his chest of drawers and discovered narcotics. Both entries had been made during the daytime. Id.

The Court distinguished warrantless arrests made in public, invalid under United States v. Watson, 423 U.S. 411 (1976), from those made in a residence: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a line at the entrance to the house." Id. at 1382. The Court then held that absent exigent circumstances, the fourth amendment prohibits police from making a warrantless entry of a suspect's home to make a routine felony arrest. Id. Noting that an arrest warrant carries an implied limited authority to enter a home when there is reason to believe that the suspect is there, the Court held that a search warrant was not also required to make an arrest in a home. Id. at 1388.

37. 298 N.C. at 141, 257 S.E.2d at 421.
38. Id.
39. 435 F.2d 385 (D.C. Cir. 1970). In Dorman, police went to defendant's home at 10:20 p.m., four and a half hours after an armed robbery had occurred. After knocking and announcing their identity, the officers were greeted by defendant's mother who informed them that her son had just left and that if they did not believe her, they should look for themselves. The officers then heard a noise in the house, whereupon they entered and searched for the defendant. Although the officers did not find defendant, they did find some of the stolen property. Id. at 387-88. The court found the officers' conduct to be reasonable. Id. at 394.
whether reason to believe the suspect is in the premises entered existed; (5) the likelihood of escape if not swiftly apprehended; (6) the amount of force used to effect the unconsented entry; and (7) whether the entry was at day or night.\footnote{40}

The court in \textit{Allison} held that the facts of the case satisfied each of these factors and that exigent circumstances justified the warrantless entry of defendant's trailer.\footnote{41} Accordingly, the court found that the trial judge did not err in admitting the seized rifle into evidence.\footnote{42}

In its holding in \textit{Allison}, the North Carolina Supreme Court has articulated a viable standard for determining the constitutionality of a warrantless entry of a dwelling for the purpose of arresting a suspect. A consideration of the factors enumerated in \textit{Allison} requires a balancing of the severity of the crime involved and the necessity of a warrantless entry against the degree of governmental intrusion into a constitutionally protected area of personal liberty. The constitutionality of the standard set forth in \textit{Allison} is, of course, subject to the Supreme Court's holding in \textit{Payton v. New York}.\footnote{43}

In \textit{State v. Taylor},\footnote{44} defendant, who was wanted for robbery and maiming in Virginia and for murder in North Carolina, was arrested in

\footnote{40. 298 N.C. at 141, 257 S.E.2d at 421 (citing 435 F.2d at 392-93).

\footnote{41. \textit{Id.} at 142-43, 257 S.E.2d at 422. Allison also claimed that the entry of his trailer was made in violation of N.C. GEN. STAT. § 15A-401(e)(1) (1978):

\begin{quote}
A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

\begin{enumerate}
    \item The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued, and
    \item The officer has reasonable cause to believe the person to be arrested is present, and
    \item The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.
\end{enumerate}
\end{quote}

Defendant conceded, for the purposes of this argument, that the requirement of subsection (a) had been met, but argued that those of (b) and (c) had not been satisfied. The court found no merit in the subsection (b) claim. Addressing defendant's argument under subsection (c), the court determined that the officer could reasonably have feared that giving notice of his authority and purpose would present a clear danger to his life. Furthermore, the officer's entry was judged reasonable under the circumstances, and the court held that if the officer had committed error in entering before announcing his authority and purpose, it was not a substantial violation of the statute. 298 N.C. at 143-44, 257 S.E.2d at 422-23.

Additionally, the court pointed out that even if the search of the trailer and seizure of the weapon had been unconstitutional, it would have been immaterial to the outcome of the case. The State was unable to prove that the seized rifle was in fact the murder weapon and therefore did not benefit from its admission into evidence. \textit{Id.} at 143, 257 S.E.2d at 422. The constitutionality of this statute is in doubt, however, after the Supreme Court's holding in \textit{Payton v. New York}. \textit{See note 36 supra.}

\footnote{42. 298 N.C. at 142-43, 257 S.E.2d at 422.}

\footnote{43. 100 S. Ct. 1731 (1980). \textit{See note 36 supra.}}

\footnote{44. 298 N.C. 405, 259 S.E.2d 502 (1979).}
Hampton, Virginia two days after the commission of the North Carolina crime. After receiving information that defendant was in a "shot house," approximately twenty-five policemen surrounded the building in the early evening and advised the suspect that he should come out. Defendant did so and identified himself as Norris Taylor, the man whom the police were seeking. After frisking defendant and discovering that he was not armed, the arresting officer asked defendant where his weapon was located. Defendant stated that it was in the house, and the officer asked to be led to it. At trial, the officer testified that he did not know if anyone was left in the house, or even whether the suspect was in fact who he claimed to be. Defendant then led the officer into a small room in the house and located his pistol for the officer.

On appeal from his conviction defendant argued that the search of the house and seizure of the pistol violated his fourth amendment rights and, therefore, that the trial judge improperly admitted the pistol into evidence. The court concluded that the Hampton police "were justified by exigent circumstances in making a limited, warrantless search of the shot house and in seizing the pistol."

In support of this decision, the court noted that when the circumstances surrounding an arrest made outside a dwelling provide officers with a reasonable belief that their safety is seriously threatened, or when there exists a "high potentiality for danger," a warrantless entry into the dwelling for the purpose of making a limited safety check is reasonable under the constitutional standard for searches and seizures. Such a cursory check is justified by the "immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon at the arresting officer as he leaves the scene of the arrest." Among the factors that, according to the court, contributed to a justifiable apprehension of danger on the part of the officers and to the fear that they may not have been able to withdraw without being fired on were the lateness of the hour, the place of arrest and the dangerousness of the defendant, an armed sus-

45. It is not clear from the opinion when the crime giving rise to the Virginia charges had been committed. See id. at 414, 259 S.E.2d at 507. It is possible that a basis for the search of the house could be found in these facts.

46. A "shot house" is a place where liquor by the drink is illegally sold. Id. at 414 n.1, 259 S.E.2d at 507 n.1.

47. Id. at 414, 259 S.E.2d at 507-508.

48. Id. at 414, 259 S.E.2d at 509.

49. Id. at 416, 259 S.E.2d at 509.

50. Id. at 416-17, 259 S.E.2d at 509.

51. Id. at 417, 259 S.E.2d at 509.
pect wanted for murder. The court added:

Once defendant had been arrested, the officers had good reason to fear for their safety. In the first place, the officers "did not know if there was anyone else in the house, or if, in fact, this was Norris Taylor or exactly what." Additionally, defendant's weapon had not been accounted for. Given the strong possibility of an ambush or "set up," it was eminently reasonable for the police to make a limited protective sweep of the premises in order to recover defendant's weapons and to ensure there was no one in the house who could fire on them while they withdrew with defendant.

In addition, the court determined that there was no reason to believe that the search was a pretext for uncovering evidence or that it was greater in scope than the circumstances demanded. Consequently, the reasonableness of the search was supported by exigent circumstances, and the trial court had not erred by admitting the pistol into evidence.

The United States Supreme Court considered the constitutional scope of a search incident to arrest in *Chimel v. California*. In that case, in which defendant was arrested in his home pursuant to a valid arrest warrant, the Court ruled that while a search of the area within the arrestee's "immediate control" including his person was justified, a search of other areas of the house was not justified. In *Vale v. Louisiana* the Court held that a search will be considered incident to an arrest only if it is made "substantially contemporaneous" with and in the "immediate vicinity" of the arrest. In particular, for a search of a house to be upheld, the arrest must actually take place inside the house.

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52. *Id.*
53. *Id.*
54. *Id.* at 417-18, 259 S.E.2d at 509-510. It is not clear whether the court's decision actually turns on its holding on the search and seizure issue, because the court also held as a preliminary matter that defendant had no standing to object to the search. *Id.* at 416, 259 S.E.2d at 508-09. The court observed that the record failed to show that defendant had a privacy interest in the room that was searched. *Id.* While it does indicate that defendant was present at the "shot house" and that his weapon was found there, the record does not show that he either owned the house, leased or occupied the room as a guest, or had permission to store personal property there. *Id.* Because the court had already disposed of the assignment of error on the ground that defendant lacked standing, it is arguable that the court's consideration of the constitutionality of the search and seizure is mere dictum.
56. *Id.* at 763.
57. 399 U.S. 30 (1970). In *Vale*, officers with a warrant for Vale's arrest observed him and another individual engaged in an apparent drug transaction. Defendant was arrested on the front step of his home. *Id.* at 32.
58. *Id.* at 33-34.

*Chimel* and *Vale*, however, did not overrule the "hot pursuit" doctrine, which the Court outlined in *Warden v. Hayden*, 387 U.S. 294 (1967). In that case, police knew that an armed
The court in *Taylor* based its holding on exigent circumstances which, in the court's judgment, made it unsafe for the officers to retreat without first making a cursory search of the house. Although the Supreme Court has never adopted this exception to the warrant requirement, six cases were cited by the North Carolina court in support of this rationale. The factual situations of all six can be distinguished from that of *Taylor* in critical ways. In *McGeehan v. Wainwright*\(^\text{59}\) police investigating an armed robbery that had occurred the same night surrounded a home and ordered the occupants to come out. The police did not have positive identification of the three perpetrators of the crime, but knew that they were armed. The court held that when no weapons were recovered from the four individuals who exited, the officers were justified in entering an open door and making a brief protective search of the house.\(^\text{60}\) In *Taylor* police were seeking one man who had already exited the house, and there was no reason to believe that he had any accomplices. Further, that defendant had had a weapon in his possession two days before the arrest was not as strong an indication that he had retained that weapon as the indication in *McGeehan* in which it was known that the arrestees had been armed just hours earlier.\(^\text{61}\) In *United States v. Looney*\(^\text{62}\) the arrest was made inside the house and the suspect was known to have a propensity to use confederates.\(^\text{63}\) The need to conduct a search in order to ensure a safe retreat was not as great in *Taylor*, because the arrest was made outside the house. *United States v. Smith*\(^\text{64}\) was a case in which police had information that the suspect was armed and accompanied by another individual. The court held that, when the suspect eventually exited the

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60. Id. at 398-99.
61. If the defendant's known possession of a weapon two days before his arrest presents such a threat of danger that the arresting officer is justified in making a search of the arrestee's house, then searches of houses incident to arrests on the street could be justified in other situations that are clearly unconstitutional. For instance, if an arrest is made of an individual who has been arrested two days earlier for carrying a concealed weapon, the need for a cursory search of the arrestee's house may be as compelling as that in *Taylor*.
63. Id. at 31-32.
64. 515 F.2d 1028 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976).
house fifteen minutes after being ordered to give himself up, police
were justified in entering the house to determine the whereabouts of his
supposed accomplice and to secure his weapon.\(^6\) In *Taylor* defendant
exited immediately upon being told to do so, and the police had no
reason to believe that he had accomplices.

While investigating a robbery that had occurred earlier that day,
police in *Hopkins v. Alabama*\(^6\) were fired on from the building in
which the suspect was located. The suspect exited without his weapon
only after tear gas had been used to force him out.\(^7\) In *Hopkins*, unlike
*Taylor*, there was not just a possibility of danger, but an actual
physical threat to the policemen’s safety. When the officers were fired
upon and the weapon was not recovered during the subsequent arrest,
the police were justified in making a brief protective search of the
house. *Banks v. State*\(^6\) presented a situation in which police were in-
vestigating a kidnapping that had occurred a few minutes earlier.
Armed individuals were seen inside the apartment, and police did not
have positive identification of the four suspects. The court held that
after seven unarmed individuals exited the building, the police were
justified in making a protective search of the apartment.\(^6\) In *Taylor*,
the crime had been committed two days earlier, and at no time did the
officers observe weapons at the scene of the arrest.\(^7\) Police investigat-
ing a domestic disturbance in *People v. Olajos*\(^7\) observed two persons
in a house, one of whom shot a rifle at the officers. The police entered
the building after one of the individuals surrendered, and after a shot-
gun he was carrying was seized. Again, unlike those in *Taylor*, the
police were in actual peril, and when the rifle was not recovered and it
seemed that one suspect remained in the house, a cursory inspection of
the building was justified.\(^7\)

The exigent circumstances that existed in *Taylor* are simply not as
compelling as those in the cases cited by the *Taylor* court. Taylor’s
arrest took place peacefully two days after the crime with which he was
charged took place. The officers had not been fired on, nor did they
have reason to believe that the suspect had accomplices waiting in the

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\(^6\) *Id.* at 1031.
\(^6\) 524 F.2d 473 (5th Cir. 1975).
\(^6\) *Id.* at 474.
\(^6\) *Id.* at 93, 575 P.2d at 594.
\(^7\) *See* 298 N.C. at 407, 414, 259 S.E.2d at 503, 507.
\(^7\) 397 Mich. 629, 246 N.W.2d 828 (1976).
\(^7\) *Id.* at 631-33, 246 N.W.2d at 829.
house who would fire on them as they attempted to withdraw. In essence, the ruling in *Taylor* supports the proposition that whenever a dangerous suspect is arrested and there is reason to believe that he may have left a weapon in the building from which he has just exited, police may justifiably search the building as an incident to his arrest. This proposition is not compatible with the United States Supreme Court's holdings in *Chimel* and *Vale.*

In addition, the danger-minimizing rationale of *Taylor* does not stand up to close analysis. If the police had wished to minimize the danger facing them once the arrest had been made, the safest procedure would have been to retreat from the scene, rather than to send a single officer into the house with the purpose of flushing out any accomplice that may have been there. If there was reason to believe that accomplices remained in the house or that the defendant had left a weapon behind, the officers could have secured the arrest scene while a search warrant was obtained.

**C. Electronic Tracking Devices**

In *State v. Hendricks* a North Carolina court considered for the first time whether the installation and subsequent monitoring of an electronic tracking device planted in the container of a lawfully owned substance, known to be used as a precursor chemical in the illegal manufacture of a controlled substance, constituted a "search" under the fourth amendment of the United States Constitution. The North Carolina Court of Appeals also ruled that the use of a dog in an attempt to sniff out heroin supposedly located in a safe deposit box did not constitute a search within the meaning of the fourth amendment. State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572, 575-76 (1979). In support of its holding, the Rogers court noted that the use of the dog's sense of smell was merely a monitoring of the air in an area that was open to the public and in which defendant had no expectation of privacy. The court cited only United States v. Solis, 536 F.2d 880 (9th Cir. 1976) (use of dogs to sniff air outside trailer was not an unreasonable search under the fourth amendment), in support of this proposition. Id. See United States v. Venema, 563 F.2d 1003 (10th Cir. 1977) (use of dog to detect marijuana in rented locker not a search); United States v. Race, 529 F.2d 12 (1st Cir. 1976) (court found no constitutional issue in use of dog for purposes of checking freight in airport warehouse); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976) (use of dog to detect marijuana in luggage at airport not a search); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (use of dog to sniff marijuana in footlocker at bus terminal not a search). But see People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975) (carrying marijuana sniffing dog into airline baggage room without probable
Carolina Court of Appeals held in Hendricks that a "search" occurred upon each of these occasions: (1) an accomplice purchased a lawful substance in which officers had installed an electronic tracking device, or "beeper"; (2) the "beeper" was utilized to monitor the movements of the accomplice as he drove from Connecticut to North Carolina; (3) the accomplice subsequently carried the container and the "beeper" into defendant's home; and (4) the "beeper" was continuously monitored while located within defendant's curtilage. Since, however, a federal magistrate had approved the initial warrant for installation of the "beeper," the search was deemed reasonable under the fourth amendment.

The application for the initial warrant was based on an informant's statement that William Douglas Johnson and James Guy Parks were operating a clandestine drug laboratory in which methamphetamine was being illegally manufactured. In addition, the authorities had information that Parks, doing business as Southeastern Tank and Steel Service of Chapel Hill, had ordered chemicals from Pflatz and Bauer Chemical Company of Stamford, Connecticut and intended to pick up those orders on May 31, 1978. On May 30 the authorities presented to a federal magistrate an affidavit requesting authorization to install a radio-tracking device in a container of phenyl-2-proponone that was to be picked up by Parks. The federal magistrate issued the warrant. On May 31 Parks picked up his order and, under surveillance, drove from Connecticut to the Raleigh/Chapel Hill area and, eventually, on June 6, to defendant's home. On June 7 the surveilling agents determined that the substance had been placed either in defendant's residence or in an outbuilding. Based on these observations and other facts concerning the clandestine operation, a search warrant for defendant's home was obtained. A search was carried out on June 12 and controlled substances were

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cause is a trespass); State v. Elkins, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976) (use of dog to sniff out marijuana around packages is a search, but is reasonable under the circumstances). See generally Annot., 31 A.L.R. Fed. 931 (1977).

77. 43 N.C. App. at 253, 258 S.E.2d at 878.

78. Id. at 258-59, 258 S.E.2d at 881. See notes 93-95 and accompanying text infra.

79. The search warrant was also based on evidence that Parks had purchased chemicals and supplies from Fisher Scientific Chemical Company of Raleigh and statements by experts that the chemicals and supplies purchased by Parks could not be used in the cleaning and painting of steel tanks (the business in which defendants were purportedly engaged), but could be used only for manufacturing the controlled substance amphetamine. Additionally, agents had observed an individual wearing a chemist's smock in defendant's house. Finally, there was evidence that Park's behavior while travelling from Connecticut to North Carolina was suspicious and erratic. 43 N.C. App. at 248-250, 258 S.E.2d at 875-77.
seized. Following a guilty plea, defendant was convicted of possession of hashish and possession of marijuana. He appealed the denial of his motion to suppress evidence obtained in the search.\(^{80}\)

In reaching its decision, the court of appeals expressed concern regarding the ramifications of the increased use of electronic tracking devices in governmental surveillance. First, the court noted that "beepers" fall outside the scope of the federal wiretap statute,\(^ {81}\) because they technically do not "intercept" the contents of a wire or aural communication.\(^ {82}\) Hence, there would be no restriction on governmental use of "beepers" and other monitoring devices of this type if the installation and use of such devices did not constitute a "search" within the meaning of the fourth amendment.\(^ {83}\) Second, as pointed out in United States v. Bobisink,\(^ {84}\) "beepers" monitor not only the movements of those individuals intended to be observed, but also those of anyone else who happens to enter an automobile or other form of transportation in which a "beeper" has been installed.\(^ {85}\) Third, the court was wary of the consequences of technological advances in the use of "beepers," observing that they could easily be attached to such things as clothing or personal property.\(^ {86}\) Finally, the court emphasized that the presence of a "beeper" is not a "minimal intrusion" nor "mere technical trespass, but an extended physical intrusion" that "pierces one's privacy of location and movement, as well as one's right to protection of property against physical invasion," and "in effect, transforms private property into an instrument of surveillance, a surrogate police presence, a use unintended by the original owner."\(^ {87}\)

After distinguishing certain federal cases whose factual situations did not correspond to that of the present case,\(^ {88}\) the Hendricks court

\(^{80}\) Id. at 246-51, 258 S.E.2d at 875-77.
\(^{82}\) See id. § 2510(4).
\(^{83}\) 43 N.C. App. at 252, 258 S.E.2d at 878.
\(^{85}\) 43 N.C. App. at 252, 258 S.E.2d at 878.
\(^{86}\) Id.
\(^{87}\) Id. at 253, 258 S.E.2d at 878.
\(^{88}\) The court distinguished several cases on the ground that they involved the installation of "beepers" in contraband rather than lawfully owned substances. Id. E.g., United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Perez, 526 F.2d 859 (5th Cir.), cert. denied, 429 U.S. 846 (1976). The court also distinguished cases involving installation of "beepers" in airplanes. 43 N.C. App. at 254, 258 S.E.2d at 879. E.g., United States v. Bruneau, 594 F.2d 1190 (8th Cir.), cert. denied, 100 S. Ct. 94 (1979); United States v. Abel, 548 F.2d 591 (5th Cir.), cert. denied, 431 U.S. 956 (1977). Finally, other cases were distinguished because they did not turn on the issue of whether a search had occurred. In those cases, probable cause supported the...
considered those federal court decisions that had actually reached the issue of whether the installation or monitoring of an electronic tracking device in an automobile or in the container of a lawfully owned substance constituted a "search" under fourth amendment standards. One circuit court of appeals\(^8\) has found such an installation or monitoring to be a search while two circuit courts\(^9\) apparently have found otherwise. Concluding that "[i]n a free and democratic society in which the rights of privacy are cherished, it is reasonable for an individual to expect that he may purchase a lawful good without having that good contaminated with surreptitiously installed governmental surveillance devices,"\(^9\) the court held that a search had been conducted at all stages of the surveillance operation.\(^9\)

Except to assert generally that his fourth amendment rights had been violated, defendant had not challenged the validity of the initial warrant authorizing the installation of the "beeper." The court found that the intervention of a neutral and detached magistrate, who had decided that a search could properly be made, had afforded the requisite protection mandated by the fourth amendment.\(^9\) The court did go further, however, and asserted that the issuance of a warrant for the use of "beepers" should be grounded on a showing of particularity and probable cause. In particular, certain facts should be shown: (1) that a crime is being, is about to be, or in fact has been committed; (2) that evidence of the crime or the whereabouts of the criminals is likely to result from the tracking of the individuals or items specified in the warrant application; (3) that the individuals or property to be tracked are directly involved in the crime; (4) that the tracking is necessary because other methods of investigation would be burdensome or ineffective; (5)

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\(^9\) The Fifth Circuit Court of Appeals has considered whether the installation and use of a "beeper" to monitor the movements of a van was a search subject to the fourth amendment. Sitting en banc, an equally divided court affirmed a district court decision holding that the installation and monitoring of a "beeper" was a search. United States v. Holmes, 537 F.2d 227 (1976), affg United States v. Holmes, Crim. No. 73-27 (N.D. Fla. April 25, 1974).

\(^9\) United States v. Hufford, 539 F.2d 32, 33-34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976) (monitoring of "beeper" in drum of caffeine did not constitute a search); United States v. Clayborne, 584 F.2d 346, 351 (10th Cir. 1978) (installation of "beeper" in can of ether not a "per se" fourth amendment violation).

\(^9\) 43 N.C. App. at 255, 258 S.E.2d at 879.

\(^9\) Id. at 253, 258 S.E.2d at 878.

\(^9\) Id. at 258-59, 258 S.E.2d at 881.
that failure to give notice of the search is justified by existing exigent circumstances; and (6) that the persons or property to be traced are sufficiently identified.\textsuperscript{94} To insure that the search is as unintrusive as possible, the magistrate's order should: (1) narrowly define the purpose of the search; (2) identify the object on which and method by which the beeper is to be attached; (3) limit the time period during which the search may be conducted; (4) state conditions that, if met, will require termination of the search in advance of the specified time limit; (5) require that a report of search activities be returned; and (6) require that subsequent notice to the parties searched be provided.\textsuperscript{95}

The United States Supreme Court has not decided whether the installation or monitoring of an electronic tracking device constitutes a search within the meaning of the fourth amendment. The Circuit Courts of Appeal that have considered this issue have reached varying results, some of which rest upon a narrow interpretation of the facts. While all the Circuit Courts of Appeal that have decided the issue have agreed that the monitoring of contraband or unlawfully possessed goods does not constitute a search,\textsuperscript{96} the decisions have not been as uniform under other fact situations. Three Circuit Courts of Appeal have considered the constitutionality of the use of electronic tracking devices to monitor airplanes. The Courts of Appeal for the Eighth Circuit and the Ninth Circuit have ruled that the monitoring of an airplane does not constitute a search, although neither has decided whether the installation of a monitoring device is a search.\textsuperscript{97} On the other hand, the Fifth Circuit Court of Appeals has held that an owner's valid consent to the installation of a tracking device is sufficient to justify governmental surveillance, without deciding whether such moni-

\textsuperscript{94} Id. at 258, 258 S.E.2d at 881.

\textsuperscript{95} Id.

\textsuperscript{96} See United States v. Botero, 589 F.2d 430 (9th Cir. 1979), cert. denied, 441 U.S. 944 (1979); United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Pringle, 576 F.2d 1114 (5th Cir. 1978); United States v. Emery, 541 F.2d 887 (1st Cir. 1976); United States v. Perez, 526 F.2d 859 (5th Cir.), cert. denied, 429 U.S. 846 (1976).

For lower courts in agreement, see United States v. French, 414 F. Supp. 800 (W.D. Okla. 1976); United States v. Carpenter, 403 F. Supp. 361 (D. Mass. 1975). The rationale most commonly expressed by the courts is that an individual has no expectation of privacy in illegal substances or contraband.

\textsuperscript{97} See United States v. Bruneau, 594 F.2d 1190 (8th Cir.), cert. denied, 100 S. Ct. 94 (1979); United States v. Miroyan, 577 F.2d 489 (9th Cir.), cert. denied, 439 U.S. 896 (1978). In Bruneau defendant was unable to document his ownership of the plane, and the court held that he lacked standing to object to the installation. Further, the installation had been made before the alleged sale of the plane to defendant. 594 F.2d at 1193. In Miroyan defendant had rented the plane, and the installation of the tracking device was made pursuant to the owner's consent and prior to the time that defendant took possession. 577 F.2d at 491.
toring of an aircraft's movements actually amounts to a search within the meaning of the fourth amendment.\(^98\)

Three Circuit Courts of Appeal have decided cases that involved the use of "beepers" to monitor the movements of an automobile. The Court of Appeals for the Eighth Circuit did not rule on whether the monitoring of an automobile was a search in *United States v. Frazier*,\(^99\) but found probable cause and exigent circumstances justifying the government's action whether or not it constituted a search.\(^100\) Without deciding whether the installation of a tracking device amounts to a search, the Ninth Circuit Court of Appeals held that the monitoring of a "beeper" does not constitute a search when the device is planted in a lawfully owned substance and transported in an automobile.\(^101\) Finally, in a decision dividing its members equally, the Court of Appeals for the Fifth Circuit affirmed a lower court decision expressly holding the monitoring of a motor vehicle a search.\(^102\)

In *United States v. Clayborne*\(^103\) the Tenth Circuit Court of Appeals held that the installation and monitoring of a tracking device in a container of ether do not constitute a search. In that case, the container was eventually transported to a commercial laboratory.\(^104\) The court distinguished the expectation of privacy in a laboratory from the expectation of privacy in a home and apparently held that the monitoring of a "beeper" inside a commercial laboratory is either a reasonable search or not a search at all.\(^105\)

The case whose facts are most closely related to those of *Hendricks* and the one on which the North Carolina Court of Appeals based its

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98. *United States v. Cheshire*, 569 F.2d 887 (5th Cir.), *cert. denied*, 437 U.S. 907 (1978). In *Cheshire* the court did not decide whether a search had been made, but held that the consent of the owner was sufficient to allow monitoring of an airplane while it was being flown by defendant. *Id.* at 889.


100. *Id.* at 1324-25.

101. *United States v. Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976). In *Hufford*, installation of a "beeper" in a drum of caffeine was made pursuant to the consent of the company that sold the drum to defendant. *Id.* at 34.


103. 584 F.2d 346 (10th Cir. 1978).

104. *Id.* at 347.

105. The court's language is equivocal: "Under these special facts, we must hold that the slight intrusion was not per se in violation of the Fourth Amendment..." *Id.* at 351. A holding based on the reasonableness of the search is supported by a finding of probable cause. *Id.* at 350. The nonsearch rationale is suggested by the court's emphasis on the lack of a reasonable expectation of privacy and the insignificance of the intrusion. See *id.* at 351.
decision is *United States v. Moore*.\(^{106}\) In *Moore* the First Circuit Court of Appeals held that the installation of a "beeper" in a lawfully owned substance is a search within the meaning of the fourth amendment.\(^{107}\) Furthermore, while there may be a reduced expectation of privacy in an automobile, the monitoring of a motor vehicle still constitutes a search, and probable cause is required for it to be constitutionally reasonable.\(^{108}\) The court also held that the continued monitoring of a substance defendant carried into a residence amounted to a search of the residence that could be justified only by a warrant.\(^{109}\)

The North Carolina Court of Appeals' decision in *Hendricks* very closely follows the First Circuit Court of Appeals' analysis in *Moore*. The *Hendricks* decision ably extends fourth amendment analysis to cover an increasingly important modern police practice. The court's explicit statement of factors to be considered in the issuance of a warrant for the installation and monitoring of electronic tracking devices provides much needed guidance in this developing area of the law.

**D. Right to Speedy Trial**

In *State v. Branch*\(^{110}\) the North Carolina Court of Appeals held that a twenty-three month delay between defendant's arrest and trial was not a denial of his right to a speedy trial, despite lack of explanation for the delay by the prosecution and the unavailability of an alibi witness due to a stroke suffered two weeks prior to trial. The decision of the court of appeals and the subsequent dismissal by the supreme court of defendant's appeal for lack of a constitutional question\(^{111}\) may be read as a retreat from the holding in *State v. McKoy*.\(^{112}\) In *McKoy* the North Carolina Supreme Court held only a year ago that a twenty-two month delay between arrest and trial in a voluntary manslaughter case was an impermissible delay in the absence of reasonable explanation from the prosecution. The *McKoy* decision was surprising because little prejudice to defendant had been shown.\(^{113}\) The opposite result

\(^{106}\) 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978).

\(^{107}\) Id. at 111-12.

\(^{108}\) Id. at 111-13.

\(^{109}\) Id. at 113-14.


was reached in *Branch*, however, in which defendant more clearly demonstrated that the delay prejudiced his ability to present a defense.

Defendant in *Branch* was charged with felonious conspiracy to steal a tractor-trailer and the tobacco it contained on August 19, 1976. He was arrested August 25, 1976, but was not indicted until October 10, 1977, despite a motion for speedy trial made January 25, 1977. A motion to dismiss for lack of a speedy trial was denied November 7, 1977; however, the court ordered that trial be held during the December 12, 1977, term of court unless continued by mutual agreement of the state and defendant. Defendant was brought to trial July 31, 1978, prior to which the court denied a second motion to dismiss on grounds of denial of his right to a speedy trial. The court held defendant was not prejudiced by the delay because defendant had adequate opportunity to prepare his defense and had been released on bond. The court rejected defendant's claim that his case was damaged by the stroke of his father, an alibi witness, only two weeks before trial. Defendant was found guilty of felonious conspiracy and sentenced to four to ten years imprisonment.

The court of appeals weighed four factors delineated by the United States Supreme Court in *Barker v. Wingo* to determine whether the accused's right to a speedy trial had been breached. The factors include the length of the delay, the cause of the delay, waiver of the right by the defendant and prejudice to the defendant. The *Branch* court's evaluation of the first three factors weighed in favor of defendant. The twenty-three month delay between arrest and trial was recognized as unusual; when such a delay is shown by the defendant to be due to the willfulness or neglect of the prosecution, the burden shifts

114. 41 N.C. App. at 80, 254 S.E.2d at 256.
116. Defendant moved for a special prosecutor on November 15, 1977, and this motion was granted November 18, 1977. 41 N.C. App. at 84, 254 S.E.2d at 258.
117. *Id.*
118. *Id.* The court denied the motion because defendant failed to make any effort to preserve his father's testimony. Defendant was allowed to testify before the jury that his father was unable to testify because of his critical illness.
119. 407 U.S. 514 (1972). The Court held in this habeas corpus action that defendant Barker waived his right to a speedy trial by failing to object to the first 11 of 16 continuances received by the prosecution. The Court held that Barker was not denied his speedy trial right because he was released on bond for all but 10 months of the more than five years between his arrest and trial, he did not actively assert his speedy trial rights, and prejudice to his defense was minimal. *Id.* at 536.
120. 41 N.C. App. at 85, 254 S.E.2d at 259.
121. 407 U.S. at 530.
to the prosecution to explain the reasons for the delay.\textsuperscript{122} No explanation was offered, a factor which had been determinative in \textit{State v. McKoy}.\textsuperscript{123} The court further found that defendant had not waived his right to a speedy trial, although he had made no effort to spur the prosecution in the last nine months before trial.\textsuperscript{124} In \textit{McKoy}, defendant had made repeated demands of the prosecution, both orally and by formal motion, to bring the case to trial, while in \textit{Branch} only two motions had been made prior to the trial.

The final factor evaluated by the court was that of prejudice to the defendant. The Supreme Court in \textit{Barker v. Wingo} suggested three bases for a finding of prejudice—oppressive pretrial incarceration, anxiety caused by the pending charges and impairment of ability to defend.\textsuperscript{125} Defendant in \textit{Branch} was free on bond after his arrest; however, he lost his job due to publicity accompanying his arrest. His claim of prejudice was primarily based on the loss of his father as his sole alibi witness due to a debilitating stroke suffered two weeks prior to trial. The court rejected the claim that the loss of this witness was prejudicial because no effort had been made by defendant to preserve his father's testimony or to show how it would support a defense to the conspiracy charge.\textsuperscript{126} Thus the court, in applying the approach of \textit{Barker v. Wingo}, put little weight on one aspect of defendant's ability to present a defense that the United States Supreme Court had considered important. The Court held in \textit{Barker} that there was no denial of Barker's right to a speedy trial, in part because "there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay."\textsuperscript{127}

The \textit{McKoy} record, in comparison, did reveal evidence relating to the prospective testimony of a missing witness. That testimony would have raised the issue of self-defense. The court held, however, that prejudice to McKay was minimal because it was highly unlikely that

\textsuperscript{122} See \textit{State v. McKoy}, 294 N.C. 134, 143, 240 S.E.2d 383, 390 (1978); \textit{State v. Johnson}, 275 N.C. 264, 167 S.E.2d 274 (1969). The \textit{Branch} court cited \textit{State v. McQueen}, 295 N.C. 96, 244 S.E.2d 414 (1978), for the separate proposition that the defendant has the burden of showing that the delay prejudiced him. A long delay, standing alone, will not give rise to a presumption of prejudice to the case, although it will shift the burden to the prosecution to explain the delay. 41 N.C. App. at 86-87, 254 S.E.2d at 260.

\textsuperscript{123} 294 N.C. at 143, 240 S.E.2d at 389-90.

\textsuperscript{124} 41 N.C. App. at 86, 254 S.E.2d at 259.

\textsuperscript{125} 407 U.S. at 532.

\textsuperscript{126} 41 N.C. App. at 86, 254 S.E.2d at 259-60.

\textsuperscript{127} 407 U.S. at 534.
the testimony would have changed the result. The McKoy court was able nonetheless to find that the defendant's right to a speedy trial had been violated in spite of the lack of demonstrable prejudice to the defendant. In balancing the four factors articulated in Barker, the court apparently attributed greatest weight to the prosecution's failure to justify ten months of the delay.

State v. Branch is significant because it signals a retreat from State v. McKoy. In Branch, even with the additional element of a witness incapacitated by illness shortly before trial, the court found no denial of the right to a speedy trial by an unexplained twenty-three month delay in prosecution. The Branch court considered the determinative factor in the balancing process to be demonstrable prejudice to defendant, rather than the presence of a lengthy, unexplained delay by the prosecution which was emphasized by the McKoy court. Thus, the court was willing to find no denial of Branch's right to a speedy trial even though the prosecution had failed to explain the twenty-three month delay, defendant had not waived his right to a speedy trial and had asserted the claim that an important witness was unavailable because of the delay. This conclusion is even more surprising because McKoy was convicted of the more egregious offense of voluntary manslaughter, while Branch was convicted of felonious conspiracy to steal. By its dismissal of Branch's appeal, the North Carolina Supreme Court indicates its dissatisfaction with the McKoy holding.

E. Sentencing

1. Sentencing Changes in DUI Laws

The 1979 North Carolina General Assembly amended several sections of the motor vehicles law in order to strengthen the penalties imposed upon conviction of driving under the influence of intoxicants.

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128. 294 N.C. at 142-43, 240 S.E.2d at 389-90.


The most significant revision is of G.S. 20-179(b), which authorizes the trial judge, within his discretion, to limit the driving privileges of any person convicted for the first time of driving under the influence of liquor or drugs that impair the faculties. The trial judge's discretion to grant the limited driving privileges is subject to two new conditions in the amended statute. The person convicted must enroll in and successfully complete a program of instruction at an Alcohol and Drug Education Traffic School and must be allowed to drive to and from the required classes. The judge may authorize limited driving privileges without the condition of attending a DUI program if one of three situations is present: 1) there is no Alcohol and Drug Education school within a reasonable distance of the defendant's home, 2) the defendant is unlikely to benefit from the program because of a history of alcohol or drug abuse, or 3) there are other extenuating circumstances that make it unlikely that the defendant will benefit from the program. The judge must make and enter into the record specific findings of the reasons why the defendant is not likely to benefit from a DUI program.

Also revised was the length of time in which a prior offense will be considered for purposes of determining whether the conviction is a first conviction. This period was reduced from ten to seven years. No person may be granted limited driving privileges if his license is revoked for failure to submit to a breathalyzer test. If the judge grants limited driving privileges conditioned upon successful completion of a DUI program, the initial revocation period is six months. If no such
condition attaches, the license is revoked for one year.\textsuperscript{138} Privileges may be modified pursuant to G.S. 20-179(b)(4).\textsuperscript{139} Failure to complete the DUI program does not constitute the offense of driving with a revoked license; it is grounds for revocation of the driving privilege, however.\textsuperscript{140}

Other provisions of the amending act concern the collection of fees, establishment and maintenance of schools by the Department of Human Resources and restoration of a license before the revocation period has run.\textsuperscript{141} The 1979 amendments illustrate continuing efforts by the legislature to deal more effectively with the problem of the drinking driver.\textsuperscript{142}

2. Miscellaneous

In \textit{State v. McGuire},\textsuperscript{143} a case of first impression, the supreme court addressed the problem of a disruptive defendant at a joint trial. The court adopted the approach taken by several federal jurisdictions\textsuperscript{144} in holding that the decision whether a passive defendant is prejudiced by the behavior of a codefendant is a matter within the discretion of the trial judge. The judge must rule on a motion for severance or mistrial in light of the circumstances of the particular case. The trial judge's decision to deny such a motion will be upheld as long as it appears that he provided sufficient protection for the rights of the passive defendant.

In \textit{McGuire} the trial judge removed the disruptive codefendant from the courtroom, instructed the jury to disregard the improper behavior in making its decision, and ascertained that the jury unanimously believed it would be able to disregard the codefendant's behavior in considering charges against the passive defendant.\textsuperscript{145} The supreme court held, therefore, that the trial court's denial of a motion for severance and mistrial was not an abuse of discretion.\textsuperscript{146}

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\textsuperscript{138} \textit{id.} § 20-179(b)(1) (Cum. Supp. 1979).  \\
\textsuperscript{139} \textit{id.} § 20-179(b)(4).  \\
\textsuperscript{140} \textit{id.} § 20-179(b)(5).  \\
\textsuperscript{141} \textit{id.} §§ 20-179.2, -19.  \\
\textsuperscript{142} Drennan, \textit{supra} note 130, at 1.  \\
\textsuperscript{143} 297 N.C. 69, 254 S.E.2d 165 (1979).  \\
\textsuperscript{145} 297 N.C. at 77, 254 S.E.2d at 170.  \\
\textsuperscript{146} \textit{id.}  \\
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In *State v. Smith*, the court of appeals clarified the test of the amount and type of evidence that the state must offer with regard to each element of the offense charged in order to withstand a defendant’s motion to dismiss. Two formulations of the test had evolved in recent years—one required that there be “substantial evidence,” and the other articulated the test as “more than a scintilla of evidence” on each element. In *Smith* the court held that the two designations are interchangeable because both require that the evidence “be existing and real, not just seeming or imaginary.” The court then applied what it chose to call “the substantial evidence test” to the instant case and upheld defendant’s conviction of voluntary manslaughter. The court also labeled as dicta portions of two previous cases, *State v. Langlois*, and *State v. Coffey*, which said that the state’s evidence must exclude every reasonable hypothesis of innocence in order to overcome a defendant’s motion to dismiss.

**F. Proposed Client Perjury**

Many defense attorneys have confronted the dilemma of the criminal defendant who, before trial, proposes perjury. Considerable professional debate has resulted from differing views on the best method of handling the problem. No clear guidelines have been developed, however, to aid trial judges and attorneys in resolving the problem. The confusion engendered by the lack of guidelines was evident in two recent North Carolina cases.

In *In re Palmer*, the supreme court reviewed a judicial disciplinary proceeding against attorney Palmer for failing to withdraw as

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147. 40 N.C. App. 72, 252 S.E.2d 535 (1979).
148. Id. at 77, 252 S.E.2d at 539.
149. Id. at 78, 252 S.E.2d at 539.
151. 228 N.C. 119, 44 S.E.2d 886 (1947).
152. 40 N.C. App. at 84, 252 S.E.2d at 543. This view had also previously been rejected by the supreme court in *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956).
counsel for a criminal defendant who intended to participate in perjury. Palmer was informed prior to trial that his client had been the driver in an accident that gave rise to charges of involuntary manslaughter and the felony of leaving the scene of an accident. Pursuant to an agreement with Palmer's client, however, a codefendant intended to testify that he had been the driver because Palmer's client had previously been convicted of driving under the influence. Palmer unsuccessfully attempted to persuade his client to tell the truth, but subsequently continued to represent him. After the trial had begun, the codefendant informed his own counsel of his false admission of guilt. The codefendant's counsel informed the judge of the fraudulent plan, and the codefendant testified truthfully pursuant to a plea bargain. The jury trial of Palmer's client continued. Palmer's client presented no evidence, did not testify, and was found guilty of both charges.

Following a hearing, the trial judge in the original action determined that Palmer had violated the North Carolina State Bar Code of Professional Responsibility by failing to move to withdraw from the case. Palmer was suspended from practicing law in North Carolina for an indefinite time. Palmer appealed to the court of appeals which concluded he had not been afforded due process and remanded for a new hearing. In the subsequent hearing, charges were dismissed because the trial judge "is not satisfied by clear and convincing evidence that Palmer willfully and intentionally violated Disciplinary Rule 7-102." The court of appeals disallowed the state's petition for certiorari after

155. 296 N.C. at 639, 252 S.E.2d at 785.

156. A second conviction of driving under the influence carries a higher minimum fine and imprisonment than does a first offense. Furthermore, limited driving privileges may only be granted for a first conviction. N.C. GEN. STAT. § 20-179 (1978). Penalties have since been stiffened for second offenses in amendments effective January 1, 1980, under N.C. GEN. STAT. § 20-179 (Cum. Supp. 1979).

157. Palmer was retained counsel, and not representing an indigent defendant. 296 N.C. at 640, 252 S.E.2d at 785. A court-appointed attorney may have greater difficulty in withdrawing from the case than privately retained counsel. Freedman, supra note 153, at 1476.

158. 283 N.C. 783 (1973). The applicable rules are DR 1-102(A)(4) and (6) (general misconduct provisions) and DR 7-102(A)(5) and (A)(7) (prohibiting "knowingly making a false statement of law or fact" and assisting a "client in conduct that the lawyer knows to be illegal or fraudulent"). Also, DR 7-102(B) requires that a lawyer who becomes aware of a misrepresentation by his client attempt to convince the client to rectify the situation and, if unable to do so, move to withdraw from litigation "without necessarily revealing his reason for wishing to withdraw." 283 N.C. 783, 786-87, 835-36 (1973). The trial judge held that Palmer "had intentionally and willfully violated the North Carolina State Bar Code of Professional Responsibility," but the particular provisions are not reiterated by the supreme court. 296 N.C. at 639, 252 S.E.2d at 785.


concluding the state had no right to appeal in a disbarment proceeding. The supreme court held that the state did have the right to petition for review of a judicial disciplinary hearing, that the clear and convincing evidence rule was the appropriate standard of proof, and that Palmer had violated Disciplinary Rule 7-102. In so ruling, the court stated that Palmer's error was in not moving to withdraw after his client refused to tell the truth. It did not reach the question of what constitutes appropriate conduct when an attorney's request to withdraw is refused.

In *State v. Simms* the court of appeals did address the problem of a trial judge's refusal to allow counsel to withdraw when he believed his client was going to perjure himself at trial. Defendant presented an entirely new alibi shortly before trial, causing his counsel to believe

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161. *Id.* at 220, 245 S.E.2d at 791 (1978). The court of appeals cited *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933), for the proposition that the state has no right to appeal a trial court decision in a judicial disbarment proceeding. 37 N.C. App. at 221, 245 S.E.2d at 792. Additionally, the state's express right to appeal from a statutory disbarment proceeding had been deleted in the last amendment of the applicable statute. Law of June 13, 1975, ch. 582, § 5, N.C. Sess. Laws 656 (current version at N.C. GEN. STAT. § 84-28 (Cum. Supp. 1979)). To allow certiorari in this situation would "allow by indirect means that which is forbidden by direct means." 37 N.C. App. at 222, 245 S.E.2d at 793.

162. The court reasoned that the appellate courts have an interest in ensuring the integrity of the license to practice law in North Carolina because it permits licensed attorneys to practice in all state courts. The North Carolina constitution authorizes the supreme court to use remedial writs to supervise the courts, N.C. CONST. art. 4, § 12, and the court of appeals has similar authority over the trial courts. N.C. GEN. STAT. § 7A-32(c) (1969). Thus, the appellate courts may review, not by direct appeal but by certiorari, judicial disbarment proceedings "whether the attorney or the state has prevailed." 296 N.C. at 646, 252 S.E.2d at 789.

163. The question of the appropriate standard of proof in a disbarment proceeding was one of first impression in North Carolina. The court chose to adopt the "clear and convincing" standard used in the majority of states, rather than the "preponderance of the evidence" rule used by the North Carolina State Bar Association in statutory proceedings. Although a disbarment proceeding is "essentially civil in nature," the potential consequences are serious enough to require "a greater quantum of proof than is ordinarily required in a civil action, i.e., a preponderance of the evidence, but less than that called for to sustain a criminal conviction, i.e., proof of guilt beyond a reasonable doubt." 296 N.C. at 648, 252 S.E.2d at 790 (quoting *In re Pennica*, 36 N.J. 401, 177 A.2d 721, 730 (1962).

164. *Id.* at 649, 252 S.E.2d at 790. The court exercised its inherent authority to censure Palmer.

165. Justice Exum concurred in the result but disagreed with the court's reasoning in reaching that result. According to the trial court's factual findings, neither Palmer's client nor Palmer intended to offer a perjurious witness. The client did not testify falsely, but pleaded not guilty as he had the right to do. The client had, however, lied prior to retaining Palmer. When Palmer advised his client that he could admit he was the driver without incriminating himself once his case was dismissed, he effectively assisted his client in his fraudulent conduct. It was this transgression, not the failure to withdraw, that should have resulted in censure. *Id.* at 651-52, 252 S.E.2d at 791-92 (Exum, J., concurring in result).

166. This issue was addressed in State v. Robinson; 290 N.C. 56, 224 S.E.2d 174 (1976), discussed at text accompanying notes 179-80 infra.

defendant was planning to perjure himself. Indicating to the judge that defendant had related a new set of facts to him that morning, counsel moved to withdraw from the case. The judge devised a novel solution, denying counsel's motion to withdraw, but appointing a second attorney to aid in presentation of the case to the jury. The judge denied the second attorney's motion for a continuance, giving him only ninety minutes to prepare for trial. Upholding this solution, the court of appeals reasoned that "[d]efendant had the benefit of two lawyers"—the first, "totally familiar with all aspects of the case" and the second, "unencumbered by the conflicting statements of defendant."

These two cases illustrate the ethical and practical problems defense counsel confronts when his client proposes perjury. These problems are compounded by competing professional responsibilities and the absence of any clear guidelines for resolving the conflict. On one hand, counsel owes his client a high degree of confidentiality. But the attorney also has a duty as an officer of the court not to know-

168. Id. at 452, 255 S.E.2d at 284.
169. The propriety of informing the trial judge of a defendant's proposed perjury is a particularly controversial point. Under NORTH CAROLINA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter N.C.C.P.R.] DR 4-101, 283 N.C. at 811-12, a lawyer is prohibited from knowingly revealing "a confidence or secret of his client," absent permission from his client. In N.C.C.P.R., Formal Opinions No. 92 (1976), the view was taken that DR 7-102(B)(1) requires a lawyer to withdraw if his client insists on misrepresentation before the court; the lawyer is not, however, required to state his reason for seeking to withdraw.

The obvious difficulty is that a motion to withdraw, without explanation, will most likely be denied. See State v. Lowery, 111 Ariz. 26, 523 P.2d 54 (1974); Lessenberry v. Adkisson, 255 Ark. 285, 499 S.W.2d 835 (1973); Thornton v. United States, 357 A.2d 429 (D.C.), cert. denied, 429 U.S. 1024 (1976). For a discussion of this problem, see text accompanying notes 177-80 infra.

170. 41 N.C. App. at 452, 255 S.E.2d at 284.
171. The decision to grant or deny a motion for continuance is a matter within the discretion of the trial court. N.C.R. Civ. P. 40(b); Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976). The Fifth Circuit Court of Appeals has held that it is not an abuse of discretion to deny a continuance when defendant is vigorously represented at trial by two lawyers, although the first attorney is inhibited from full participation for some reason and the second has only brief notice before trial. United States v. Abshire, 471 F.2d 116 (5th Cir. 1972); United States v. Gower, 447 F.2d 187 (5th Cir.), cert. denied, 404 U.S. 850 (1971).

The practical problems for the attorneys in this situation are obvious. Counsel with all the relevant knowledge, including an awareness of the proposed perjury, has not really been relieved of his ethical problems because he is still, albeit indirectly, participating in the presentation of false testimony. The newly appointed counsel is handicapped by his lack of familiarity with the case and may also be burdened by the realization that the defendant is planning to perjure himself.

172. 41 N.C. App. at 454, 255 S.E.2d at 285.
173. The issue whether defendant has the right to testify when that testimony is false is discussed in Lefstein, supra note 153, at 682-83 and Polster, supra note 153, at 36-37.
174. See N.C.C.P.R., supra note 169, DR 4-101, 283 N.C. at 811-12.
ingly aid in a fraud upon the court. At least four solutions to this dilemma have been proposed, but none has been adopted in North Carolina.

The first proposal takes the view that counsel's obligation of confidentiality to his client and the necessity of promoting frankness between client and counsel so that counsel is told of all relevant facts outweigh counsel's duty toward the court. Counsel, therefore, should attempt to dissuade his client from perjuring himself, but if the client is determined to lie, counsel has no alternative to putting the client on the stand without alerting the court.

A second approach, favored by the American Bar Association [ABA], is embodied in section 7.7 of the Standards Relating to the Defense Function. Under this proposal, counsel should attempt to withdraw from the case if he is unable to dissuade his client from committing perjury, but without necessarily informing the court of the reason for his motion to withdraw. If the motion to withdraw is denied, the ABA advocates allowing the defendant to present the perjurious testimony without aid of counsel and without argument to the jury. Counsel, however, should make an appropriate record, without revealing it to the court, that defendant is testifying against counsel's advice.

The most significant problem with invoking section 7.7 is that the judge, and possibly the jury, will note the unusual manner in which counsel is treating a portion of the defendant's testimony and infer it is perjurious. This was the opinion of the North Carolina Supreme Court in State v. Robinson, when it held that the section 7.7 approach denied defendant a fair trial because it prejudiced his case before the jury.

A third proposal suggests that counsel warn his client at an initial meeting that the scope of the attorney-client privilege does not extend to perjured testimony. This serves to reduce the likelihood of the prob-

175. Id., DR 7-102, 283 N.C. at 835-36.
176. Freedman, supra note 153, at 1475-79.
177. ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.7 (Approved Draft 1971). See also Burger, supra note 153, at 13.
178. Lefstein, supra note 153, at 684.
180. Further dissatisfaction with § 7.7 was shown when it was not formally adopted in the latest revision of the ABA defense standards. The section was withdrawn prior to submission to the ABA House of Delegates and is therefore not included in the 1980 ABA STANDARDS FOR CRIMINAL JUSTICE.
lem even arising. Moreover, in following this procedure counsel has not misled the client if he subsequently reveals the proposed perjury to the court.\textsuperscript{181} If the client, even after warning, proposes perjury then counsel must choose between the ABA approach and revealing the proposed perjury to the court.\textsuperscript{182}

Finally, in one commentator's view,\textsuperscript{183} counsel should warn his client at an initial meeting that perjurious testimony is not encompassed in the attorney-client privilege. If the client begins to perjure himself on the stand, counsel will immediately inform the court and will serve as the state's chief witness in a subsequent perjury trial. The significance of \textit{Palmer} and \textit{Simms} is not that they adopt one or a combination of the proposed solutions but that they serve to emphasize the need for further analysis and ultimate adoption of a clear guide for counsel. In \textit{Palmer} the supreme court set forth its belief that counsel must attempt to dissuade a defendant from intended perjury and, failing that, move to withdraw from the case. There is no clear standard of conduct, however, for making the motion so as not to prejudice the defendant's case, nor for the trial judge to follow in assuring that the defendant is effectively represented. This is a critical gap in both the national and state codes of professional responsibility. Until some workable standards are agreed upon, the not uncommon problem of the perjurious defendant will continue to plague both courts and defense attorneys.

\section*{G. Limits to an Accused's Miranda Rights}

During 1979 the North Carolina courts decided several cases limiting the scope of an accused's rights established by the United States Supreme Court in \textit{Miranda v. Arizona}.\textsuperscript{184} Under \textit{Miranda} an accused


\textsuperscript{182} Lefstein, \textit{supra} note 153, at 691.

\textsuperscript{183} Polster, \textit{supra} note 153, at 34.

\textsuperscript{184} 384 U.S. 436 (1966). In one case the North Carolina Supreme Court held that \textit{Miranda} does not require police to inform an individual of the crime he is suspected of having committed before he can knowingly and intelligently waive his rights to remain silent and to have an attorney present during custodial interrogation. \textit{State v. Carter}, 296 N.C. 344, 250 S.E.2d 263, \textit{cert. denied}, 441 U.S. 964 (1979). That the accused is not informed of the nature of the suspicions against him is only one factor to consider when assessing the validity of his waiver of rights. \textit{Id.} at 353, 250 S.E.2d at 269. In \textit{Carter} defendant was asked to accompany police to the police station for questioning about a break-in. After he had waived his rights and been interrogated for an hour, he learned he was really being questioned about a more serious crime of homicide. \textit{Id.} at 347, 250 S.E.2d at 265. Defendant testified on \textit{voir dire} that he would not have waived his right to an attorney had he known that the investigation concerned a homicide, and that he had assumed that signing the waiver precluded him from later asserting his right to an attorney when police changed
must be informed of his constitutional rights to remain silent and to have an attorney present whenever questioning is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In *State v. Perry* the North Carolina Supreme Court clarified the test for determining when a person has been taken into custody. The court expressly adopted an objective test of custodial interrogation—whether a reasonable person would believe under the circumstances that he was free to leave—rather than a subjective test of whether the defendant believed, even unreasonably, that his freedom of movement

the subject of the interrogation. *Id.* at 347-48, 250 S.E.2d at 265. On appeal, therefore, he argued that his incriminatory statements made during the latter part of the interrogation were inadmissable because he had not knowingly and intelligently waived his *Miranda* rights. The supreme court rejected defense counsel's argument that "[T]he chilling effect . . . on an accused once a waiver has been signed, intimidat[es] him from later asking for a lawyer once the true nature of the interrogation is divulged." Brief for Defendant at 11. The court thus refused to follow a minority line of cases holding that a knowing waiver requires awareness of the crime being investigated. 296 N.C. at 350, 250 S.E.2d at 267. The court said *Miranda* did not require police to disclose the nature of the charges; rather, all *Miranda* requires is that police inform the accused of his constitutional rights so they will not be forfeited because of an unawareness of their existence. *Id.* at 352, 250 S.E.2d at 268.

Justice Exum's dissenting opinion distinguished the situation in which police simply fail to tell the accused anything about the nature of the crime being investigated from the situation in which police affirmatively misrepresent the nature of the crime under investigation. *Id.* at 354, 250 S.E.2d at 269 (Exum, J., dissenting). Justice Exum clearly believed that the facts of *Carter* fell into the latter category because it appeared that the police affirmatively misled defendant to believe the crime under investigation was much less serious than the crime they were actually investigating. *Id.* at 355-56, 250 S.E.2d at 270. Since the police told defendant they were investigating a break-in and defendant was not involved in a break-in, he naturally did not see the need for an attorney. *Id.* at 355, 250 S.E.2d at 270. Under these circumstances, Justice Exum said, an intelligent and knowing waiver of defendant's right to counsel could not have been made. *Id.* Justice Exum also argued that waiver of counsel must be specifically made, citing *State v. Butler*, 295 N.C. 250, 255, 244 S.E.2d 410, 413 (1978), and that defendant's continued answering of questions after being informed of the true nature of the investigation did not constitute a specific waiver. *Id.* at 356, 250 S.E.2d at 270. Reliance on *State v. Butler* is no longer appropriate, however, after the decision in *North Carolina v. Butler*, 441 U.S. 369 (1979), holding that a specific waiver of the right to counsel is not required. For a discussion of both *Butler* opinions, see notes 225-43 and accompanying text infra. The court's decision in *Carter* appears constitutionally sound, although it would be preferable for police, when giving *Miranda* warnings in the future, to emphasize that a waiver of one's right to have an attorney present is not final and that at any point in the questioning the accused can revoke his waiver and ask to speak to an attorney.

185. 384 U.S. at 444; *State v. Martin*, 294 N.C. 702, 707, 242 S.E.2d 762, 765 (1978). *Miranda* warnings are required in these circumstances in order to safeguard the defendant's fifth amendment privilege against self-incrimination. 384 U.S. at 467.


187. The *Perry* court noted that while it had never expressly adopted the objective test before, it had applied such a test for all practical purposes in prior cases addressing this issue. *E.g.*, *State v. Martin*, 294 N.C. 702, 707, 242 S.E.2d 762, 765 (1978) (no custodial interrogation because "all the evidence shows that defendant[s] . . . freedom to depart was not restricted" (emphasis added)); *State v. Hill*, 294 N.C. 320, 327-28, 240 S.E.2d 794, 800 (1978) (no custodial interrogation because statement was made during casual conversation between sheriff and defendant while defendant was waiting to be interrogated about an unrelated offense).
was significantly restricted.\textsuperscript{188}

In \textit{Perry} a detective was investigating a missing person report.\textsuperscript{189} Upon discovering that defendant was the last one seen with the missing person,\textsuperscript{190} the detective went to defendant's place of work and asked him if he would sit in the detective's car to talk.\textsuperscript{191} Defendant voluntarily entered the front seat of the car and shut the door.\textsuperscript{192} The detective testified on voir dire that he did not give defendant his \textit{Miranda} warnings at this time, because he did not know a crime had been committed (the victim's body was not discovered until the next day) and did not suspect the defendant of anything.\textsuperscript{193} While being questioned in the detective's car, defendant made an inculpatory statement,\textsuperscript{194} and the detective immediately took defendant to the police station.\textsuperscript{195} Defendant was frisked, arrested for carrying a concealed weapon, read his \textit{Miranda} rights and released on bond.\textsuperscript{196} Later he was convicted of first degree murder of the previously missing person.\textsuperscript{197}

Defendant contested\textsuperscript{198} the admission in evidence of inculpatory statements he made while in the detective's car, arguing that he had been subjected to custodial interrogation and should have been advised of his \textit{Miranda} rights before being questioned.\textsuperscript{199} The North Carolina Supreme Court rejected defendant's argument\textsuperscript{200} by objectively evaluating the facts and circumstances surrounding his questioning and con-

\textsuperscript{188}. 298 N.C. at 507, 259 S.E.2d at 499.
\textsuperscript{189}. \textit{Id.} at 503, 259 S.E.2d at 497.
\textsuperscript{190}. The detective questioned two little boys who testified that they went to help a lady whose car had broken down and that they introduced her to defendant, a gas station attendant they both knew. Defendant offered the woman a ride to a phone or gas station, and the last the boys saw of her she was riding in defendant's car. \textit{Id.}
\textsuperscript{191}. \textit{Id.}
\textsuperscript{192}. \textit{Id.}
\textsuperscript{193}. \textit{Id.} at 504, 259 S.E.2d at 497.
\textsuperscript{194}. The detective asked defendant about the missing person whereupon defendant denied ever having seen her or having given her a ride the previous day. \textit{Id.}
\textsuperscript{195}. \textit{Id.}
\textsuperscript{196}. \textit{Id.}
\textsuperscript{197}. Defendant was also convicted of first degree rape, kidnapping and crime against nature. He was sentenced to two consecutive life terms for murder and rape, a 30 year term for kidnapping, and a concurrent 10 year sentence for crime against nature. \textit{Id.} at 505, 259 S.E.2d at 498.
\textsuperscript{198}. The supreme court granted defendant's petition for certiorari on the sentences imposed for murder and rape since time for appeal as of right, pursuant to N.C. GEN. STAT. § 7A-27(a) (1969), had lapsed. The court also allowed defendant's motion to bypass the court of appeals for review of the sentences imposed for kidnapping and crime against nature, pursuant to \textit{Id.} § 7A-31. 298 N.C. at 505, 259 S.E.2d at 498.
\textsuperscript{199}. 298 N.C. at 506, 259 S.E.2d at 498-99.
\textsuperscript{200}. The court did, however, accept defendant's argument that his conviction for first degree rape was erroneous because the indictment for first degree rape did not properly allege all the necessary elements of the crime. The court vacated the judgment and remanded the case to the
cluding that up to the time when defendant made his inculpatory
statements, no reasonable person would have believed he was "in cu-
stody." This approach is the one adopted by the majority of courts
that have specifically addressed this issue and is the approach
the court found to have been implicitly adopted by the United States
Supreme Court in Oregon v. Mathiason. In Mathiason the Supreme
Court held that a defendant was not under custodial arrest, despite his
having been questioned in a police station. The Court focused on
the following facts: that defendant came voluntarily to the police of-

fice; that he was immediately informed he was not under arrest; and
that after the interview he left without hindrance. The Supreme
Court thus objectively analyzed the events occurring prior to, during
and after questioning to determine whether he was in custody.

The North Carolina court in Perry adopted this three factor ap-
proach for determining whether a reasonable person would have be-
lieved under the circumstances that he was free to leave. It noted
that in prior North Carolina cases in which the court had implicitly
used this approach, the court had identified several factors that were
important to its finding of noncustodial interrogation. First, prior to
questioning, the police had initially sought out the defendant to gather
information about missing persons or known crimes from him because
he happened to be a witness or had volunteered information, rather
than because they had suspected him of having committed a crime in
connection with the events being investigated. Second, during ques-
tioning, only one or two policemen were involved, and questioning was

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201. Id. at 509, 259 S.E.2d at 500.
202. See, e.g., United States v. Warren, 578 F.2d 1058, 1071 (5th Cir. 1978) (four factor test
applied to determine whether custodial interrogation occurred: (1) whether probable cause to
arrest had arisen; (2) whether the subjective intent of the officer conducting the interrogation was
to hold the defendant; (3) whether the subjective belief of the defendant was that his freedom was
significantly restricted; and (4) whether the investigation had focused on the defendant at the time
of interrogation); United States v. Hall, 421 F.2d 540, 544-45 (2d Cir. 1969), cert. denied, 397 U.S.
990 (1970) (factors to be considered include: place of questioning, number of officers present,
length of questioning, and degree to which police investigation has "focused" on defendant);
United States v. Bekowies, 432 F.2d 8, 12-14 (9th Cir. 1970); People v. P., 21 N.Y.2d 1, 9-10, 233
Mathiason, 1978 DUKE L.J. 1497, 1500-02 (collecting cases).
203. 429 U.S. 492 (1977) (per curiam).
204. Id.
205. Id. at 495.
206. 298 N.C. at 509, 295 S.E.2d at 500.
207. Id. at 508-09, 295 S.E.2d at 500.
conducted by them in an open-ended, nonthreatening manner. Finally, after questioning, the defendant was released, or was arrested only if the investigation had given the police probable cause to make an arrest. Applying this analysis to the *Perry* facts, the court concluded that the interrogation was noncustodial because the detective was investigating a routine missing person report and did not know that a crime had been committed. During the questioning defendant voluntarily entered the car and immediately gave an inculpatory statement. At that point the detective ceased questioning and took defendant to the police station where he was given his *Miranda* warnings and was allowed to leave after being arrested on an unrelated charge.

Neither the subjective nor objective test of determining whether an accused is under custodial interrogation and entitled to his *Miranda* warnings is faultless. Obviously, the most practical test in terms of proof is the objective test. As pointed out by Judge Friendly,

The Court could scarcely have intended the issue whether the person being interrogated had "been taken into custody or otherwise deprived of his liberty in any significant way" to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses.

On the other hand, the purpose of *Miranda* warnings is to reduce the inherent pressures put on an individual in coercive settings. Proponents of the subjective test, therefore, argue that "[t]he person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable."

One procedure for reducing uncertainty about whether a person being questioned is in custodial surroundings would be to require the police officer to specifically ask whether that person would be willing to

208. *Id.* at 509, 295 S.E.2d at 500.
209. *Id.*
210. *Id.*
answer some questions, but clearly emphasize that he is under absolutely no obligation to do so and is free to leave at any time. This at least would ensure that most people would be aware that they were free to leave and at the same time would avoid the necessity for police to look into the minds of everyone they question.\textsuperscript{213}

In another case, the North Carolina Supreme Court was forced to abandon its requirement that a waiver of right to counsel must be explicit to be binding. On remand from the United States Supreme Court,\textsuperscript{214} the North Carolina Supreme Court held in \textit{State v. Connley}\textsuperscript{215} that an accused need not expressly waive his right to counsel for his statements given during a subsequent custodial interrogation to be admissible against him in court.

In \textit{Connley} the trial court had found that defendant was fully advised of and understood his \textit{Miranda} rights, but had refused to sign the Advice of Rights form.\textsuperscript{216} The first time the North Carolina Supreme Court reviewed the case,\textsuperscript{217} it held that defendant’s inculpatory statements made during in-custody interrogation\textsuperscript{218} were inadmissible because there was no showing of an affirmative written or oral waiver of his right to counsel.\textsuperscript{219} Following prior North Carolina decisions,\textsuperscript{220} the court relied on the statements in \textit{Miranda} that the accused’s “failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been

\begin{itemize}
\item \textsuperscript{213} While officers’ use of this procedure would be a factor for courts to consider in the state’s favor whenever the state contended that questioning occurred in a noncustodial setting, courts still would be free to find the situation so coercive that \textit{Miranda} warnings should have been given to the defendant. For instance, coercive factors such as the surrounding of the accused by several policemen, coupled with an accused’s lack of education and legal experience, could render meaningless the officers’ assurances that the accused is under no obligation to answer their questions.
\item \textsuperscript{214} North Carolina v. Conley, 441 U.S. 929 (1979).
\item \textsuperscript{215} 297 N.C. 584, 256 S.E.2d 234, cert. denied, 100 S. Ct. 433 (1979).
\item \textsuperscript{216} Id. at 588, 256 S.E.2d at 236.
\item \textsuperscript{218} Defendant was questioned by an FBI agent in the Duke Medical Center emergency room. \textit{Id.} at 333, 245 S.E.2d at 667. The agent testified that prior to questioning he asked defendant if he would talk to him and defendant said yes. The agent handed him a copy of an Advice of Rights form, then read it orally to him and asked him if he understood his constitutional rights. He answered, “I know what it says and I understand, but I’m not going to sign it.” \textit{Id.} at 336, 245 S.E.2d at 669. Thereafter, in response to the agent’s questions, defendant told the agent how he had wounded the policeman he was charged with murdering and how he had kidnapped him at gunpoint. \textit{Id.} at 333-34, 245 S.E.2d at 667-68.
\item \textsuperscript{219} \textit{Id.} at 337-38, 245 S.E.2d at 669-70.
\end{itemize}
given." It thus concluded that Miranda requires an explicit waiver of counsel by the accused before his later statements made during custodial interrogation may be properly admitted against him.

The United States Supreme Court, however, vacated and remanded the Connley decision with instructions to reconsider the case in light of its decision in North Carolina v. Butler. In State v. Butler the North Carolina Supreme Court examined the trial court's findings that defendant was given Miranda warnings, refused to sign a waiver of rights, but said he understood his rights and would talk with arresting officers. He then made an inculpatory statement that was later admitted as evidence against him. The North Carolina Supreme Court found that there was no explicit waiver of counsel and consequently ordered a new trial for defendant. Having granted certiorari, the United States Supreme Court held in North Carolina v. Butler that an express written or oral statement is not a prerequisite to an effective waiver of Miranda rights. The test of whether the rights were validly waived is "whether the defendant in fact knowingly and voluntarily waived the [Miranda] rights." Although there is a strong presumption against waiver, in some cases the court may properly infer that a knowing and voluntary waiver occurred by looking at the particular facts and circumstances surrounding the case. Facts to consider include defendant's background and experience, his silence

221. 295 N.C. at 337, 245 S.E.2d at 669 (quoting 384 U.S. at 470).
222. Id. The supreme court ordered a new trial because it could not say with certainty that the evidence improperly admitted did not contribute to the defendant's conviction. Id. at 338, 245 S.E.2d at 670.
226. Id. at 252-53, 244 S.E.2d at 411-12. An FBI agent testified on voir dire that he arrested defendant on a fugitive warrant and immediately advised him of his rights. Defendant was then transported to a police office, again advised of his rights, given an Advice of Rights form to read, and asked if he understood his rights. He replied that he did, but refused to sign the form. Id.
227. Defendant admitted that he was present at the armed robbery where a gas station attendant was shot, but said it was his accomplice who had done the shooting. Id. at 253, 244 S.E.2d at 412.
228. Id. at 254, 244 S.E.2d at 412.
229. Id.
230. Id. at 256, 244 S.E.2d at 413. The court ordered a new trial because it found there was a reasonable possibility the improperly admitted statement contributed to his conviction. Id.
231. 441 U.S. 369 (1979) (5-3 decision).
232. Id. at 373.
233. Id.
234. Id.
235. Id. at 374-75 (quoting Johnson v. Zeibst, 304 U.S. 458, 464 (1938).
after the rights are read, his understanding of his rights and his course of conduct indicating a waiver of those rights.\textsuperscript{236} The Supreme Court noted that North Carolina was the only state that had a per se rule requiring express waiver of the right to counsel\textsuperscript{237} and that the North Carolina Supreme Court had gone beyond the mandates of the United States Constitution.\textsuperscript{238} Justice Brennan, joined by Justices Marshall and Stevens, dissented,\textsuperscript{239} referring to the \textit{Miranda} language,\textsuperscript{240} relied on by the North Carolina Supreme Court, that a \textit{specific} waiver of the right to counsel must be made before it is effective.\textsuperscript{241} Without this requirement, Justice Brennan argued, courts are free to construct inferences from ambiguous words and gestures of the defendant, yet the premise of \textit{Miranda} is that any such ambiguity should be interpreted against the interrogator.\textsuperscript{242}

Following the instructions in the majority opinion, the North Carolina Supreme Court reconsidered \textit{State v. Cohnley}\textsuperscript{243} on remand by analyzing defendant's actions and words preceding and during his interrogation and the trial court's conclusion with respect to these factors.\textsuperscript{244} The court considered defendant's free and voluntary choice to talk with the FBI agent and defendant's refusal to answer questions he did not want to answer.\textsuperscript{245} It also considered the agent's failure to exert any pressure on defendant and the agent's immediate cessation of questioning when defendant said that he wanted a lawyer.\textsuperscript{246} The court found that under these circumstances defendant's actions clearly implied a waiver of his \textit{Miranda} rights and, therefore, that he was not entitled to a new trial.\textsuperscript{247}

While the United States Supreme Court decision in \textit{Butler} does appear to ignore the language in \textit{Miranda}\textsuperscript{248} relied on by both the

\textsuperscript{236} \textit{Id.} at 373.

\textsuperscript{237} \textit{Id.} at 370, 375. The Supreme Court noted that North Carolina's position is contrary to 11 United States Court of Appeals decisions and 17 state court decisions. \textit{Id.} at 375. For a listing of these cases, see \textit{Id.} at 375 nn.5 & 6.

\textsuperscript{238} \textit{Id.} at 376.

\textsuperscript{239} \textit{Id.} at 377.

\textsuperscript{240} 384 U.S. at 470.

\textsuperscript{241} 441 U.S. at 377 (Brennan, J., dissenting).

\textsuperscript{242} \textit{Id.}

\textsuperscript{243} 297 N.C. 584, 256 S.E.2d 234 (1979).

\textsuperscript{244} \textit{Id.} at 586-89, 256 S.E.2d at 236-37.

\textsuperscript{245} \textit{Id.} at 588, 256 S.E.2d at 237.

\textsuperscript{246} \textit{Id.} at 588-89, 256 S.E.2d at 237.

\textsuperscript{247} \textit{Id.}

\textsuperscript{248} The \textit{Butler} Court quoted the language in \textit{Miranda} that an express statement can constitute a waiver but that waiver cannot be presumed simply from silence after the warnings are
North Carolina courts and the dissenting Supreme Court justices, its conclusion on this issue is consistent with the underlying purpose of *Miranda*. The apparent purpose behind *Miranda* requirements is to combat the pressures inherent in custodial interrogation by providing a defendant with warnings of his constitutional rights so he will not forfeit them simply because he is unaware of their existence.\(^{249}\) If a defendant has been read his rights and has expressly stated that he understood them, as both trial courts found in *Connley* and *Butler*,\(^ {250}\) then the purpose of the *Miranda* warnings is fulfilled despite the lack of an express waiver.\(^ {251}\) Without an express waiver requirement, however, there exists some uncertainty about whether a defendant really did understand and waive his rights, as well as the potential for abuse by courts in drawing the inference that the defendant understood his rights whenever they were read to him.\(^ {252}\) But as the Supreme Court noted, there is a strong presumption against waiver, and absent an express waiver, the prosecution carries a heavy burden of proof to show waiver actually occurred.\(^ {253}\) In order to help the prosecution carry this burden, therefore, it is still wisest for police to obtain express written waivers, or if this is not possible, to specifically ask the defendant whether he waives his right to counsel before questioning.\(^ {254}\)

In *State v. Burnett*\(^ {255}\) the North Carolina Court of Appeals diminished the protection afforded an accused under the fifth amendment right to remain silent.\(^ {256}\) The court decided in an alternative holding\(^ {257}\)

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\(^ {249}\) State v. Carter, 296 N.C. 344, 352, 250 S.E.2d 263, 268, cert. denied, 441 U.S. 964 (1979) (citing United States v. Hall, 396 F.2d 841, 844 (4th Cir. 1968)).

\(^ {250}\) 297 N.C. at 587-88, 256 S.E.2d at 236-37; 295 N.C. at 252-53, 244 S.E.2d at 411-12.


\(^ {252}\) See id. at 377 (Brennan, J., dissenting).

\(^ {253}\) Id. at 373.

\(^ {254}\) The dissenters in North Carolina v. Butler argued that because it would be so easy merely to ask a defendant if he waives his right to counsel that police ought to be explicitly required to do so. Id. at 379 (Brennan, J., dissenting).


\(^ {256}\) U.S. Const. amend. V provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The fifth amendment privilege against self-incrimination extends to state court defendants through the due process clause of the fourteenth amendment. Malloy v. Hogan, 315 U.S. 1 (1964).

\(^ {257}\) The court discussed the merits of defendants' fifth amendment argument, but noted in addition that defendants could not properly object on appeal to introduction of the contested evidence because they had failed to properly object to its introduction at trial. 39 N.C. App. at 609, 251 S.E.2d at 720. The prosecution first questioned defendant Sanders about his postarrest silence to police, without objection by defense counsel. Next the prosecution questioned defendant about his postarrest silence to the District Attorney's office, to which defense counsel objected. The court held that defendants waived their right to object to the evidence because they had once
that a prosecutor may use an accused's postarrest silence to impeach the credibility of his exculpatory testimony offered for the first time at trial if the record on appeal fails to disclose that he was read his Miranda rights.

In Burnett defendants were charged with breaking or entering a motor vehicle and felonious larceny of its contents. A police undercover agent testified that he purchased from defendants goods that were later identified as being stolen. Defendants presented evidence that a man named Ike, whose existence and whose role in the transaction defendants had not previously revealed to the authorities, sold the equipment to them and that they in turn sold it to the agent. At trial the prosecution attempted to impeach defendants' story by questioning defendant Sanders about his failure to make a statement after arrest.

After defendants were found guilty as charged, they argued on appeal that the comment on Sanders' postarrest silence should not have been permitted because it violated his fifth amendment right to remain silent. Rejecting this argument, the court of appeals distinguished the United States Supreme Court case of Doyle v. Ohio, which held that the impeachment use of silence at the time of arrest and after receiving Miranda warnings is a violation of the due process clause of the fourteenth amendment. The court said that the Doyle holding

allowed the same evidence to come in without objection. Id. at 610, 251 S.E.2d at 720. Because of this procedural holding, the court's holding on the merits is arguably dictum.


259. 39 N.C. App. at 609, 251 S.E.2d at 720.

260. Id. at 605, 251 S.E.2d at 718.

261. Id. at 606, 251 S.E.2d at 718. State's evidence showed that Ollie Garris, Jr. left photography equipment in his car on February 24, 1978, and discovered it was missing February 27. On February 25 defendants sold some photography equipment to a police undercover agent. The equipment was later identified as the equipment missing from Garris' car.

262. Id.

263. Id. at 608, 251 S.E.2d at 719. See note 257 supra.

264. Id.


266. 39 N.C. App. at 608-09, 251 S.E.2d at 719-20. U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The court of appeal's distinction between Doyle and the situation presented in Burnett is a valid one. The Supreme Court's rationale in Doyle is that it would violate the fundamental fairness assured by due process to use defendant's silence against him at trial for impeachment pur-
was based on the implicit assurance an accused receives from the *Miranda* warnings\(^{267}\) that his silence will not be used against him.\(^{268}\) The court used Justice Stevens' dissenting opinion in *Doyle*, which suggested that the *Doyle* holding is limited to situations in which *Miranda* warnings have been given,\(^{269}\) to bolster its distinction between *Doyle* and *Burnett*.\(^{270}\) The court concluded, therefore, that *Doyle* places no constitutional bars on using silence for impeachment purposes against defendants who have not been given their *Miranda* warnings.\(^{271}\)

The *Burnett* court did not discuss an opinion\(^{272}\) in which the Florida District Court of Appeals reached an opposite conclusion when faced with this identical issue. In *Webb v. State*\(^{273}\) it was also argued by the State that when a record does not reflect whether or not *Miranda* warnings were given, the State is free to confront the defendant at trial with his prior silence for impeachment purposes if he offers an exculpa-

poses after he has received assurances by police that his silence will not be used against him. The *Doyle* Court, however, never reached the issue presented in *Burnett* of whether a defendant has a separate fifth amendment right not to have his postarrest silence used against him in a situation in which he did not receive assurances at his arrest that his silence would not be used against him.

Similarly, the *Doyle* Court did not reach the question whether its decision in *Harris v. New York*, 401 U.S. 222 (1971), would permit use of postarrest silence against a defendant who had not been given his *Miranda* warnings. The Court held in *Harris* that a defendant's postarrest statements may be used against him at trial for impeachment purposes, even though the statements are inadmissible as substantive evidence of defendant's guilt because he was not given his *Miranda* warnings. By analogy, it was argued to the Court in *Doyle* that a defendant's postarrest silence should be admissible for impeachment purposes. The *Doyle* Court was not required to address this argument because defendant in *Doyle* had received *Miranda* warnings and because his right to due process had been violated.

\(^{267}\) "Prior to any questioning, the person must be warned that he has a right to remain silent, [and] that any statement he does make may be used as evidence against him . . . ." 384 U.S. at 444.

\(^{268}\) 39 N.C. App. at 609, 251 S.E.2d at 719-20. Both petitioners in *Doyle* received their *Miranda* warnings soon after their arrests. At trial petitioners presented testimony about a frame-up by the police informer, and the prosecutor cross-examined both petitioners as to why they had not told their stories to the police after they were arrested. 426 U.S. at 612-13.

\(^{269}\) "For without reliance on the waiver, the case is no different than if no warning had been given, and nothing in the Court's opinion suggests that there would be any unfairness in using petitioners' prior inconsistent silence for impeachment purposes in such a case." Id. at 624-25 (Stevens, J., joined by Blackmun and Rehnquist, JJ., dissenting).

\(^{270}\) 39 N.C. App. at 609, 251 S.E.2d at 720.

\(^{271}\) Id. In another case decided in 1979 the North Carolina Court of Appeals upheld the constitutionality of the State's direct examination of a police officer and cross-examination of defendant as to defendant's refusal, through counsel, to make a statement the day he was arrested. The court held that defendant had not timely objected to this evidence, and that its introduction did not violate *Doyle v. Ohio* anyway because the evidence was not used for impeachment purposes, but to explain the chronology of the investigation. State v. Holsclaw, 42 N.C. App. 696, 701-02, 257 S.E.2d 650, 654 (1979). For further discussion of *Holsclaw*, see this Survey, *Criminal Law: Homicide*.


\(^{273}\) Id.
tory explanation while on the witness stand. The prosecutor also relied on language from the dissenting opinion in Doyle that indicates that Doyle was limited to situations in which Miranda warnings are given. In rejecting this argument, the Florida District Court of Appeals reiterated that the language relied upon by the State was from a dissenting opinion. Furthermore, the United States Supreme Court had not reached the issue before the court in Webb because in Doyle the accused had received his Miranda warnings. In addition, the court reasoned:

[W]e note that, while Miranda warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for the fear of self-incrimination, then the mere fact the police call his attention to that right does not elevate it to any higher level. If it were otherwise, an ignorant defendant who was advised of his right to remain silent would be protected against use of his silence to impeach him at trial; but an educated, sophisticated defendant familiar with his right to remain silent who was not apprised of that right by the police would be subject to impeachment for the exercise of a known constitutionally protected right.

The Webb court's decision is preferable to the North Carolina Court of Appeals holding in Burnett on both evidentiary and constitutional grounds. While the North Carolina court held that defendant's prior silence was relevant evidence, the Supreme Court has held that silence at the time of arrest is inherently ambiguous and carries too great a potential for prejudice to be admitted in evidence. At the

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274. Id. at 1055-56. In Webb, the defendant was cross-examined about his postarrest silence after he had offered an alibi in his testimony at trial. Id. at 1055.
275. Id. at 1056.
276. Id. See notes 266-69 and accompanying text supra.
277. 347 So.2d at 1056.
278. 39 N.C. App. at 609, 251 S.E.2d at 720.
279. In United States v. Hale, 422 U.S. 171 (1975), the Court determined that the potential for prejudice in use of postarrest silence outweighs the probative value of any such evidence. Id. at 180. While Hale involved evidentiary use of postarrest silence after Miranda warnings, id. at 177, and is not binding on state courts because the Supreme Court was exercising its supervisory powers over federal courts, id. at 181, its reasoning seems equally applicable to postarrest situations in which no Miranda warnings have been given. As the Court in Doyle stated, "But in United States v. Hale we noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation." 426 U.S. at 617 n.8 (emphasis added).

The North Carolina courts have followed Hale in cases in which Miranda warnings have been given by holding that a defendant's postarrest silence is inadmissible because it is "not sufficiently probative of an inconsistency with his in-court testimony." State v. Love, 296 N.C. 194,
time of arrest and thereafter an accused may remain silent because of fear or unwillingness to incriminate another, or such a reaction may stem from the intimidating circumstances or antipathy toward police in general.280

Even more disturbing than its holding on the evidentiary issue is the Burnett court's decision on the constitutional question. It is undisputed that a person has a constitutional right to remain silent when confronted by his accusers following an arrest or in a custodial interrogation setting.281 However, if a person's silence can be used against him for impeachment purposes when Miranda warnings are not given, an unwarned arrestee personally aware of the widely known right to remain silent282 may be forced to assert his fifth amendment privilege only at the risk of later having his exercise of this right used against him.283 This approach is inconsistent with the statement in Miranda that "[i]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his [fifth amendment] privilege in the face of accusation."284 Moreover, the court of appeals' approach could induce police to forego Miranda warnings if they thought a defendant would not talk to them but would later testify.285 Under these circumstances the failure to give Miranda warnings would operate to the State's advantage since it then would not be limited by Doyle's restrictions against the use of postarrest silence in the face of Miranda warnings.286 It is hoped that the court's analysis will be viewed as mere dictum by North Carolina courts in subsequent cases.287


280. 422 U.S. at 177.


283. See Webb v. State, 347 So. 2d 1054, 1056 (Fla. Dist. Ct. App. 1977); CALIF. L. REV., supra note 258, at 1217. "The Supreme Court consistently has held that it is constitutionally impermissible to fetter a defendant's free choice of the exercise of his fifth amendment privilege against self-incrimination by attaching high costs to the exercise of that right." Id.

284. 384 U.S. at 468 n.37 (emphasis added). This language seems to apply to the situation confronting the court in Burnett because defendant's silence at and after arrest was surely claimed "in the face of accusation," despite the absence of Miranda warnings.

285. CALIF. L. REV., supra note 258, at 1214.

286. Id.

287. Such an interpretation is possible since the court apparently could have decided Burnett on procedural grounds. See note 257 supra. But see North Carolina's recent use of postarrest
H. Breathalyzer Test Administration\textsuperscript{288}

In \textit{Seders v. Powell}\textsuperscript{289} the North Carolina Supreme Court joined a majority of states\textsuperscript{290} by holding that there is no constitutional right to the assistance of counsel\textsuperscript{291} during administration of a breathalyzer test.\textsuperscript{292} The court also overruled \textit{Price v. North Carolina Dept. of Motor Vehicles},\textsuperscript{293} the 1978 court of appeals decision that interpreted G.S. 20-16.2(a)(4)\textsuperscript{294} and G.S. 15A-510(5)\textsuperscript{295} as providing a driver a reasonable time to communicate with an attorney before submitting to a breathalyzer test.\textsuperscript{296}

Petitioner in \textit{Seders} was arrested for driving under the influence\textsuperscript{297} and taken to the breathalyzer room where he was read his statutory rights, including G.S. 20-16.2(a)(4), which provides "[t]hat he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights."\textsuperscript{298} Petitioner was unable to contact his attorney within thirty silence in another context in \textit{State v. Holtsclaw}, 42 N.C. App. 696, 701-02 (1979), \textit{discussed} at note 271 \textit{supra}.

\begin{itemize}
\item For a comprehensive summary of the use of breathalyzer tests in North Carolina, see J. DRENNAN \& A. MOSELY, \textit{LEGAL ASPECTS OF CHEMICAL TESTING FOR INTOXICATION} (Administration of Justice Memo No. 79/14, Oct. 1979).
\item \textit{U.S. Const. amend. VI} provides, "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." The sixth amendment right to counsel applies to the states through the fourteenth amendment. \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963).
\item \textit{Id.} § 20-16.2(a)(4) (1978) (emphasis added). The other statutory rights provided in G.S. 20-16.2(a) require informing the accused:
\begin{enumerate}
\item That he has a right to refuse to take the test;
\item That refusal to take the test will result in revocation of his driving privilege for six months;
\item That he may have a physician, qualified technician, chemist, registered nurse or
minutes and refused to take the test at the expiration of that time limit. Subsequently his license was revoked for six months because of his wilful refusal to take the test within the statutory time limit. He appealed, asserting that he was denied both his constitutional right to the assistance of counsel before taking the test and his statutory right to communicate with an attorney within a reasonable time after arrest, pursuant to G.S. 15A-501(5). The court of appeals rejected these arguments, and the supreme court affirmed expressly overruling

other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-enforcement officer.

299. 298 N.C. at 455, 259 S.E.2d at 546-47. Seders was read his breathalyzer rights at 3:30 p.m. After unsuccessfully attempting to reach several attorneys, he contacted the wife of an attorney who promised to have her husband call him back shortly. At 4:01 p.m., before the attorney called, the trooper wrote Seders up as having failed to take the test. After finally conferring with his attorney 10 minutes later, Seders consented to take the test, but the trooper had dismantled the machine and refused to administer the test.

300. Petitioner unsuccessfully argued that the Division of Motor Vehicles presented insufficient evidence to show that petitioner wilfully refused to submit to the breathalyzer test because it did not show that he was made aware of the passage of time. His refusal, petitioner maintained, resulted from accidentally allowing the 30 minute period to elapse while waiting for his attorney to call. The supreme court found the evidence sufficient to support a finding that "[p]laintiff's action constituted a conscious choice purposefully made . . . ." Id. at 461, 259 S.E.2d at 549-550.

In another 1979 case involving wilful refusal to take the test, the North Carolina Court of Appeals held in Bell v. Powell that wilful refusal encompasses failure to follow the instructions of the breathalyzer operator, such as failure to give a sufficient breath sample to allow an accurate reading. 41 N.C. App. 131, 254 S.E.2d 191 (1979). See also Poag v. Powell, 39 N.C. App. 363, 250 S.E.2d 93, cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979) (similar facts).

301. 298 N.C. at 454, 259 S.E.2d at 546. N.C. GEN. STAT. § 20-16.2(c) (1978) provides in part: "However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Division [of Motor Vehicles] shall revoke the driving privilege of the person arrested for a period of six months."

302. N.C. GEN. STAT. § 15A-501(5) (1978) requires that a law enforcement officer "[m]ust without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so."

In addition to these right to counsel arguments and the argument that he had not wilfully refused to take the test, note 300 supra, petitioner asserted that the statutorily prescribed 30 minute time limit is irrational and violative of due process. 298 N.C. at 463, 259 S.E.2d at 551. The supreme court rejected this argument on the ground that the 30 minute period is not unreasonable in view of the legislature's conflicting desires to afford the arrestee sufficient time to contact an attorney and yet preserve evidence of his condition before it "metabolizes away." Id. Although plaintiff argued that a meaningful test result could be obtained several hours after arrest by extrapolation, the court refused to examine the merits of such a procedure, since this is the function of the legislature rather than the court. Id. at 463-64, 259 S.E.2d at 551.


304. 298 N.C. at 457, 259 S.E.2d at 547.

305. Id. at 460, 259 S.E.2d at 549. The supreme court did not agree with the Division of
Price v. North Carolina Dept. of Motor Vehicles\textsuperscript{306} upon which petitioner had relied to support his statutory claim.

The supreme court rejected petitioner's constitutional argument on two grounds. First, it held that petitioner could not successfully claim a denial of his constitutional right to counsel because license revocation proceedings are civil in nature and distinct from any criminal proceedings that may arise from the same action.\textsuperscript{307} Revocation is not punitive in nature, but is "a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked."\textsuperscript{308} As another basis for its holding, the court found that petitioner could not claim the right to consult with an attorney before the administration of a breathalyzer test because he had already consented under G.S. 20-16.2(a)\textsuperscript{309} to take the test by driving on North Carolina highways.\textsuperscript{310} In effect, the court observed, this prior consent statute operates to waive any right to counsel because there is nothing an attorney can do to void that prior consent.\textsuperscript{311} The result reached by the court is consistent with the decision in Schmerber v. California,\textsuperscript{312} in which the United States Supreme Court held that


\textsuperscript{307} 298 N.C. at 462, 259 S.E.2d at 550.

\textsuperscript{308} \textit{Id.} (quoting Joyner v. Garrett, 279 N.C. 226, 238, 182 S.E.2d 553, 562, \textit{cert. denied}, 279 N.C. 397, 183 S.E.2d 241 (1971)).

\textsuperscript{309} N.C. Gen. Stat. \S 20-16.2(a) (1978) provides in part:

\textit{Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent . . . to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor.}

\textsuperscript{310} 298 N.C. at 462-63, 259 S.E.2d at 550-51.

\textsuperscript{311} \textit{Id.} The advice of an attorney, however, could be helpful to one facing the decision whether to take a breathalyzer test, because the arrestee might reasonably want to know the potential effects of his refusal to take the test on subsequent proceedings against him as compared with the use of a high blood alcohol content reading against him if he does submit to the test. While both the results of a breathalyzer test and an arrestee's refusal to take the test are admissible against the defendant in a criminal proceeding, N.C. Gen. Stat. \S\S 20-139.1(a), -139.1(f) (1978), a refusal to submit to the test might be explicable and therefore constitute less damaging evidence than high test results. Furthermore, while refusal to submit to the test incurs an automatic six month license revocation, \textit{id.} \S 20-16.2(a)(2), the penalties for a criminal conviction for driving under the influence of alcohol can be significant. Fines range from $100 to $500 for a first offense, $200 to $500 for a second offense, and a minimum of $500 for a third or subsequent offense. \textit{Id.} \S 20-179(a)(1) to (a)(3) (Cum. Supp. 1979). If convicted, a criminal defendant also faces possible imprisonment of six months for a first offense, a year for a second offense and two years for a third or subsequent offense. \textit{Id.} For a discussion of 1979 statutory changes in sentencing procedures, see this Survey, \textit{Criminal Procedure: Sentencing}.  

\textsuperscript{312} 384 U.S. 757 (1966).
Schmerber had no right to counsel after he was arrested for drunk driving and before he was involuntarily forced to submit to a blood test.\textsuperscript{313}

Addressing petitioner's statutory claim, the North Carolina Supreme Court noted that G.S. 15A-501(5) is a general statute providing an arrestee reasonable time and opportunity to communicate with an attorney,\textsuperscript{314} while G.S. 20-16.2(a)(4) gives him the right to select a witness to view the test and to call an attorney, but adds that the testing procedure shall not be delayed "for this purpose" more than thirty minutes from the time the driver is notified of his breathalyzer rights.\textsuperscript{315}

The \textit{Price} decision\textsuperscript{316} had resolved the apparent conflict between the statutes by holding that the language "for this purpose" refers only to the right to select a witness, thus leaving the right to call an attorney governed by the reasonable time limit in G.S. 15A-501(5) rather than the thirty minute limit imposed by G.S. 20-16.2(a)(4).\textsuperscript{317}

The \textit{Seders} court analyzed legislative intent and found that the words "for this purpose" in subsection (a)(4)\textsuperscript{318} were added to the statute at the same time that the rights in subsections (a)(1) through (a)(3)\textsuperscript{319} were added.\textsuperscript{320} Thus, said the court, the language in the statute providing that the test shall not be delayed "for this purpose" refers to the "single generic right" enumerated in subsection (a)(4), i.e., the

\textsuperscript{313} \textit{Id.} at 765-66. Schmerber was appealing a criminal conviction for driving under the influence and objected to the use of blood analysis against him as a violation of his right to due process under the fourteenth amendment, his privilege against self-incrimination under the fifth amendment, his right not to be subjected to unreasonable searches and seizures under the fourth amendment and his right to counsel under the sixth amendment. The blood was extracted from him in a hospital after his counsel had advised him to refuse to take the test without the presence of his attorney. The Supreme Court rejected Schmerber's sixth amendment argument, as well as his other constitutional arguments.

The \textit{Schmerber} decision is consistent with other Supreme Court cases holding that the right to counsel attaches only at or after the initiation of judicial proceedings, Brewer v. Williams, 430 U.S. 387, 398 (1977), Kirby v. Illinois, 406 U.S. 682, 688 (1972), and not when, as in the instant case, petitioner is arrested and brought to a breathalyzer room but is not yet subject to formal charges.


\textsuperscript{317} \textit{Id.} at 702-03, 245 S.E.2d at 521. The court in \textit{Price} applied the rules of construction that statutes imposing penalties must be strictly construed, and statutes \textit{in pari materia} should be construed together. Strict construction of G.S. 20-16.2(a)(4), the \textit{Price} court said, would require the singular phrase "for this purpose" to refer to the phrase closest to it, the right to "select a witness." This interpretation would harmonize the statutes \textit{in pari materia} because G.S. 15A-501(5), allowing a reasonable time to communicate with an attorney, would then apply to the right to "call an attorney." \textit{Id.}


\textsuperscript{319} \textit{Id.} § 20-16.2(a)(1) to (3).

\textsuperscript{320} 298 N.C. at 458, 259 S.E.2d at 548.
right to call an attorney and select a witness, as opposed to the other newly-enumerated rights in subsections (a)(1) through (a)(3). The court also found this interpretation grammatically correct since the phrase "for this purpose" refers to a singular right with two components—the right to call and to select. Both components, therefore, are subject to the thirty minute time limit.

Because the court considered the language of G.S. 20-16.2(a)(4) in context with G.S. 20-16.2(a)(1) through (a)(3), its analysis of legislative intent was sound. Furthermore, as the court pointed out, the thirty minute time limit serves important policies. It provides the arrestee enough time to decide whether to take the test, but does not tie up the arresting officer for an unreasonable length of time. The thirty minute time limit is also justified because it ensures that the test will be given reasonably close to the time the driver was operating the vehicle, and therefore, that the test will be reasonably accurate.

I. Right to Counsel

The North Carolina Supreme Court considered whether an accused's sixth amendment right to counsel attaches at, or after, her

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321. Id.
322. Id. at 459, 259 S.E.2d at 548. Compare this with the grammatical interpretation advanced by the court of appeals in Price that the first clause in G.S. 20-16.2(a)(4)—the right to call an attorney and select a witness—sets out two separate rights rather than a singular right with two components. 36 N.C. App. at 701, 245 S.E.2d at 520.

The Sedor court also applied the rule of construction that when two statutes apparently overlap, the special and particular statute should control over the general statute, absent clear legislative intent to the contrary. G.S. 20-16.2 is a more specific statute dealing with breathalyzer administration, while G.S. 15A-501 deals with the rights of an arrestee in general. 298 N.C. at 459, 259 S.E.2d at 549. But see the contrary rules of construction, applied by the court of appeals in Price, discussed at note 317 supra.

323. Id. at 465, 259 S.E.2d at 552. The arresting officer must remain with the arrestee during the 30 minute time period because, if the arrestee ultimately refuses to submit to the test, the officer must then make a sworn report of his refusal to do so. See N.C. GEN. STAT. § 20-16.2(c) (1978).

324. 298 N.C. at 463, 259 S.E.2d at 551. The Sedor court also found that simply calling and obtaining advice from an attorney in most cases will take less time than finding a friend to drive to the testing room to witness the test. Therefore, the court concluded, since the legislature has given drivers 30 minutes to find a witness, it could not have found the imposition of a 30 minute time limit on the right to call an attorney unreasonable. Id. at 459-60, 259 S.E.2d at 549. Compare this with the Price reasoning that since the exercise of the right to call an attorney generally requires only a few minutes, there is no great need for a time limitation on this right, beyond the reasonable time limit imposed by G.S. 15A-501(5). 36 N.C. App. at 704, 245 S.E.2d at 521. Both courts' analyses assume that an arrestee will be able to contact an attorney quickly. The assumption is questionable especially regarding the majority of arrests, which are more likely to occur during nonbusiness hours.

325. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall . . .
initial appearance before a district court judge,\textsuperscript{326} pursuant to G.S. 15A-601(a).\textsuperscript{327} In \textit{State v. Detter}\textsuperscript{328} the court held that the initial appearance before a district court judge is not a critical stage triggering the sixth amendment right to counsel.\textsuperscript{329} Thus, defendant's conversation with a police informer after her initial appearance but before her probable cause hearing was properly admitted at trial.\textsuperscript{330}

Defendant in \textit{Detter} was arrested for the first degree murder of her husband and released on bail.\textsuperscript{331} The next day she had her initial appearance before a district court judge\textsuperscript{332} who determined the sufficiency of the charges against her, informed defendant of those charges, assured her of her right to counsel for the subsequent stages of the proceedings, and set the date for her probable cause hearing.\textsuperscript{333} Defendant

\begin{itemize}
  \item \textit{have the Assistance of Counsel for his defence.} The sixth amendment applies to states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).
  \item \textit{\textsuperscript{326} State v. Detter, 298 N.C. 604, 624, 260 S.E.2d 567, 582 (1979).}
  \item \textit{\textsuperscript{327} N.C. GEN. STAT. § 15A-601(a) (1978) provides that "[A]ny defendant charged in a magistrate's order under G.S. 15A-511 or criminal process under Article 17 of this Chapter, Criminal Process, with a crime in the original jurisdiction of the superior court must be brought before a district court judge in the judicial district in which the crime is charged to have been committed. This first appearance before a district court judge is not a critical stage of the proceedings against the defendant."}
  \item \textit{\textsuperscript{328} The stages in the criminal justice system occurring prior to a person's initial appearance before a district court judge are set forth in N.C. GEN. STAT. §§ 15A-301 to -544 (1978 & Cum. Supp. 1979).}
  \item \textit{\textsuperscript{329} Id. at 624, 260 S.E.2d at 582.}
  \item \textit{\textsuperscript{330} Id. at 626, 260 S.E.2d at 583.}
  \item \textit{\textsuperscript{331} Id. at 623, 260 S.E.2d at 581. Defendant's husband died on June 9, 1977, from arsenic poisoning allegedly administered by defendant at different times during January, February, and March 1977. Id. at 607-08, 260 S.E.2d at 572-73. Defendant was arrested for murder on Nov. 22, 1977, and was released on bail that same day. Id. at 623, 260 S.E.2d at 581.}
  \item \textit{\textsuperscript{332} Id. Defendant had no initial appearance before a magistrate, but instead had her initial appearance before a district court judge, pursuant to G.S. 15A-601(a), quoted at note \textsuperscript{327} supra.}
  \item \textit{\textsuperscript{333} 298 N.C. at 625, 260 S.E.2d at 582. The court did not in fact say that all these procedures were followed. Nevertheless, the court's discussion of these procedures as mandated by statute indicates that the procedures must have been followed in this case. See N.C. GEN. STAT. §§ 15A-603, -604(a), -605(1), -606 (1978).}
\end{itemize}
thereafter hired her own attorney. The day before her probable cause hearing, a little more than a month and a half after her initial appearance before the district court judge, the police surreptitiously taped defendant's conversation with a prosecution witness. This tape recording was later played to the jury at trial.

On appeal, defendant contended that the use of the tape violated her sixth amendment right to counsel as interpreted in the United States Supreme Court cases of Massiah v. United States and Brewer v. Williams. The court recognized that under those cases, once a critical stage in the proceedings against a defendant is reached, police

nesses, it also noted, as one of its reasons for finding the hearing to be a critical stage requiring counsel, that "counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as . . . bail." Id. at 9.

334. 298 N.C. at 626, 260 S.E.2d at 583. Defendant had hired counsel soon after her arrest and before the contested recording of her conversation with witness Brooks. Id.

335. Id. at 623, 260 S.E.2d at 581. Defendant was arrested November 22, 1977, and had her initial appearance November 23, 1977. Her conversation with the informer, Brooks, was taped January 11, 1978. Defendant had her probable cause hearing January 12, 1978, was indicted January 30, 1978, and arraigned February 27, 1978. Id.

Defendant also contested the use of another tape recorded conversation she had with prosecution witness Christy before she was arrested. Id. Because defendant clearly was not entitled to counsel before her arrest, the court focused on whether the recording of the conversation was an unreasonable search in violation of the fourth amendment or a violation of defendant's fifth amendment privilege against self-incrimination. The court properly concluded that neither the fourth nor the fifth amendment was violated and that this tape was admissible under Hoffa v. United States, 385 U.S. at 302. Instead, the defendant has talked freely to someone in whom he has misplaced his confidence. 385 U.S. at 304. Nor is there a fourth amendment violation if the informer is wired for sound so that defendant's statements are recorded. 385 U.S. at 751. Similarly, there is no fifth amendment violation when police use an informer because the defendant is under no compulsion to speak. 385 U.S. at 304.

336. 298 N.C. at 616, 260 S.E.2d at 577.
337. Id. at 619, 260 S.E.2d at 579.

Defendant also argued that imposition of the death penalty violated the constitutional proscription of ex post facto laws. Id. at 636, 260 S.E.2d at 589. Defendant's alleged acts of poisoning occurred after the United States Supreme Court declared unconstitutional North Carolina's automatic death penalty statute for first degree murder, Law of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323 (current version at N.C. GEN. STAT. § 14-17 (Cum. Supp. 1979)), but before North Carolina had enacted its new death penalty statute, Law of June 1, 1977, ch. 406, 1977 N.C. Sess. Laws 407 (codified at N.C. GEN. STAT. §§ 15A-2000 to 2003 (1978 & Cum. Supp. 1979)). The North Carolina Supreme Court held that for the purposes of determining if a punishment is barred by the ex post facto laws, murder is committed on the day of the murderous act rather than the day of death. 298 N.C. at 638, 260 S.E.2d at 590. Therefore, although decedent died June 9, 1977, after the effective date of the new death penalty, June 1, 1977, the court found the murder occurred before that time and that application of the new death penalty statute was unconstitutional. Id. at 637-38, 260 S.E.2d at 589-90. Consequently, defendant's sentence was vacated and the case was remanded for imposition of a life sentence. Id. at 639, 260 S.E.2d at 590.
may not interrogate a defendant without the presence of counsel, unless there is a valid waiver of that right. The supreme court determined, however, that there is no right to counsel at or after the initial appearance before a district court judge because it is not a critical stage. The court noted that North Carolina has two preliminary hearings—the initial appearance before a district court judge and the probable cause hearing. Although G.S. 7A-451(b)(4) provides for the right to counsel at a preliminary hearing, G.S. 15A-601(a) says that the first appearance before a district court judge is not a critical stage requiring the assistance of counsel.

The court followed G.S. 15A-601(a) because the first appearance is nonadversarial—no rights or defenses are preserved or lost at it nor are any pleas taken. In Hamilton v. Alabama, the United States

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340. 298 N.C. at 621, 260 S.E.2d at 580 (citing Brewer v. Williams, 430 U.S. 387, 397-401 (1977)). The Brewer Court, however, did not discuss the right to counsel in terms of "critical stages" of the trial. Instead, it referred to the right to counsel once adversary or judicial proceedings have begun. 430 U.S. at 398-99, 401.

341. 298 N.C. at 621, 260 S.E.2d at 580 (citing Massiah v. United States, 377 U.S. 201, 206 (1964)).

342. Id. at 624, 260 S.E.2d at 582. The court noted its previous decision, however, that the probable cause hearing is a critical stage triggering the right to counsel. Id. (citing State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978)).

343. Id. at 624, 260 S.E.2d at 582 (quoting Official Commentary to Article 30 of Chapter 15A). The preliminary hearing was divided into two parts under the Criminal Procedure Act of 1975, Chapter 15A, which became effective Sept. 1, 1975.


345. The North Carolina Supreme Court held that a defendant has the right to counsel at a preliminary hearing in State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888 (1972). Hairston, of course, was decided before the division of the preliminary hearing into two parts. See note 343 supra.


348. 298 N.C. at 624, 260 S.E.2d at 582.

Supreme Court said that when rights or defenses are preserved or lost or pleas taken, an innocent defendant without counsel may face "the danger of conviction [merely] because he does not know how to establish his innocence."\(^\text{350}\)

In determining whether defendant was improperly denied her right to counsel, the North Carolina Supreme Court failed to follow a controlling case, *Brewer v. Williams,*\(^\text{351}\) in which the United States Supreme Court said "[t]he right to counsel granted by the Sixth and Fourteenth Amendment means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."\(^\text{352}\) Until *Brewer* the Supreme Court had not clarified what it meant by the initiation of judicial proceedings.\(^\text{353}\) But in *Brewer* the Court found that defendant had been denied his right to counsel when he was questioned by police on a car ride back to Des Moines, Iowa where his arrest warrant had been issued.\(^\text{354}\) The only proceedings that had been initiated against defendant in that case were the same as those that had been brought against defendant in *Detter.* In *Brewer,* defendant contacted his attorney, turned himself in to the Davenport, Iowa police, was read his *Miranda* rights and taken before a judge who read him the charges against him from the warrant and placed him in jail until the Des Moines police arrived to take him back to Des Moines.\(^\text{355}\) In the car with the police and without counsel, defendant made incriminating

\(^{350}\) *Id.* at 54 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).


\(^{352}\) *Id.* at 398.

\(^{353}\) Before *Brewer* the Court had been confronted with cases in which defendants had been questioned without the assistance of counsel at or after: (1) arraignment (Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932)); (2) indictment (United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964)); or (3) preliminary hearing (Coleman v. Alabama, 399 U.S. 1 (1970), discussed at note 333 supra, White v. Maryland, 373 U.S. 59 (1963) (per curiam)).

\(^{354}\) 430 U.S. at 390-93, 401.

\(^{355}\) *Id.* at 390-91. The Supreme Court's statement in *Brewer* that defendant "was arraigned before a judge in Davenport on the outstanding arrest warrant," *id.* at 391, may have misled the North Carolina court in *Detter.* In *Brewer* the term "arraigned" was used in its nontechnical sense to refer to proceedings in which the judge merely read to defendant from the arrest warrant the charges against him before committing him to jail. In its technical, formal sense, an arraignment is a "[p]rocedure whereby the accused is brought before the court to plead to the criminal charge in the indictment or information. The charge is read to him and he is asked to plead 'guilty' or 'not guilty' or, where permitted, 'nolo contendere.'" *BLACK'S LAW DICTIONARY* 100 (5th ed. 1979). It is clear that in *Brewer* defendant was not forced to plead to the charges immediately after his arrest in Davenport. Rather, his formal "arraignment" took place much later in Des Moines after he was indicted. The *Detter* court was incorrect, therefore, in categorizing *Brewer* as involving a situation in which arraignment had already occurred. 298 N.C. at 623, 260 S.E.2d at
statements that he later challenged as having been made without a waiver of his constitutional right to have counsel present. The Supreme Court in Brewer found that there was "no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines." Detter cannot be distinguished from Brewer. Detter had been arrested, read her Miranda rights, and taken before a district court judge who determined the sufficiency of the charges and formally read them to her. Just as the police interrogation of defendant in Brewer without an attorney violated the sixth amendment, so also did the interrogation of Detter through an informant and in the absence of counsel violate the sixth amendment. Although the admission of the tape against defendant in this case was clearly harmless error, the North Carolina Supreme Court may have established precedent that is clearly

581. Actually, defendant in Brewer had not been formally arraigned any more than had been defendant in Detter.
356. 430 U.S. at 390-93.
357. Id. at 399.
358. 298 N.C. at 623, 260 S.E.2d at 581-82.

The Detter court further confused the issue when it said that since defendant had employed her own counsel, "the issue concerns the use of an informer to directly invade confidential communications between a defendant and his attorney," assuming the sixth amendment right to counsel had attached. 298 N.C. at 626, 260 S.E.2d at 583 (citing Weatherford v. Bursey, 429 U.S. 545 (1977), and Hoffa v. United States, 358 U.S. 293 (1966)). That issue and the cases cited discussing it are clearly irrelevant to the Detter situation. In those cases the informer had listened to communications between the defendant and his counsel and the issue was whether the defendant had been denied effective assistance of counsel. Detter, on the other hand, did not involve the taping of communications between defendant and her attorney, but involved the use of a taped conversation between defendant and a friend in the absence of defendant's attorney. This issue is clearly controlled by Massiah v. United States, 377 U.S. 201 (1964), and Brewer v. Williams, 430 U.S. 587 (1977), rather than by cases dealing with interference between defendant and counsel. Under Massiah and Brewer, once the initiation of formal judicial proceedings has begun, the defendant is entitled to the presence of counsel at any direct or indirect prosecutorial confrontation, absent a valid waiver of that right. Thus, the Detter court was incorrect in suggesting that even if the right to counsel had attached, Detter's sixth amendment rights had not been violated because there was no invasion of her confidential communications with her attorney.

360. The admission was harmless because the court found defendant's statements to the informer were not incriminatory and in no way contributed to her conviction. 298 N.C. at 626-27, 260 S.E.2d at 583-84. The court was thus not required to reach the issue of whether the right to counsel attaches at an accused's initial appearance before a district court judge, and the court's statements concerning that issue are arguably dicta. Nevertheless, the court's lengthy discussion of its position on this issue indicates that if it were confronted with a case in which the taped conversations were clearly harmful to the defendant, it would hold that the initial appearance before a district court judge does not trigger the right to counsel.
inconsistent with the United States Supreme Court’s interpretation of
the sixth amendment.

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VII. Evidence

A. Photographic Evidence

In *State v. Hunt* the supreme court created another exception to...
the general rule in North Carolina that photographs are admissible only for the limited purpose of illustrating the testimony of a witness, and not as substantive evidence. The court held "that a photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence." The Hunt decision is a logical extension of State v. Foster, a 1973 case in which the supreme court departed from the general rule and allowed the admission of a photograph of fingerprints as substantive evidence. Nevertheless, Hunt is a disappointing decision because the court failed to repudiate the "illustrative" doctrine in its entirety.

In North Carolina, a photograph is admissible as a graphic illustration of the testimony of a witness once the witness testifies that it represents a fair and accurate portrayal of the scene he or she observed. The photograph "is admissible in evidence and is subject to inspection by the jury; but the opposing party is entitled, upon request, to an instruction limiting its use in accordance with the rule." The commentators have found no persuasive rationale for North Carolina's distinction between "illustrative evidence" and substantive evidence. The better view is that, when the photographic process has

3. This rule has been firmly entrenched in North Carolina evidence law since 1929. See Honeycutt v. Cherokee Brick Co., 196 N.C. 556, 146 S.E. 227 (1929). Prior to 1929 there is conflicting case law on the issue. For a history of the development of this rule in North Carolina, see Gardner, The Camera Goes to Court, 24 N.C.L. REV. 233 (1946). See generally C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 214 (2d ed. 1972); 1 D. Stansbury, supra note 1, § 34; 3 J. Wigmore, Evidence, § 790 (J. Chadbourne rev. 1970).
4. 297 N.C. at 451, 255 S.E.2d at 185. In Hunt, the prosecutor introduced photographs of shoeprint impressions taken at the scene of the crime, and of impressions taken from defendant's shoes, which were seized from his home during a consent search. The photographs were compared by an expert witness for the state who noted the similarities between the two impressions. The expert concluded that the shoeprints at the scene of the crime were made by defendant's shoes and the photographs were admitted as substantive evidence. See id. at 450-51, 255 S.E.2d at 184-85.
6. Id. at 272-73, 200 S.E.2d at 792. The Foster court examined extensively the criticism of the general rule, but limited its holding to the facts of the case and refused to abolish the rule entirely.
7. See 1 D. Stansbury, supra note 1, § 34, at 93-96.
8. Id. at 99-100. (emphasis in original). It is questionable whether a jury gives any significance to the limiting instruction accompanying the admission of a photograph. Therefore, as a practical matter, in most cases the use for which a photograph is admitted probably will be insignificant.
9. See C. McCormick, supra note 3, § 214, at 531 (distinction "groundless"); 1 D. Stansbury, supra note 1, § 34, at 99 ("inability to grasp the significance of this distinction"); Gardner, supra note 3, at 244-46. Professor Stansbury, in his original treatise on North Carolina evidence, questioned the significance of the distinction with the following example:
If a witness says, "There was a three-foot hedge at the northeast corner of the intersec-
been properly authenticated, photographs stand as "silent witnesses" to be weighed by the jury in the same manner as any other substantive evidence. North Carolina refuses to recognize that modern developments in technology have made photographic evidence more accurate and reliable than human testimony in many cases. Instead of straining to apply the rule in extraordinary situations and creating exception," beyond question that is substantive evidence. Wherein is the difference if, instead, he testifies that a photograph at which he is looking is an accurate portrayal of the scene, and the photograph shows a hedge at the northeast corner? In the latter case the words alone are meaningless, and the photograph alone is meaningless, but the combination of the two conveys the same message as did the witness's verbal testimony in the former illustration. If the photograph is not evidence, what is it, and on what ground can its use for any purpose be justified? If it is evidence, in what respect does it fail to meet the test for "substantive" evidence?

D. STANSBURY, NORTH CAROLINA EVIDENCE § 34, at 53 (1st ed. 1946). See also 2 C. SCOTT, PHOTOGRAPHIC EVIDENCE, § 1022, at 327-28, 329-30 (2d ed. 1969). Scott criticizes the North Carolina rule and finds the "illustrative" doctrine the poorest reason for the use of photographs in that, considered by itself, it fails to recognize their independent probative value. At its weakest, photographic evidence usually either corroborates or contradicts human testimony instead of merely illustrating or explaining it, and at its best, photographic evidence may constitute an irrefutable demonstration of physical facts.

Id. at 330.

10. See 3 J. WIGMORE, supra note 3, § 790, at 220:
Even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the "pictorial testimony" rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which "speaks for itself."

11. In his criticism of the North Carolina rule, Mr. Gardner gives an extreme example of the absurd results it can produce:

If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under other deceptive visual conditions) to a diseased brain, even after the eroding effects of weeks have advanced the process of forgetting, the owner of the eye—though he may be a simple soul of limited intelligence and an even more limited vocabulary—will be permitted to describe in court what he thinks he remembers that he saw; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy that view is kept from the jury, perhaps... or its use is sharply circumscribed (under the "illustration" rule). Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-of-the-street.

Gardner, supra note 3, at 245.


The application of the "illustrative" doctrine to x-ray photographs has been particularly criticized. See Baer, Radar Goes to Court, 33 N.C.L. REV. 355, 362 (1955) ("instead of the x-ray photo explaining and making clear the testimony of the witness to the jury... the physician is explaining and making clear to the jury the significance of the x-ray itself"); Gardner, supra note 3, at 244-45. Realistically, photographs such as x-rays and those taken by hidden cameras (where no one observes a defendant's actions) can be admitted only as silent witnesses. No one else has observed the thing depicted. See 1 D. STANSBURY, supra note 1, § 34, at 61-62 n.23 (Cum. Supp. 1979).
tions to the rule in others,13 the court should allow the use of all photographs as substantive evidence once an adequate foundation has been laid for their admission.14 It is time for the court to follow the advice of Dean Henry P. Brandis, Jr. that "the illustrative doctrine should be given a death sentence, to which, even in Washington, there should be no constitutional objection."15

B. Admissions16

Whether classified as nonhearsay17 or as an exception to the hearsay rule,18 a party's own relevant statements are generally admissible as substantive evidence against that party, unless excluded by a specific statute or rule.19 Admissions can be classified as either judicial or evi-


14. See, e.g., Bergner v. State, 397 N.E.2d 1012 (Ind. App. 1979) (citing State v. Hunt with approval and adopting the "silent witness" theory as an alternative basis for admissibility of photographic evidence). The Bergner court commended other courts for not blindly following the "illustrative" doctrine, noting that these jurisdictions have analyzed the theory behind the traditional requirements, and have recognized the probative potential of photographic evidence. As a result, these courts view photographic evidence in a modern, realistic light and admit photographs where their authenticity can be sufficiently established in view of the context in which the photographs are sought to be admitted. We think this creative analysis and refusal to follow traditional standards merely because such standards exist is laudable as the highest form of a progressive judiciary.

Id. at 1016.


16. In State v. Burnett, 39 N.C. App. 605, 251 S.E.2d 717, cert. denied, 297 N.C. 302, 254 S.E.2d 924 (1979), the court of appeals allowed the silence of a defendant after arrest to be used against him as an admission for impeachment purposes. For a criticism of this case, see this Survey, Criminal Procedure.


19. 2 D. Stansbury, supra note 1, § 167, at 4. See generally 4 J. Wigmore, Evidence, § 1048 (J. Chadbourne rev. 1972); Morgan, Admissions, 12 Wash. L. Rev. 181 (1937). For a list of exceptions in North Carolina to the general rule of admissibility, see 2 D. Stansbury, supra note 1, § 167, at 4 n.10. An admission should be clearly distinguished from a declaration against interest, although courts often confuse the two. See C. McCormick, supra note 3, §§ 276-280; 1 D. Stansbury, supra note 1, § 147; 4 J. Wigmore, supra note 19, § 1049.
A judicial admission is a formal concession that removes a disputed fact from contention and dispenses with the need for proof of the admitted fact. Final pleadings, formal pretrial admissions, and stipulations are examples of this type of admission. An evidential admission, on the other hand, is not conclusive and may be explained or contradicted by other evidence. Examples include oral and written statements, or conduct, of the party or someone vicariously related to the party.

In *Woods v. Smith* the North Carolina Supreme Court faced the question whether a party should be conclusively bound by his own adverse testimony despite the existence of other contradictory evidence, and adopted the position that a party's adverse statements are to be treated as evidential admissions only, rather than conclusive judicial admissions. *Woods* arose out of an automobile accident that injured plaintiff, a passenger in her own car, operated by defendant Smith at the time it collided with a car driven by defendant Stallings. Plaintiff alleged that both Smith and Stallings were negligent. The defendants denied their own negligence, and each admitted the negligence of the other. The trial court entered summary judgment for both defendants, and plaintiff appealed.

On his motion for summary judgment, Smith argued that plaintiff's deposition testimony so unequivocally repudiated her allegation

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20. *See generally* McCORMICK, supra note 3, § 262, at 630; 2 D. STANSBURY, supra note 1, § 166.
21. C. McCORMICK, supra note 3, § 262, at 630. Mr. Stansbury offers the following description of a judicial admission:

It is binding in every sense. Evidence offered in denial of the admitted fact should undoubtedly be rejected. Evidence offered in affirmance of such fact may properly be excluded on the ground of irrelevancy, and exclusion certainly serves the purpose of judicial admissions—that is, the promotion of trial efficiency.

2 D. STANSBURY, supra note 1, § 166, at 1-3.
22. 2 D. STANSBURY, supra note 1, § 166, at 1.
23. Id. at 4.
24. Id.; see id. §§ 167-181.
26. This issue has been described as "one of the most troublesome questions in the law of evidence and has been the subject of much diversity of judicial opinion." 32A C.J.S. Evidence § 1040(3), at 776 (1964).
27. 297 N.C. at 373-74, 255 S.E.2d at 181.
28. 297 N.C. at 365, 255 S.E.2d at 176.
29. Id.
30. The supreme court granted certiorari to review the entry of summary judgment in favor of Stallings after the court of appeals denied a similar writ. At the same time, the court certified for review plaintiff's appeal from the entry of summary judgment in favor of Smith. Id. at 366, 255 S.E.2d at 176.
of negligence against him that she should not be allowed to rely on other contrary evidence to support her claim. Smith relied on *Cogdill v. Scales*, a case of first impression, in which the North Carolina Supreme Court examined three major approaches other jurisdictions have taken when faced with the issue of the conclusiveness of a party’s adverse testimony. Rather than adopt one of these views, however, the *Cogdill* court, in a narrow decision limited to its facts, held that “[i]f, at the close of the evidence, a plaintiff’s own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant’s motion for a directed verdict should be allowed.”

Justice Brock, writing for a unanimous court in *Woods*, distinguished *Cogdill* and reversed the entry of summary judgment in favor of Smith. The court characterized plaintiff’s deposition testimony as indicating “her continuing uncertainty about the events that led up to the accident” and found it “distinguishable from the unequivocal repudiation of the allegations of the complaint that were present in *Cogdill*.” Unconstrained by *Cogdill*, the *Woods* court was

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31. *Id.* at 365-66, 255 S.E.2d at 176. At the hearing the court had before it the depositions of plaintiff, both defendants, Stallings’ daughter (a passenger in the Stallings car), and the investigating patrolman. The judge accepted the argument and entered summary judgment. *Id.*


33. 290 N.C. at 40-43, 224 S.E.2d at 609-11. See notes 39-41 and accompanying text infra.

34. *Id.* at 44, 224 S.E.2d at 611.

35. 297 N.C. at 372, 255 S.E.2d at 180.

36. *Id.* (emphasis in original). Plaintiff had claimed that Smith was negligent in not keeping a proper lookout, speeding, and failing to reduce speed to avoid an accident, among other things. *Id.* at 370-71, 255 S.E.2d at 179. The court quoted extensively from the deposition of plaintiff to illustrate the equivocal and uncertain nature of the testimony:

‘[I]t was just that we were going down the road and it was just one of those things, just, I just saw a flash of light . . . then it was an accident. It happened so quickly I didn’t have a long time to sit and watch it happening. The accident happened very suddenly . . . .

. . . .

To my knowledge he [Smith] appeared to be looking out where he was driving and he had control of the car.

. . . .

I said the accident happened very quickly . . . I don’t think he [Smith] had time to turn the car and get out of the way and keep from being hit.

. . . .

The only thing I am really sure about is that I just saw a flash of light.’

297 N.C. at 371-72, 255 S.E.2d at 179-80. Compare the unequivocal testimony in *Cogdill*. 290 N.C. at 33-37, 224 S.E.2d at 606-08.

37. 297 N.C. at 372, 255 S.E.2d at 180. Discussing the testimony in *Cogdill*, the *Woods* court noted that:
required to affirmatively adopt one of the three major approaches courts follow in this area. These three views, often overlapping and quite nebulous, are summarized by McCormick as follows:

First, the view that a party's testimony in this respect is like the testimony of any other witness called by the party, that is, the party is free . . . to elicit contradictory testimony from the witness himself or to call other witnesses to contradict him . . .

Second, the view that the party's testimony is not conclusive against contradiction except when he testifies unequivocally to matters "in his peculiar knowledge." . . .

Third, the doctrine that a party's testimony adverse to himself is in general to be treated as a judicial admission, conclusive against him, so that he may not bring other witnesses to contradict it, and if he or his adversary does elicit such conflicting testimony it will be disregarded.

The Woods court adopted the first approach—that a party's adverse testimony should be treated as an evidential rather than a judicial admission. The court, however, recognized two exceptions to this general rule. First, under the Cogdill rule, unequivocal, adverse testimony will be treated as binding judicial admissions in a case where the

Mrs. Cogdill testified to concrete facts, not matters of opinion, estimate, appearance, inference, or uncertain memory; her testimony was deliberate, unequivocal and repeated; her statements were diametrically opposed to the essential allegations of her complaint and destroyed the theory on which she brought her action; her attorney did not seek to elicit any remedial testimony from her; and she manifested an intent to be bound by repeating her testimony even after being warned of the consequences of perjury.

Id. at 370, 255 S.E.2d at 179. See Cogdill v. Scates, 290 N.C. at 33-37, 224 S.E.2d at 606-08, noted at 55 N.C.L. REV. 1155 (1977); 12 WAKE FOREST L. REV. 1113 (1976).

38. The court summarily rejected plaintiff's contention that deposition testimony should be treated differently from testimony at trial. 297 N.C. at 373 & n.1, 255 S.E.2d at 180-81 & n.1.


40. "These matters may consist of subjective facts, such as [the party's] own knowledge or motivation, or they may consist of objective facts observed by him." C. MCCORMICK, supra note 3, § 266, at 637.

41. See id. § 266, at 637-38:

Obviously, this general rule demands many qualifications and exceptions. Among these are the following: (1) The party is free to contradict, and thus correct, his own testimony; only when his own testimony taken as a whole unequivocally affirms the statement does the rule of conclusiveness apply. The rule is inapplicable, moreover, when the party's testimony (2) may be attributable to inadvertence or to a foreigner's mistake as to meaning, or (3) is merely negative in effect, or (4) is avowedly uncertain, or is an estimate or opinion rather than an assertion of concrete fact, or (5) relates to a matter as to which the party could easily have been mistaken, such as the swiftly moving events just preceding a collision in which the party was injured.

42. 297 N.C. at 373-74, 255 S.E.2d at 181.
facts are similar to those in Cogdill. Second, summary judgment or a directed verdict most likely will be proper "when a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of his complaint." Applying these rules to the facts in Woods, the court found that neither exception was applicable and that sufficient evidence existed to contradict plaintiff's adverse testimony and support a finding that Smith was negligent. Therefore the court held that the trial judge erred in not allowing the case to go to the jury.

The decision of the supreme court is a sound one. Of the three views discussed, treating a party's adverse testimony as an evidential admission is the preferable rule. In most situations, a party's testimony should be weighed by the jury in the same manner as that presented by any other witness. Only in the most extreme cases

43. Id. at 374, 255 S.E.2d at 181. See text accompanying notes 35 & 37 supra; C. McCormick, supra note 3, § 266, at 638 n.82; Annot., 169 A.L.R. 798, § III (1947).
44. 297 N.C. at 374, 255 S.E.2d at 181 (emphasis in original). See Thompson v. Purcell Construction Co., 160 N.C. 390, 76 S.E. 266 (1912); Fulghum v. Atlantic Coast Line R.R., 158 N.C. 555, 74 S.E. 584 (1912); C. McCormick, supra note 3, § 266, at 636-37; Annot., 169 A.L.R. 798, § II (1947). This "exception" appears to be the only logical application of directed verdict and summary judgment proof standards to the evidential admission.
45. 297 N.C. at 374-75, 255 S.E.2d at 181-82. Stallings testified at her deposition that the car driven by Smith crossed into her lane of traffic. Stallings' daughter, a passenger in his car, testified at her deposition that Smith was speeding and crossed into the lane of the Stallings car before the accident. Id. at 372-73, 255 S.E.2d at 180.
46. This is the position of the major commentators. See, e.g., C. McCormick, supra note 3, § 266, at 638 ("preferable in policy and most in accord with the tradition of jury trial"); 9 J. Wigmore, supra note 39, § 2594a, at 597-601.
47. McCormick notes, however, that a party may have a hard time persuading a jury that the facts are other than as the party himself has testified. "[O]bviously the trial judge would often be justified in saying, on motion for directed verdict, that reasonable minds in the particular state of
should a court apply the *Cogdill* exception and give a binding effect to a party's testimony.\textsuperscript{48} Before it is treated as a judicial admission, testimony should be consistent, definite, and clearly unequivocal and should present a strict repudiation or formal concession of the party's claim, in the nature of a waiver.\textsuperscript{49} Injustice generally will be avoided if a party's testimony is treated as a judicial admission only in rare cases, with any doubts resolved in favor of the general rule of evidential admissions.

The *Woods* case also presented for the first time the question whether pleadings against multiple defendants framed *in the alternative* constitute binding judicial admissions of the facts alleged.\textsuperscript{50} In her complaint, plaintiff alleged that both defendants, Smith and Stallings, were negligent and claimed in the alternative that the negligence of "either or both" of the defendants caused the accident.\textsuperscript{51} The two defendants were properly joined under N.C.R. Civ. P. 20(a).\textsuperscript{52} Stallings moved for summary judgment on the grounds that (1) any negligence of Smith, the driver of plaintiff's car, should be imputed as a matter of the proof could only believe that the party's testimony against his interest was true." C. McCormick, supra note 3, \S 266, at 637.

\textsuperscript{48} Even McCormick, who argues for the evidential admissions approach, concedes that in some extreme cases a party's testimony must be given a conclusive effect. But this should occur only when "the party and his counsel advisedly manifest an intention to be bound." Id. \S 266, at 638 n.82.

The *Cogdill* court felt that to allow plaintiff's testimony to be treated other than as a binding admission, when she so directly repudiated her allegations even after consultation with her attorney, "would be contra bonos mores [against good morals] and a violation of public policy." 290 N.C. at 44, 224 S.E.2d at 612.

\textsuperscript{49} See generally 9 J. Wigmore, supra note 39, \S 2588, at 586. Cf. Alamo v. Del Rosario, 98 F.2d 328, 330 (D.C. App. 1938) ("Mere testimony, though it come from a party, is not 'by intention an act of waiver.' A witness is not selling something or giving something away, but simply reporting something. 'The testimony of parties to a suit must be regarded as evidence, not as facts admitted.'").

\textsuperscript{50} The *Woods* court framed the issue as

[W]hether the allegation of negligence against one defendant in the complaint of a plaintiff who joins two defendants asserting claims of negligence against them *in the alternative*, when admitted by the second defendant in his answer, is a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to the plaintiff?

297 N.C. at 366, 255 S.E.2d at 177 (emphasis in original).

\textsuperscript{51} Id. at 365, 255 S.E.2d at 176.

\textsuperscript{52} Id. at 364, 255 S.E.2d at 176. Rule 20 allows permissive joinder of parties and provides in part that:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or *in the alternative*, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action.

N.C.R. Civ. P. 20(a) (emphasis added).
law to plaintiff, the owner of the car, and (2) plaintiff's allegations of negligence against Smith in her complaint constituted binding judicial admissions by plaintiff of Smith's negligence. Under Stallings' theory, the negligence of Smith alleged in plaintiff's complaint would be treated as a judicial admission and imputed to plaintiff, barring her recovery against Stallings as a matter of law because of the contributory negligence doctrine. The trial judge accepted this argument and granted summary judgment for Stallings.

The supreme court reversed and, following the clear majority rule in other jurisdictions, held that such alternative claims could not form the basis for binding judicial admissions. The court acknowledged the general rule that a party is conclusively bound by his final pleadings, but found that such a rule should not be applied to alternative pleadings. Treating alternative pleadings as judicial admissions “could well defeat the salutary purposes of Rule 20's joinder provisions.” Alternative joinder of defendants allows a plaintiff to assert claims against multiple defendants when he is unsure of the exact defendant from whom he is entitled to recover. The court said that

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53. In framing the issue in this case, the court assumed that the negligence of Smith, if any, would be imputed to plaintiff. It did not have to decide if negligence would indeed be imputed, however, because the admissions issue was answered in the negative. 297 N.C. at 366-67, 255 S.E.2d at 177.
54. Id. at 365, 255 S.E.2d at 176.
55. Id. at 365, 255 S.E.2d at 176, 177.
56. Id. at 365, 255 S.E.2d at 176.
57. “[T]he decisions with seeming unanimity deny [inconsistent, alternative, and hypothetical claims] status as judicial admissions, and generally disallow them as evidential admissions.” C. McCormick, supra note 3, § 265, at 634. Although the express language in Woods refers only to the use of alternative pleadings as judicial admissions, the underlying reasons for the decision apply equally to the treatment of alternative pleadings as evidential admissions. See notes 61-66 and accompanying text infra.
58. 297 N.C. at 369, 255 S.E.2d at 178.
59. Id. at 368, 255 S.E.2d at 178. See, e.g., 2 D. Stansbury, supra note 1, § 177, at 37.
61. 297 N.C. at 368, 255 S.E.2d at 178. See C. McCormick, supra note 3, § 265, at 634; 4 J. Wigmore, supra note 19, § 1064, at 70.
62. “The need for such joinder most often arises when 'the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint.'” 297 N.C. at 367, 255 S.E.2d at 177 (quoting 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1654, at 278). See Aetna Ins. Co. v. Carroll's Transfer, Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972); Conger v. Travelers Ins. Co. 260 N.C. 112, 131 S.E.2d 699 (1963); 1 McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE 2D § 661 (1956); Brandis & Graham, Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina, 34 N.C.L. REV. 405.
Woods was “a classic example of the need for joinder of defendants in the alternative” because it was clear that plaintiff’s injuries were caused by one or both of the defendants.63

The most important reason for not treating alternative pleadings as binding admissions lies in the very nature of alternative pleadings themselves. Such pleadings are based on uncertainty and are not admissions of facts.64 The pleader “is not ‘admitting’ anything other than his uncertainty.”65 The burden of determining which one of several defendants is liable to the plaintiff is for the judge or jury, and should not be shifted to the plaintiff through the recognition of judicial admissions in alternative pleadings.66 Therefore, the Woods court properly concluded that alternative pleadings are not conclusively binding upon a party.

C. Privileged Communications

Statutory protection against forced disclosure of communications between a physician and his patient has existed in North Carolina since 1885.67 This physician-patient privilege, which did not exist at common law, was created primarily to encourage full disclosure to a physician so that proper treatment could be accomplished.68 It applies not

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63. 297 N.C. at 367, 255 S.E.2d at 177.
64. See C. Mccormick, supra note 3, § 265, at 634 (“[P]leadings of this nature are directed primarily to giving notice and lack the essential character of an admission.”).
66. This point was acknowledged by the Illinois Court of Appeals in McCormick v. Kopmann, id:

Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader. The pleader states the facts in the alternative because he is uncertain as to the true facts. . . . An essential objective of alternative pleading is to relieve the pleader of the necessity and therefore the risk of making a binding choice, which is no more than to say that he is relieved of making an admission.

Id.
68. “It is the purpose of such statutes to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination.” Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962). See C. Mccormick, supra note 3, § 98, at 212-13; 8 J. Wigmore, supra note 67, § 2380a, at 828-32.
only to oral or written communications, but also to any knowledge a physician may obtain in the course of treating a patient. The privilege, however, is qualified. A court may order disclosure of privileged information when necessary to the proper administration of justice. In In re Albemarle Mental Health Center the court of appeals interpreted legislative intent to determine the relationship between the qualifying provisions of the physician-patient privilege, G.S. 8-53, and the psychologist-client privilege, G.S. 8-53.3. The Health Center court held

71. N.C. GEN. STAT. § 8-53 (Cum. Supp. 1979) provides:

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin; provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

In 1979 the supreme court interpreted and applied the physician-patient privileges of N.C. GEN. STAT. §§ 8-53 and 122-8.1 (Cum. Supp. 1979) in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979). The Smith decision involved tape records of a meeting of the Credentials Committee of Broughton Hospital, a state hospital for the mentally disordered. Plaintiff, at the time the superintendent of the hospital, refused to turn over the tapes when requested by his superiors in the course of an investigation into the deaths of two patients at the hospital. Id. at 129, 257 S.E.2d at 407. He claimed that to comply with the request would require him to violate the physician-patient privilege. Id. at 130, 257 S.E.2d at 407. The information on the tapes pertained to the hospital staff's discovery of and response to the deaths and contained no discussion of the psychiatric or medical treatment administered the two patients while at Broughton. Id.

The supreme court, finding the privilege inapplicable to the information disclosed at the meeting, cited three separate grounds for the decision, any one of which would have supported the denial of the privilege. First, the only arguably privileged information related to facts already on public record in the death certificate of the patients. "[N]o privilege of confidentiality can attach to information which is already public." Id. at 131, S.E.2d at 408. Second, even if the tapes contained information otherwise privileged, the court found that G.S. 122-8.1 did not protect information from disclosure to the superiors of the physician "attempting to investigate complaints of improprieties or neglect on the part of members of the hospital medical staff." The court felt that the patient's expectation of confidentiality and privacy "does not extend to hospital administrators or employees who need the information in order to facilitate the patient's treatment or properly administer the hospital in accordance with approved standards." Id. at 131-32, 257 S.E.2d at 409. Finally, the court held that the privilege does not extend to information obtained by observations made after the patient's death because treatment is not then possible. Id. at 131, 257 S.E.2d at 408.


72. N.C. GEN. STAT. § 8-53.3 (1969) provides:

No person, duly authorized as a practicing psychologist or psychological examiner, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional psychological services, and which information was necessary to enable him to render professional psychological services: Pro-
that, despite the differences in the qualifying language, the statutes should be construed together in order to allow a trial court to compel **pretrial** disclosure of privileged communications under both privileges where necessary to assure the proper administration of justice.\(^7\)

Prior to filing an indictment, a district attorney made a motion in the Superior Court of Pasquotank County seeking discovery of information from certain professional employees of the Albemarle Mental Health Center pertaining to an alleged homicide.\(^4\) The motion requested the court to conduct an immediate **in camera** examination of the employees to determine if the information sought was privileged under G.S. 8-53.3, and if so, whether disclosure of the information was necessary to a proper administration of justice.\(^7\) After hearing arguments on the motion the superior court judge dismissed the action, deciding that his court was without jurisdiction over the mental health center or its employees because judicial proceedings had not been initiated.\(^7\)

The court of appeals, however, found the case to be in the nature of a special proceeding.\(^7\) Although admitting that the action was not commenced according to statutory requirements,\(^7\) the court concluded that the superior court had an inherent power to assume jurisdiction in such an extraordinary situation.\(^7\) The *Health Center* opinion focused on the qualifying language of G.S. 8-53 and G.S. 8-53.3 that allows a court to order disclosure of privileged information when necessary to the proper administration of justice.\(^8\) Disclosure of communications between a physician and his patient, generally protected by G.S. 8-53,

\[\text{See generally Comment, supra note 67, at 643-44.}\]

\(73\). 42 N.C. App. at 299-300, 256 S.E.2d at 823.

\(74\). *Id.* at 293, 256 S.E.2d at 819. The district attorney had been notified by the director of the health center that certain professional employees of the center had received the information from a client of the center. The director, however, would not disclose any details of the information because he had been advised by counsel that it was privileged. *Id.*

\(75\). *Id.* at 293-94, 256 S.E.2d at 819-20.

\(76\). *Id.* at 294-95, 256 S.E.2d at 820.

\(77\). *Id.* at 295, 256 S.E.2d at 820.

\(78\). *Id.* at 295-96, 256 S.E.2d at 821. *See* N.C.R. CIV. P. 3 (filing of complaint, or issuance of summons followed by complaint within 20 days).

\(79\). "We believe that this is one of those extraordinary proceedings and that our rules of procedure should not be construed so literally as to frustrate the administration of justice." 2 N.C. App. at 296, 256 S.E.2d at 821.

\(80\). The court of appeals concluded that the legislature, by failing to provide statutory guidelines for implementation of the G.S. 8-53 and G.S. 8-53.3 qualifying provisions, intended for the courts to perform that task. Therefore, a trial court can assume jurisdiction and compel disclosure of otherwise privileged communications as a part of its inherent power to issue all orders neces-
can be compelled either before or at trial. Under G.S. 8-53.3, however, which protects psychologist-client communications of the type at issue in the *Health Center* case, the qualifying language refers only to the judicial right to compel disclosure at trial. While acknowledging that G.S. 8-53.3 did not expressly provide for disclosure *prior to trial* as requested by the district attorney, the court found it inconsistent to allow pretrial disclosure under G.S. 8-53 and not under G.S. 8-53.3, and thus assumed that the legislature did not intend such an inconsistency. The court viewed the language of both statutes as "sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice." Therefore, the decision of the superior court was reversed, and an *in camera* hearing was ordered.

The present qualifying provision of G.S. 8-53.3, which simply states that "the presiding judge . . . may compel . . . disclosure," is identical to the qualifying language found in G.S. 8-53 before the statute was amended in 1969 to provide that disclosure was proper "at the trial or prior thereto." Before the amendment, the North Carolina Supreme Court held that disclosure of information protected by G.S. 8-53 could be ordered only by the presiding superior court judge at the

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81. The qualifying provision for G.S. 8-53 states "that the court, either at the trial or prior thereto, . . . may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." N.C. GEN. STAT. § 8-53 (Cum. Supp. 1979).

82. The qualifying provision for G.S. 8-53.3 provides "that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." N.C. GEN. STAT. § 8-53.3 (1969).

83. 42 N.C. App. at 297, 256 S.E.2d at 822.

84. *Id.* at 298, 256 S.E.2d at 822.

85. See notes 71, 81 supra.

86. The heart of a statute is the intention of the law-making body. In performing our judicial tasks, 'we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language.' In construing a statute, we must view it as giving effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia. *Id.* (quoting Ballard v. City of Charlotte, 235 N.C. 484, 487, 70 S.E.2d 575, 577 (1952)).

trial, and not prior to the trial.\(^8\) When the legislature amended G.S. 8-53 to clearly state that disclosure could be compelled prior to trial,\(^9\) it failed to similarly amend G.S. 8-53.3. The Health Center court acknowledged the pre-1969 supreme court decisions, but refused to apply them to G.S. 8-53.3.\(^9\) According to the court of appeals, the legislature clearly intended the two statutes to be construed with reference to each other; therefore the reworded provision of G.S. 8-53 should apply to G.S. 8-53.3 as well.\(^9\) "The reasons for the exceptions to the privileges granted by the two statutes are the same and it would be discordant . . . to fail to extend the latter amendment of one to the other."\(^9\)

Although some of the Health Center court's logic and its treatment of prior precedents is not beyond attack, the ultimate conclusion reached by the court of appeals is correct. Two statutes with the same intended purpose should not produce conflicting results under a similar set of facts. The legislature should clear up this conflict by amending G.S. 8-53.3 to add qualifying language identical to that in the present version of G.S. 8-53.\(^9\)

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\(^9\) 42 N.C. App. at 299, 256 S.E.2d at 823.

\(^9\) Id. at 299-300, 256 S.E.2d at 823.

\(^9\) Id. at 300, 256 S.E.2d at 823. The court obviously rejected a negatively implicating theory and instead relied on the policy reasons for the exceptions to the privileges.

\(^9\) The psychologist-client privilege of G.S. 8-53.3 was applied in 1979 by the supreme court in State v. Crews, 296 N.C. 607, 617, 252 S.E.2d 745, 752 (1979). Although some of the privileged information examined by the court in Crews was requested via motions for pretrial discovery, the Health Center issue apparently did not arise. The language used by the court in Crews is confusing, but from an examination of the record it appears that the trial judge examined the privileged information in camera a few days prior to trial and issued orders denying disclosure during the trial.
VIII. FAMILY LAW

A. Child Custody

The court of appeals gave a new twist to the rule that a showing of changed circumstances is necessary to obtain modification of a custody decree in Newsome v. Newsome. The court in Newsome held that a custody order entered on the basis of a separation agreement may be modified merely by a showing that a change in custody would be in the best interest of the child rather than a showing that the situation had changed substantially since the original custody decision was made.

The court reasoned that because the "changed circumstances" rule is designed to prevent relitigation of the same issues, no purpose is served by invoking it if, as in the case at bar, there has been no previous evidentiary hearing.

Defendant-husband and plaintiff-wife in Newsome separated in September, 1976, and were divorced in October, 1977. Their separation agreement, which was incorporated into the divorce decree, established custody of their only child, Amy, then age two, with plaintiff. After Mr. Newsome left the family residence in Goldsboro, Virginia Gooding moved in with Mrs. Newsome and Amy, and the three of them subsequently moved to Winston-Salem. Mr. Newsome then filed for a change in custody, complaining that his wife's move was surreptitious, that she refused for a time to give him any information on Amy's whereabouts and that she was engaged in an illicit homosexual rela-

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1. A 1979 addition to the child custody statutes, N.C. GEN STAT. § 50-13.5 (j) (Cum. Supp. 1979), gives grandparents the right to intervene in a custody action when their own child had been awarded custody and subsequently died. In these cases, the court has discretion to award custody or visitation rights to grandparents as it deems appropriate.

2. The procedure for modifying custody decrees is set forth in Id. § 50-13.7(a), which states:

An order of a court of this state for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. Subject to the provisions of G.S. 50A-3 jurisdictional prerequisites, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

See Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); In re Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969). The change in circumstances is often required to be "substantial" in a custody case, though this requirement is not usually found in cases dealing only with the amount of support. Compare Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963) (support) with Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969) (custody).


4. Id. at 425, 256 S.E.2d at 854.

5. Id.
tionship with Gooding that was detrimental to the child. At a hearing, defendant presented evidence to substantiate his claims, but he did not challenge plaintiff's ability or fitness to care for Amy. The trial judge did not explicitly find plaintiff to be homosexual, but granted custody to defendant. The judge concluded that a substantial change in circumstances had occurred since the entry of the divorce decree, stating, "the environment in which the minor child is now being raised is not conducive or beneficial to the raising of a minor child of such tender years."

On appeal, plaintiff argued that there was insufficient evidence of a change in circumstances to warrant modification of custody. The court of appeals, over one dissent, affirmed the trial court's determination and further ruled that a showing of changed circumstances was not required in this instance. Because the separation agreement establishing custody was incorporated into the divorce decree, the court assumed that the decree had been rendered without a factual determination of the best interest of the child, and thus reviewed the lower court judgment as if it were an original custody determination. Discerning no abuse of discretion in the finding that it was in Amy's best interest to be in her father's custody at that time, as opposed to the time the original agreement was made, the court allowed the district court's holding to stand.

Judge Clark, dissenting, noted that the decision was based on assumptions made about the parties' divorce decree, which was not before the court, and that it ignored the law regarding the standards for an adjudication of custody.

The majority's holding is surprising for several reasons. First it is unnecessary to support the court's affirmance because the court hinted

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6. Id. at 418, 256 S.E.2d at 850.
7. Id. at 423, 256 S.E.2d at 853.
8. Id. at 425, 256 S.E.2d at 854.
9. The court stated:
   We are advised only that "the divorce decree incorporated the separation agreement by reference." There is no indication, however, that the question of custody was litigated and decided by the judge after hearing evidence tending to show the circumstances as they then existed relating to the best interest of this child.
10. Id. at 424, 256 S.E.2d at 854.
11. Id. at 427, 256 S.E.2d at 855.
12. Id. In addition, Judge Clark stated that the entire proceeding should have been stayed to allow for an investigation of a charge made by Mr. Newsome that Mrs. Newsome had taken the child for a weekend visitation and had not returned her as scheduled. If true, Mrs. Newsome would have committed the felony of transporting a child outside the state with an intent to violate a custody order set forth in G.S. 14-320.1. Id., 256 S.E.2d at 855.
in dicta that a material change in circumstances had occurred. In addition, as Judge Clark pointed out, the trial judge based his opinion only upon the assumption that the original custody order was not litigated; the record on appeal contained neither the separation agreement nor the divorce decree. Third, the rule has never before been interpreted this way in North Carolina, and the Newsome court’s interpretation could in fact lead to just the kind of “turmoil and insecurity” that the rule is designed to prevent. One explanation for the ruling might be the court’s reluctance to face squarely the factual issue presented: Can the newly-discovered homosexuality of a custodial parent constitute a change in circumstances significant enough to warrant a modification of the custody decree?

If the court rendering the divorce decree did in fact adopt the parties’ determination of custody as presented in their separation agreement without a factual inquiry, the Newsome holding finds some support in the general policy related to child custody. The goal of courts in awarding custody is to promote the best interest of the child; for this reason parents may never remove their children from the protective supervision of the court once it is invoked. If a court accepts without inquiry the agreement of the parents concerning custody, it has not assured itself that custody was decided in accordance with the child’s best interest. Thus, the Newsome court reasoned, if the agreement is later challenged, the burden on the complaining parent should be only to establish what is then in the child’s best interest, just as he or

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12. Id. at 426, 256 S.E.2d at 855.
13. Id. at 424, 256 S.E.2d at 854. See note 9 supra.
14. Neither the statute, quoted at note 2 supra, nor the North Carolina cases indicate that a custody order based on a separation agreement should be treated any differently than one entered after litigation. See e.g., In re Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969). In addition, the court’s holding contradicts the majority rule. See Annot. 73 A.L.R.2d 1444 (1960). (“It is clearly and universally established that the conclusiveness of custody provisions in divorce decrees is neither abridged nor enhanced by the fact that the decree incorporates, adopts or informally follows an agreement of the parties.” Id.).
15. 42 N.C. App. at 425, 256 S.E.2d at 854. The court of appeals cited the case of Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965), to illustrate the need for the changed circumstances rule. In Stanback, a superior court judge awarded custody to the father after an evidentiary hearing. Sixteen days later, the mother petitioned for a custody determination before a different superior court judge who ruled in her favor. The supreme court disallowed this second hearing because no change in circumstances was properly shown; the wife’s only remedy therefore was to appeal the first judge’s ruling or wait for a more favorable factual background.
16. N.C. GEN. STAT. § 50-13.2(a) (Cum. Supp. 1979) states: “An order for custody of a minor child shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child.”
she would have been required to do in an original custody hearing. When the court has yet to determine that circumstances justify a particular custodial arrangement, the more difficult burden of showing changed circumstances should not be imposed.\(^\text{18}\)

This practice, however, inhibits couples from attempting to settle custody problems themselves and discourages judges from accepting the parties' agreement without a time-consuming, costly and potentially bitter fact-finding endeavor. It also deprives the separation agreement of much of its integrity by allowing a parent to avoid his or her court-sanctioned contract by proving, not that circumstances have changed, but that the first agreement was flawed. In short, this approach creates a divorce decree with no res judicata effect vis-à-vis custody and produces the very effect the "changed circumstances" rule tries to prevent—the insecurity that results when parents and children cannot rely, in the absence of changed circumstances, on the finality of a custody order. Furthermore, the case holding seems to be in substantial disagreement with a North Carolina Supreme Court case that held:

\[\text{[W]here parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase . . . .}\]

Although this case involved child support rather than custody, the court exhibited a willingness to accept an agreement of the parents as determinative, in the absence of changed circumstances, and it seems likely that the same acceptance would apply to a custody agreement as well.

Dicta in Newsome indicates that the court considers the homosexuality of the custodial parent, not alleged at the time of the original custody decree, a change significant enough to warrant a shift in custody. The case does not stand for this proposition, however, and another case will be required for the court to establish its position on that question.

In a later 1979 case involving issues similar to Newsome, a differ-
ent court of appeals panel applied the majority rule rather than following the *Newsome* court. In *Hassell v. Means*, a couple established custody in a separation agreement that was later incorporated into a divorce decree. When the noncustodial parent challenged the custody arrangement six years later, the court held that "the agreement is sufficient to establish permanent custody of the children" because "[p]arents are in a better position on most occasions to provide custody arrangements for their children. . . ." The court invoked the rule that a substantial change in circumstances must be shown to justify a modification of permanent custody. The remarriage of both parents and the relocation of the custodial parent and the children from North Carolina to Georgia were held to be insufficient to warrant a custody modification.

The *Newsome* problem is unlikely to recur, however, because of a 1979 addition to G.S. 50-13.2 that obviates the need for a higher court determination of the effect of a custody agreement made solely by the parents and incorporated into the divorce decree without a factual inquiry. The new law requires that "[a]n order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child." Presumably, even when the court is prepared to accept the custody agreement of the parents, it must now include findings of fact to support that agreement, thereby preventing a problem similar to that in *Newsome* from arising.

In 1979 North Carolina joined the majority of states that have enacted the Uniform Child Custody Jurisdiction Act (UCCJA),
which addresses problems encountered in interstate custody disputes. The overriding purpose of the act is to promote the best interest of the child by keeping custody decisions within a single state. The act attempts to avoid jurisdictional competition among states by designating one state as the most appropriate forum for a custody determination and enhancing cooperation among states.\(^3\) Custody determinations made under the act bind all parties properly served and notified.\(^4\) States complying with the act agree to recognize and enforce the decrees of other states\(^5\) and to decline jurisdiction to modify the decision of another state unless that state no longer has jurisdiction.\(^6\)

Under the act, a state may exercise jurisdiction over a custody dispute if it is the child’s home state\(^7\) or the state with the most significant connection with the family.\(^8\) Physical presence of the child is not required,\(^9\) and jurisdiction will ordinarily be declined if the child is in the state because of a wrongful taking.\(^10\) Furthermore, jurisdiction cannot be exercised if it appears another state has already properly established it,\(^11\) and should not be exercised if another forum appears more convenient.\(^12\) To encourage the parties to choose the most convenient state, the act allows the court to require the party who com-


34. \(\text{id. } \text{\S} \) 50A-12.
35. \(\text{id. } \text{\S} \) 50A-13.
36. \(\text{id. } \text{\S} \) 50A-14.
37. “Home state” means the state in which the child has lived for at least six consecutive months before the commencement of the action. \(\text{id. } \text{\S} \) 50A-2(5).
38. \(\text{id. } \text{\S} \) 50A-3(a)(1) and (2). Even in the absence of a “significant connection,” emergency jurisdiction may be established if a child has been abandoned or abused. \(\text{id. } \text{\S} \) 50A-3(a)(3). Furthermore, the court may exercise jurisdiction if no other state has. \(\text{id. } \text{\S} \) 50A-3(a)(4).
39. \(\text{id. } \text{\S} \) 50A-3(c).
40. \(\text{id. } \text{\S} \) 50A-8(a).
41. \(\text{id. } \text{\S} \) 50A-6.
42. \(\text{id. } \text{\S} \) 50A-7. Factors that may be taken into account in determining whether a forum is convenient include the child’s home state, the connection of any state to the child or his family, the availability of evidence and witnesses, any agreement of the parties and the overall purposes of the act. \(\text{id. } \text{\S} \) 50A-7(c)(1) to (5).
menced the proceeding to pay the necessary travel and other expenses of the other parties and their witnesses.\(^{43}\)

Cooperation among the courts and parties involved is encouraged in a number of ways. In addition to requiring that a central registry be kept by each court,\(^ {44}\) the act suggests that courts exchange information directly\(^ {45}\) and requires parties to submit extensive information when a court is trying to determine the most appropriate location for a trial.\(^ {46}\) The act authorizes judges to request that testimony and evidence be adduced or studies be made in other states and encourages courts so requested to comply in order to facilitate proceedings in other states.\(^ {47}\)

**B. Paternity**

In affirming a conviction of abandonment and nonsupport of a child, the court of appeals in *State v. White*\(^ {48}\) applied a conclusive presumption of paternity that it admitted might be unconstitutional. The court upheld the trial court's requirement that defendant, husband of the mother, prove he had no access to his wife during the period when the child could have been conceived, despite evidence that another man had access to the mother during the same period. Although it was no more probable that the child was fathered by the defendant than the lover, defendant was convicted upon his failure to present proof of nonaccess.

The evidence showed that although defendant was married to the mother, he had separated from her 265 days before the birth, and that the mother began living in open adultery with another man 262 days before the birth.\(^ {49}\) Thus, both men had access to the mother within the normal gestation period.\(^ {50}\) Applying the "modern doctrine"\(^ {51}\) on the

\(^{43}\) *Id.* § 50A-7(g).

\(^{44}\) *Id.* § 50A-16. Custody decrees of other states, information on pending custody proceedings in other states, information on findings of inconvenient forum in other states and other pertinent information is kept in the registry. *Id.*

\(^{45}\) *Id.* § 50A-7(d).

\(^{46}\) *Id.* § 50A-9.

\(^{47}\) *Id.* § 50A-18 to -20.

\(^{48}\) 42 N.C. App. 320, 256 S.E.2d 505 (1979).

\(^{49}\) *Id.* at 321, 256 S.E.2d at 506.

\(^{50}\) As the opinion points out, one series of North Carolina cases sets the normal gestation period at seven to ten months, another group finds the period to be 280 days, while another notes that there is no agreement even among medical experts as to the normal period. See 42 N.C. App. at 322, 256 S.E.2d at 507, and cases cited therein. In this case, if the mother were presumed to have had sexual relations with each man during the time she lived with him, the child could have been conceived by either of them regardless of the standard used to measure the normal gestation period, because the time periods were so close together.
issue of paternity, the trial court instructed the jury that unless defendant could prove he had no access to the mother within the normal gestation period, he was conclusively presumed to be the father. Because defendant provided no such proof, the jury found him guilty of abandonment and nonsupport. The court of appeals affirmed the jury verdict.

Judge Carlton, in his dissenting opinion, argued that the presumption denies defendant his fourteenth amendment due process rights. He referred to the United States Supreme Court's holdings that due process requires the prosecution in a criminal case to prove each element of the charge beyond a reasonable doubt. If this rule is applied to White, then the burden of proving lack of access arguably should not have shifted to defendant; rather, the state should have been required to prove beyond a reasonable doubt that defendant was the father. Because evidence established that both defendant and another man had access to the mother within the normal gestation period, the state could not have met its burden.

The conflict over the proper use of the presumption in this case stems from the court's application to criminal proceedings of rules established for civil cases. For example the old bastardy laws, which were codifications of the common law, combined elements of both civil and criminal law. A complaint could be brought by either the mother or the county commissioner, and defendant could be imprisoned for failure to support the child if he were adjudged to be the father. After some dispute, the courts concluded that the proceeding was civil in na-

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51. The "modern doctrine" is contrasted with the strict common law rule, which did not allow proof of nonaccess if the husband were "within the four seas" [i.e. in England]. 42 N.C. App. at 322, 256 S.E.2d at 507.
52. Id. at 324, 256 S.E.2d at 508.
53. In In re Winship, 397 U.S. 358 (1970), the Court set forth the principle that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. Applying that concept in Mullaney v. Wilburn, 421 U.S. 684 (1975), the Court struck down an application of Maine's homicide statute that required the defendant to prove he acted in the heat of passion in order to rebut a presumption that an unlawful and intentional killing was done with malice aforethought. The state thus was required to prove beyond a reasonable doubt the absence of the heat of passion. 421 U.S. at 704.
56. AN ACT, supra note 54, §§ 10-11.
ture and therefore applied a civil standard of proof. In the wake of a legislative change making wilful nonsupport a misdemeanor, however, the courts recognized a paternity action as criminal in nature.

In making this switch, however, the courts failed to revise the procedures used under the old law and apparently did not stop to consider that a presumption of paternity in the mother's husband, which satisfied a "preponderance of the evidence" standard, might not satisfy a "beyond a reasonable doubt" standard. The presumption was simply carried over, and, as is seen in the White case, continues to be used in criminal actions today.

If the minority in White had prevailed, the presumption would not have been applied to this case and the prosecution would have been required to prove beyond a reasonable doubt that defendant conceived the child. Absent additional evidence, the prosecution could not have met this standard. This failure, however, would not have precluded the mother from bringing a civil suit against her husband to establish paternity and support obligations. In other words, under criminal law, defendant would not be considered to be the father, but under civil law he would be. Although this anomaly is avoided in the majority's position, another one emerges: the defendant is criminally convicted through the use of a presumption that does not satisfy a criminal standard of proof. This conflict is inherent in the statutes because they provide both criminal and civil actions to establish paternity and support obligations. Given the dual procedure, however, it seems much preferable to allow the distinction between "criminal paternity" and "civil paternity" to exist rather than to permit a defendant to be criminally convicted under a civil standard of proof.

The problem of establishing paternity in White might have been

57. See, e.g., State v. Liles, 134 N.C. 735, 47 S.E. 750 (1904); 11 N.C.L. REV. 191, 205 n.4 (1933).


59. See, e.g., State v. Ellis, 262 N.C. 446, 448, 137 S.E.2d 840, 842 (1964); State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

60. Compare, e.g., State v. Pettaway, 10 N.C. 623 (1825) (case considered civil in nature) with State v. Green, 210 N.C. 162, 185 S.E. 670 (1936) (criminal case)(both cases invoked same presumption, thereby placing same burden of proof upon defendant).


As in the criminal case, the presumption in the civil suit that defendant was the father could be rebutted if the defendant could show he was impotent or did not have access to the mother. 42 N.C. App. at 322, 256 S.E.2d at 507.
avoided had the parties introduced evidence of blood tests. Test results must be accepted by juries under certain conditions as conclusive and can often exclude the possibility of a defendant's paternity. The General Assembly rewrote the statute authorizing the use of blood grouping tests in 1979 to allow for the use of more sophisticated tests that not only exclude the possibility of parentage, but can establish it in over ninety percent of the cases. In addition, the new statute allows for the possibility that on some occasions maternity may need to be established. A further change provides that the costs of the tests shall be included in the costs of the action rather than assessed to the party requesting the tests. As before, the tests are admissible in both criminal and civil paternity actions at the request of any of the parties.

In a related matter, the court of appeals determined in *Joyner v. Lucas* that the three-year statute of limitations for a civil action to determine paternity is procedural rather than substantive in nature. The effect of this classification was to toll the statute while defendant was out of the state, thus allowing plaintiff to bring her suit three and a half years after the illegitimate birth.

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62. See Law of June 2, 1975, ch. 449, 1975 N.C. Sess. Laws 447 (current version at N.C. Gen. Stat. § 8-50.1 (Cum. Supp. 1979)). The results of blood grouping tests are conclusive if the results are not in conflict with any other tests, the jury believes the tests were properly conducted and the witness presenting the results testified truthfully. The conclusiveness is not altered by any presumptions. Id.


67. N.C. Gen. Stat. § 8-50.1(a), and (b) (Cum. Supp. 1979). In criminal actions, either the state or the defendant may request that tests be taken. In civil actions, any interested party may request tests. The judge must order tests when they are requested. Id.


69. N.C. Gen. Stat. § 49-14(c) (1976) states: "Such action shall be commenced within one of the following periods: (1) Three years next after the birth of the child; or (2) Three years next after the date of the last payment by the putative father for the support of the child . . . ."

70. A procedural statute of limitations is not part of a right of action, but merely a limitation on when the right of action may be exercised. A substantive statute of limitations defines the existence of a right of action. Thus, the lapse of a procedural limitation does not extinguish the right of action, but cuts off access to the courts to enforce that right. The lapse of a substantive statute of limitations extinguishes the right completely. See 51 Am. Jur.2d Limitation of Actions § 21 (1970).
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Defendant urged the court to apply the doctrine, which it has invoked in connection with the North Carolina wrongful death statute,71 that time limits included in rights of action created by the legislature are part of the substantive right of action and not true statutes of limitations72. If the time limit were not a true statute of limitations, the rule tolling statutes of limitations while a defendant is out of the state73 would not apply, defendant reasoned.74 Instead, the substantive right to establish paternity in a civil action would be extinguished after the three years had passed.

The court rejected application of the rule on the basis of the equities of the situation and the potential constitutional problem of strictly limiting the rights of an illegitimate child to support.75 It was also aware that by precluding the mother’s suit, the court might have forced the state either to institute a criminal action for nonsupport or to support the mother and child through public assistance. The result in this case is consistent with the recent national trend to disregard the harsh procedural/substantive distinction with regard to limitations of actions.76

C. Domestic Violence

The 1979 General Assembly enacted a chapter77 to respond to the problem of domestic violence.78 It allows the victim of spouse abuse to

72. 42 N.C. App. at 545, 257 S.E.2d at 108 and sources cited therein.
74. 42 N.C. App. at 545, 257 S.E.2d at 108.
76. See 51 AM. JUR.2d Limitations of Actions § 15, at 601 (1970) and cases cited therein.
file a civil action to obtain both emergency and long-term relief. The act defines domestic abuse as acts between past or present spouses, or persons who are or were living together as if married, intended to cause or actually causing bodily injury or fear of such harm.\(^7\)

On motion for emergency relief, a hearing must be held within ten days.\(^8\) Prior to this hearing, the court may enter a protective order designed to stop the violence.\(^9\) These orders range from directing the offending party to refrain from violence to evicting the abusive spouse and assisting the victim in returning to the household.\(^10\) Similar measures to protect minor children are also authorized.\(^11\) Protective orders may be entered for any time period not exceeding one year.\(^12\)

The act provides for enforcement in several ways. Local police are authorized to arrest persons believed to be in violation of a protective order\(^13\) and to take whatever steps are necessary to protect victims from harm.\(^14\) They are also permitted to assist victims by advising them about available facilities and services and are authorized to provide transportation to these facilities.\(^15\) The act gives police permission to ignore multiple complaints if they have reason to believe immediate assistance is not needed.\(^16\) In addition, the new law makes it a misdemeanor to enter the premises of a spouse after being forbidden to do so.\(^17\) The offense is punishable by a maximum of a $500 fine or six months imprisonment or both.\(^18\)

\section*{D. Divorce and Separation}

The North Carolina Supreme Court, in \textit{White v. White},\(^19\) adopted

\(^7\) N.C. GEN. STAT. § 50B-1 (Cum. Supp. 1979). This definition excludes acts between persons of the same sex and acts against children. The latter are covered in the juvenile code, \textit{id.} §§ 7A-516 to -732 and at \textit{id.} § 14-318A. Mental cruelty is also not subject to remedy under this act.

\(^8\) \textit{id.} § 50B-2(b).

\(^9\) \textit{id.} § 50B-2(c). The court may enter a temporary order upon a finding of good cause, immediate and present danger of violence against the victim or minor children constitute good cause. \textit{id.}

\(^10\) \textit{id.} § 50B-3.

\(^11\) \textit{See id.} § 50B-3.

\(^12\) \textit{id.} § 50B-3(b).

\(^13\) \textit{id.} § 50B-4(b). The charge is civil contempt. \textit{id. See id.} § 5A-21.

\(^14\) \textit{id.} § 50B-5(a).

\(^15\) \textit{id.}

\(^16\) \textit{id.}

\(^17\) \textit{id.}

\(^18\) \textit{id.} § 14-134.3. This provision also applies to a former spouse or a person with whom the person charged has lived as if married. The crime is domestic trespass.

\(^19\) \textit{id.}

\(^{91}\) 296 N.C. 661, 252 S.E.2d 698 (1979).
a presumption to be used in interpreting separation agreements that will simplify litigation on these agreements and gave practitioners some guidelines to be followed in drafting them. In essence, the court ruled that provisions for support and property settlement in separation agreements and consent judgments shall be presumed to be independent of each other, so that in the absence of evidence to the contrary the support provisions may be modified without regard to the property settlement. The implicit advice in the presumption is clear: if the support provisions and the property settlement are intended to be reciprocal, this intention should be made explicit in the document.

The separation agreement at issue in White was adopted by the divorce court in the form of a consent judgment. It provided that Mr. White would pay Mrs. White a weekly stipend and a lump sum, and would convey to her his half interest in their house. The agreement did not indicate if these provisions were intended to be separable or if they were reciprocal. The litigation arose when Mrs. White petitioned for modification of the support provisions. Mr. White contended that the provision for support and the property settlement were reciprocal, so that to modify one without modifying the other would be improper. Because the court has no power to modify the property settlement, neither can be modified if the provisions are in fact reciprocal.

The North Carolina court first set forth the theory espoused by defendant in Bunn v. Bunn in which it held, "if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." Because there was no evidence available in White upon which to apply this rule, the case was remanded to determine the intent of the parties on the issue of severability.

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92. Id. at 672, 252 S.E.2d at 704.
93. The North Carolina Supreme Court, in Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964), explained the operation of the type of consent judgment entered in this case as follows: [T]he court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony. . . . [B]eing an order of the court, [it] may be modified by the court at any time changed conditions make a modification right and proper.

262 N.C. at 69, 136 S.E.2d at 242-43.
94. 296 N.C. at 663-64, 252 S.E.2d at 700.
95. Id. at 667, 252 S.E.2d at 701.
98. Id. at 70, 136 S.E.2d at 243.
To simplify this issue, the *White* court adopted a rule articulated by an Idaho court\(^5\) that the provisions are presumed to be separable in the absence of evidence to the contrary.\(^6\) The court viewed its rule as a "common sense"\(^7\) approach, relieving the courts of making fine distinctions regarding reciprocity.\(^8\) In future proceedings, the party opposing modification will be required to establish reciprocity by showing, for example, that the wife agreed to take lower support payments in return for a greater share of the property than she might have expected, or higher payments in return for less property.\(^9\) If no such proof is provided, the court will be free to modify the support provisions without reference to the couple's division of property.

The court of appeals in *Edwards v. Edwards*\(^10\) made several noteworthy rulings. First, it held that the provision of North Carolina's divorce statute that bars recrimination as a defense to divorce\(^11\) applies to any divorce action filed after July 31, 1977, the effective date of the statute.\(^12\) The court rejected defendant's claim that because the activities that formed the basis of the recrimination defense occurred before the statute was enacted, the defense should be allowed. The court also ruled that fraud in the procurement of a separation agreement is no defense to divorce\(^13\) and that one parent cannot recover from the other for alienating the affections of their child.\(^14\)

The parties in *Edwards* were separated in July 1977 and entered into a separation agreement in October 1977. Plaintiff-husband sued for absolute divorce in July 1978. Defendant wife set up three defenses.

\(^{99}\) 296 N.C. at 670, 252 S.E.2d at 703.


\(^{101}\) Under the Idaho rule, the presumption must be rebutted by clear and convincing evidence. *Id.* at 387, 462 P.2d at 52. The North Carolina court, however, held that only a preponderance of the evidence is necessary to rebut the presumption. 296 N.C. at 672, 252 S.E.2d at 704. The burden of proof is on the party opposing modification. *Id.*

\(^{102}\) *Id.* at 671, 252 S.E.2d at 704.

\(^{103}\) For a discussion of the rules used in determining whether provisions are separable or reciprocal, see Annot., 61 A.L.R.3d 520 §§ 19-23 (1975 & Supp. 1980).

\(^{104}\) 296 N.C. at 670 n.1, 252 S.E.2d at 703 n.1.

\(^{105}\) 43 N.C. App. 296, 259 S.E.2d 11 (1979).

\(^{106}\) N.C. GEN. STAT. § 50-6 (Cum. Supp. 1979). The doctrine of recrimination allowed a defendant in a divorce action to set up a defense in bar of the plaintiff's action by alleging that plaintiff was guilty of misconduct that in itself would be a ground for divorce. Recrimination was recognized in North Carolina until the 1977 amendment barring the defense. *See* Harrington v. Harrington, 286 N.C. 260, 210 S.E. 190 (1974); Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

\(^{107}\) 43 N.C. App. at 299, 259 S.E.2d at 13.

\(^{108}\) *Id.* at 300, 259 S.E.2d at 14.

\(^{109}\) *Id.* at 300-02, 259 S.E.2d at 14-15.
and a counterclaim. First, she alleged that her husband had been engaged in adultery before and at the time of their separation and claimed this to be a valid defense to a divorce under the doctrine of recrimination. The court recognized that this would have been correct before the General Assembly's passage of the 1977 amendment to G.S. 50-6, but noted that the defense was no longer available. The time of the events giving rise to such a defense is of no consequence, the court declared.

Defendant also contended that plaintiff concealed his adultery and that this concealment caused plaintiff to enter a separation agreement she would not otherwise have entered. The court held that such an allegation of fraud was essentially an assertion of recrimination and thus unavailable to defendant as a defense.

In her third defense and counterclaim, defendant claimed that her husband had alienated the affections of their son from her. At common law, the action of alienation of affections was a right in the husband to sue a third party for alienating his wife's affections so that he suffers a loss of consortium, and subsequently has been held to be a right of the wife as well. Common law did not recognize a right in either parent to sue for the alienation of a child's affection. In a ruling of first impression, the Edwards court decided that no such action should exist in this state, thereby aligning North Carolina with the few other states to have considered the issue as it relates to children.

In another case named Edwards v. Edwards, the court of appeals ruled on a variety of issues relating to divorce actions. Of note are its holdings that summary judgment is never appropriate in an action for absolute divorce and that a jury trial should be granted in divorce suits even when all the essential facts have been admitted in the pleadings. The court also found the compulsory counterclaim rule, ap-

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110. Id. at 298, 259 S.E.2d at 12.
112. 43 N.C. App. at 299, 259 S.E.2d at 13.
113. Id. at 300, 259 S.E.2d at 14.
114. See generally 2 R. Lee, supra note 111, § 207, at 553. Many states have abolished the action by statute. Id. at 566-67.
115. 3 R. Lee, supra note 111, § 244, at 132 n.122 (1963).
118. In addition, the court held that the North Carolina statute allowing divorce based on one year's separation, N.C. GEN. STAT. § 50-6 (Cum. Supp. 1979), is constitutional. 42 N.C. App. at 305-06, 256 S.E.2d at 731.
plied to divorce actions in the 1978 case of *Gardner v. Gardner*,\(^{120}\) inapplicable to the facts of *Edwards*.

After nine years of marriage, plaintiff-husband in *Edwards* filed for divorce from bed and board\(^{121}\) in early December, 1976. The couple separated several weeks later. In March of the following year, defendant-wife counterclaimed for alimony in her husband's suit for divorce from bed and board.\(^{122}\) Neither of these actions was resolved by June 1978, when plaintiff instituted a new suit for absolute divorce based on a year's separation.\(^{123}\) In her answer, defendant admitted that the parties had been separated for a year, but pleaded adultery and abandonment as defenses to the divorce and demanded a jury trial. Upon plaintiff's motion for summary judgment, defendant moved that the action be dismissed and filed as a compulsory claim in the previous unresolved action.\(^{124}\) The trial court heard evidence and found that the parties had been separated for more than a year. Denying defendant's motion to dismiss, the court granted plaintiff's summary judgment motion.\(^{125}\)

On review, the court of appeals found no reason to apply the compulsory counterclaim rule because the husband could not have sued for absolute divorce at the time of his earlier action for divorce from bed and board or when his wife counterclaimed for alimony.\(^{126}\) The court correctly distinguished the *Gardner* holding on these grounds, pointing out that in *Gardner* the counterclaim was mandatory because the husband's claim for absolute divorce had accrued before his answer was due in his wife's earlier suit for alimony without divorce. Furthermore,

\(^{119}\) N.C.R. Civ. P. 13(a) provides in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

\(^{120}\) 294 N.C. 172, 240 S.E.2d 399 (1978). In *Gardner*, a husband's action for absolute divorce was held to be a compulsory counterclaim in his wife's earlier action for alimony without divorce. For a discussion of *Gardner*, see 57 N.C.L. REV. 439 (1979).


\(^{122}\) 42 N.C. App. at 302, 256 S.E.2d at 731.


\(^{124}\) 42 N.C. App. at 302, 256 S.E.2d at 730.

\(^{125}\) Id.

\(^{126}\) Id. at 305, 256 S.E.2d at 731. Plaintiff's original action was filed in December 1976. Defendant answered and counterclaimed in March 1977. The one year statutory period, upon which plaintiff's action for absolute divorce was based, did not expire until December 1977. Thus, the requirement of Rule 13(a) that the claim exist at the time of the pleading was not met.
the denial in *Edwards* of defendant's motion to dismiss did not prejudice defendant; her pending alimony rights were not affected in any way by her husband's suit.  

Nevertheless, the trial court's grant of summary judgment was reversed. The court of appeals ruled that summary judgment may not be entered in an action for absolute divorce and that a timely demand for a jury trial should be honored. The court based its findings on G.S. 50-10, which provides that material facts alleged in a complaint for divorce are always deemed denied and that no judgment shall be given until such facts have been found by a judge or jury. The statute creates a material issue of fact in every divorce case, and accordingly makes summary judgment, which may be entered only when no genuine issue of material fact exists, inappropriate. Though the trial court had purported to enter summary judgment, the court of appeals found no prejudicial error because the trial court had in actuality heard testimony of witnesses and made appropriate findings of fact. A new trial was ordered, however, to honor defendant's timely request for a jury trial.

The purpose of G.S. 50-10, which has been part of the statutes since 1868, is to prevent collusion. When applied to a divorce action grounded only upon a separation period, the law is of limited value. The only defense to a divorce based on the statutory period is proof that the parties have not been separated for the requisite time. The incentive for collusion on that issue seems slight and probably does not justify the increased court time and costs necessary to fulfill the mandate that every fact be determined by a judge or jury. In the *Edwards* case, for example, where the essential facts are admitted in the pleadings, summary judgment should have been allowed.

A 1979 statutory addition, G.S. 50-19, comports with the court's  

127. 42 N.C. App. at 305, 256 S.E.2d at 731. See N.C. GEN. STAT. § 50-6 (Cum. Supp. 1979), which provides in part: "a divorce under this section obtained by a supporting spouse shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action."


129. See N.C.R. CIV. P. 56.

130. 42 N.C. App. at 307, 256 S.E.2d at 732. The only facts necessary for the adjudication were that the parties had been married, were separated for a year and had not resumed marital relations. 42 N.C. App. at 303, 256 S.E.2d at 730.

131. N.C.R. CIV. P. 39(a) provides: "When trial by jury has been demanded . . . the action shall be designated upon the docket as a jury action."


133. Conceivably, a couple might collude on establishing the date of their separation to accelerate the time of their divorce to permit remarriage sooner.
ruling in *Edwards* that an action for absolute divorce filed while a prior related action is pending need not be denominated a compulsory counterclaim. The new provision allows the independent prosecution of an action for divorce, based on either fault grounds or the statutory period, despite the pendency of an action for divorce, custody and support of minor children, alimony or alimony pendente lite. The statute works in the opposite direction as well, allowing those related actions to be maintained during the pendency of an action for absolute divorce. Curiously, the statute does not include divorce from bed and board as one of the actions that may be pursued during the pendency of other related actions.

The statute is to be applied without regard to Rule 13(a) of the North Carolina Rules of Civil Procedure, which requires that certain counterclaims be asserted, and overrules the application of that rule in *Gardner v. Gardner*. The *Gardner* court concluded that the application of Rule 13(a) to divorce proceedings would not contravene the state policy favoring maintenance of marital ties and would avoid a multiplicity of actions by keeping the litigation in one forum. A potential flaw in the *Gardner* scheme is that it allows one party to defeat the other's choice of forum. Although G.S. 50-19 mends this forum choice problem, it undermines the goal of efficient court procedure emphasized in *Gardner*. The new law permits, for example, the wife to file for divorce and alimony in one city while the husband is litigating divorce and custody in another.

The court of appeals significantly safeguarded the alimony rights of dependent spouses in *Wilhelm v. Wilhelm*. In a first impression interpretation of a 1978 amendment to G.S. 50-6, which preserves the alimony rights of a dependent spouse if they have been asserted in the divorce action at bar or any pending action, the court held the term

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135. Id. at § 50-19(b).
136. See id. § 50-7.
137. Id. §§ 50-19(a) & (b) begin: "Notwithstanding the provisions of G.S. § 1A-1, Rule 13(a) . . . ." See N.C.R. Civ. P. 13(a) quoted supra.
139. 294 N.C. at 178, 181, 240 S.E.2d at 404, 406.
140. Under the compulsory counterclaim rule, the first party to file can force the entire litigation to take place in his or her choice of forum, as long as the other party's cause of action is available by the time the answer is due. See N.C.R. Civ. P. 13(a), quoted supra; 57 N.C.L. Rev. 439, at 445 (1979).
142. N.C. Gen. Stat. § 50-6 (Cum. Supp. 1979) allows an absolute divorce on the basis of a one year separation. The amendment added the following provision: "Notwithstanding the pro-
"alimony" to include "alimony pendente lite." As a result, a dependent spouse, who had asserted only a claim for temporary alimony, was permitted to maintain her right to support after her husband had been granted an absolute divorce.

Plaintiff-wife in *Wilhelm* sued for divorce from bed and board and alimony pendente lite. The court awarded temporary alimony, but retained the action without a decision on the divorce action. Seven months later, in an independent action, the husband was granted an absolute divorce, whereupon he ceased paying alimony. When the wife attempted to have her former husband held in contempt, he claimed that the absolute divorce barred further alimony pendente lite. The trial court agreed with him and accordingly dismissed the action.

The court of appeals' decision on review hinged on whether the wife's claim for alimony pendente lite in her action for divorce from bed and board should be considered an assertion that would protect her alimony rights. The court looked to the statutory definitions of alimony and alimony pendente lite and to the legislative intent of G.S. 50-11, or of the common law, a divorce under this section obtained by a supporting spouse shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action."

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143. 43 N.C. App. at 551, 259 S.E.2d at 322.

144. Id. at 552, 259 S.E.2d at 322. The general rule is that after a decree for absolute divorce is entered, all marital incidents are ended and the right to sue for alimony is lost. Thus, to preserve alimony claims, a dependent spouse must adjudicate them before or at the time the divorce decree is rendered. See *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976); *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967); N.C. GEN. STAT. § 50-11 (1976).

Defendant in the 1979 case of *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E.2d 441 (1979), was estopped from asserting this principle. Plaintiff-wife and defendant-husband in *Hamilton* stated that they had settled their differences on the issues of custody, support and alimony. On this representation, pending the execution of a consent order, the court granted defendant an absolute divorce. Subsequently, defendant refused to sign the consent order, and a trial ensued. Defendant moved to amend his answer to plead that his absolute divorce barred his wife from claiming alimony. The court held that he was equitably estopped from doing so, because both his wife and the court had relied on his original agreement to the alimony terms in the consent order.

145. 43 N.C. App. at 549, 259 S.E.2d at 320. The court's opinion does not mention when this action was initiated. The suit also sought child support and custody, which were granted to plaintiff.

146. Id. Alimony pendente lite was awarded on February 2, 1978. No reason is given to explain the lack of a decision on the suit for divorce from bed and board.

147. Id. Apparently, the wife did not assert a claim for permanent alimony in her action for divorce from bed and board or in her husband's action for absolute divorce. The reason for this failure is not evident.

148. Id. at 550, 259 S.E.2d at 321. Alimony is defined in N.C. GEN. STAT. § 50-16.1(1)(1976) as "payment for the support and maintenance of a spouse, either in a lump sum or on a continuing basis, ordered in an action for divorce whether absolute or from bed and board, or an action for alimony without divorce." Alimony pendente lite is "alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in
50-6 and decided that the word alimony was meant to include "alimony pendente lite." The trial court's dismissal was reversed, and the action remanded, apparently for a determination of a permanent alimony award.

Clearly, a dependent spouse should not lose support rights if a claim for them is outstanding. The interpretation here, however, leads to some incongruous implications. After the absolute divorce was granted, the wife's action for divorce from bed and board became moot. Therefore, after the divorce, no pending action remained. Yet the husband was required to continue paying alimony despite the fact the wife had asserted rights only to alimony pendente lite, which, by definition, is owed only during the pendency of an action. The incongruity in this case resulted from the wife's failure to assert a claim for permanent alimony, which she could have done in her own action for divorce from bed and board, in her husband's action for absolute divorce, or even after the divorce was granted. The court recognized that although she never asked for alimony, her prayer for divorce from bed and board was an action that would have supported an award of alimony. Because she had asked for "such other and further relief as to the court may seem just and proper," the court considered her to have asserted "'rights of a dependent spouse with respect to alimony'" as is required by G.S. 50-6. This is a very liberal reading of the requirement that rights be asserted; future litigants would be

149. 43 N.C. App. at 551, 259 S.E.2d at 321. The court determined that the intent and spirit of the legislature was to protect the rights of a dependent spouse by allowing a supporting spouse to obtain a divorce without closing the door on the adjudication of previously asserted alimony rights. Id.

150. Id. at 552, 259 S.E.2d at 322. The court gave no specific instructions to the lower court on how to proceed. The appeal reviewed a dismissal of plaintiff's motion asking that defendant be held in contempt for failure to pay alimony pendente lite. Id. at 549, 259 S.E.2d at 320. A reversal would seem to indicate that defendant should be ordered to resume paying alimony pendente lite or be held in contempt. Yet, the court suggested that plaintiff should be allowed a trial on the merits on her right to alimony. The court noted that she pleaded for "further relief" in her action for divorce from bed and board, then it stated, "this would support an award of permanent alimony in the event plaintiff is successful upon a trial on the merits." Id. at 552, 259 S.E.2d at 322.

151. See note supra 148. The statute providing the grounds for alimony pendente lite states: "The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made. N.C. GEN. STAT. § 50-16.3(b) (1976) (emphasis added).

152. 43 N.C. App. at 552, 259 S.E.2d at 322.

153. Id.

wise, however, to affirmatively claim their rights to permanent alimony before the entry of a decree of absolute divorce.

E. Alimony

Several 1979 alimony cases explored the meaning of dependent and supporting spouses.155

The court of appeals emphasized in Gardner v. Gardner156 that a spouse need not be unable to exist without the aid of the supporting spouse before he or she is considered dependent.157 In this suit for divorce from bed and board and alimony pendente lite, the court affirmed the trial court’s award of temporary alimony of $1,250 a month, despite the plaintiff’s net worth of $220,000 and monthly income of $930158 because plaintiff had established monthly expenses exceeding $2,000. The court held that her ownership of property did not relieve the husband of his duty to maintain her at the standard of living to which they had become accustomed.159

In Galloway v. Galloway,160 the court of appeals invoked the presumption that the husband is the supporting spouse161 to vacate a trial court determination that because the wife was “able-bodied, intelligent and capable to find employment” she was not a dependent spouse.162 While observing that the presumption could have been, but was not, challenged on the ground that it constitutes unconstitutional gender-based discrimination,163 the court found that defendant-husband failed to show his wife was neither substantially dependent upon him for support nor in need of such support. The court suggested defendant could show either that his wife was supporting herself, or was capable of sup-

155. Dependent spouse is defined as one “who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.” N.C. GEN. STAT. § 50-16.1(3) (1976). “Supporting spouse” is one “upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife.” Id. § 50-16.1(4). Only a dependent spouse is entitled to alimony. Id. § 50-16.2.


157. Id. at 338, 252 S.E.2d at 870. This proposition was established in Peeler v. Peeler, 7 N.C. App. 456, 461, 172 S.E.2d 915, 918 (1970), and reiterated in Sprinkle v. Sprinkle, 17 N.C. App. 175, 183, 193 S.E.2d 468, 474 (1972).

158. 40 N.C. App. at 338, 252 S.E.2d at 870.


162. 40 N.C. App. at 368, 253 S.E.2d at 43.

163. Id. at 369, 253 S.E.2d at 43.
porting herself but had not taken advantage of a reasonable opportunity to do so.\footnote{164}

This formulation of the evidence needed to show lack of dependency is new. To support the proposition, the court relied, by analogy, on two cases that deal with the amount of alimony owed, not a determination of dependency.\footnote{165} Those cases held that an alimony award should be based on earning capacity rather than actual earnings only if evidence showed the husband failed to exercise his capacity to earn because of a disregard of his marital obligation.\footnote{166} It is a substantial leap to contend that those decisions support, even by analogy, a holding that a dependent spouse may be denied alimony if she is capable of supporting herself but has not taken advantage of a reasonable opportunity to do so.

In addition, the formulation differs sharply from the implication of G.S. 50-16.1, which presumes the husband to be the supporting spouse unless he is incapable of supporting his wife.\footnote{167} That presumption seems to require rebutting evidence showing the incapability of the husband to support his wife, not evidence of the wife's capability to support herself. Courts have shunned this construction, however, preferring to determine factually whether the wife fits the definition of a dependent spouse.\footnote{168} While the Galloway holding follows this general

\begin{footnotes}
\item[164] Id. The court gave some examples of evidence that would have sustained defendant's burden. He could have shown that the plaintiff did not make reasonable efforts to obtain employment for which she was suited and which was available, that she had refused employment opportunities that were available to her, or that she had been employed in a manner which would have adequately supported her but terminated such employment in order to establish her status as a dependent spouse.

\item[165] Id. at 370, 253 S.E.2d at 44.


\item[168] Id. at 370, 253 S.E.2d at 44.


\item[170] 10 N.C. App. at 468, 179 S.E.2d at 148; 252 N.C. at 418, 113 S.E.2d at 917.


\item[172] Rayle v. Rayle, 20 N.C. App. 594, 202 S.E.2d 286 (1974), appears to be the only case to have addressed the point explicitly. In construing the provision deeming the husband to be the supporting spouse the court said:

\begin{quote}
[T]he sentence does not constitute an irrebuttable presumption and where there is evidence tending to show that the husband is not the supporting spouse, a question of fact for jury determination is presented.

A different construction would render meaningless many portions of the 1967 Act, particularly the provisions of Subsection (3) and (4) of G.S. 50-16.1 defining "dependent spouse" and "supporting spouse" and contravene the manifest purpose of the General Assembly.
\end{quote}

\item[173] Id. (citations omitted). In other cases, the presumption has been ignored, and the inquiry focused on the actual financial status of the parties. \textit{See}, \textit{e.g.}, Loflin v. Loflin 25 N.C. App. 103, 212 S.E.2d 403 (1975); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973); Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Radford v. Radford 7 N.C. App. 569, 172 S.E.2d 897 (1970).
\end{footnotes}
trend away from applying the statutory presumption, it changes the is-

sue of dependency from a determination of the actual financial rela-
tionship between the parties to a determination of the wife's ability to
earn her own living. Although this may be a more reasonable and eq-
utable way to determine the necessity for alimony, it is not the scheme
prescribed by the General Assembly.

F. Juvenile Law

The 1979 North Carolina legislature, in one of its most important
enactments, adopted a new Juvenile Code effective January 1, 1980. The
new Code repeals G.S. 7A-277 to -289 and -289.7, enacting in its
place G.S. 7A-516 to -732. This Code is the product of a committee
established by the 1977 General Assembly to evaluate the existing
North Carolina Juvenile Code and other statutory law pertaining to
juveniles, which had been adopted in a "piecemeal fashion," and to
propose new, comprehensive legislation. The 1979 legislature
adopted nearly all of the Committee's proposals with few variations
and modifications.

The new Code differs from its predecessor in both its focus and content. Whereas the former Code focused on providing the juve-

169. Law of June 7, 1979, ch. 815, 1979 N.C. Sess. Laws 966 (codified at N.C. GEN. STAT. §§ 7A-516 to 732 (Cum. Supp. 1979)). This same law repealed parts of Chapter 134A, Youth Services, and Chapter 10, Child Welfare. Id. These chapters have been incorporated into the new Code.


173. JUVENILE CODE REVISION COMMITTEE, FINAL REPORT ii (1979) [hereinafter cited as FINAL REPORT]. The provisions regarding child abuse, for example, were adopted at a different time and located in a different section of the statutes than the Juvenile Code. Law of July 1, 1971, ch. 710, 1971 N.C. Sess. Laws 827 (formerly codified at N.C. GEN. STAT. § 110-115 to -123).

174. The Committee's purpose was to "develop a legislative plan . . . [that would] best serve the needs of young people and protect the interests of the State." N.C. GEN. STAT. § 143B-480(c)(6) (1978). The Committee, in considering what the scope of its inquiry should be, decided not to limit its evaluations and proposals to matters involving a court order, but to consider disposi-
tional alternatives, intake proceedings and community resources as well. FINAL REPORT, supra note 173 at 2.

175. The statement of purpose of the new Code states that it should be construed to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized . . . so that juveniles may . . . be treated through community-based serv-
ices. . . ;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and eq-
uity and that protect the constitutional rights of juveniles and parents.
nile with an informal, flexible procedure that placed the court system in the role of the overseer of the juvenile's activities, the new Code seeks to ensure the juvenile's rights by requiring a more formal hearing. In addition, in contrast to the limited dispositional alternatives available under the former Code, the new Code seeks to utilize all available community resources in providing dispositional alternatives both before and after invoking the court's jurisdiction.

In order to implement this new focus, the 1979 legislature made material changes in substance and procedure and clarified and expanded some aspects of the former Code. The most important procedural changes in the new Code provide screening procedures prior to adjudication, new rules for temporary custody, a statutory process for emancipation and totally new discovery procedures. In addition, the new Code restricts the jurisdiction of the juvenile court by imposing new age limitations on the class of juveniles and clarifies the law of nontestimonial identification, the juvenile's right to an attorney, venue, pretrial hearings and the right to an open trial. Finally, the new Code contains a greatly expanded definitional section that makes the jurisdiction of the juvenile court more explicit.

Three aspects of the new definitional section expand and clarify prior juvenile law. First, the definition of "abuse" has been expanded to include emotional abuse, and the definition of "abused juvenile" has correspondingly been expanded to include a juvenile whose parent or any other person responsible for his care "creates or allows to be created serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment." According

N.C. GEN. STAT. § 7A-516 (Cum. Supp. 1979). The goal of the prior Code was to provide procedures that were "different in purpose and philosophy from the procedures applicable to criminal cases involving adults" in order to "provide a simple judicial process . . . appropriate in relation to the needs of the child." Law of June 19, 1969, ch. 911, § 2, 1969 N.C. Sess. Laws 1047 (formerly codified at N.C. GEN. STAT. § 7A-277(1978)). See also, Thomas, Juvenile Justice in Transition—A New Juvenile Code for North Carolina, 16 WAKE FOREST L. REV. 1 (1980).


The former statute defined abuse as causing physical injury, creating a substantial risk of physical injury, or committing or allowing to be committed any sex act upon a child. Law of July 1, 1971, ch. 710, § 1, 1971 N.C. Sess. Laws 827 (formerly codified at N.C. GEN. STAT. § 110-117(1)(1978)).

to the statute, emotional damage is manifested by "severe anxiety, depression, withdrawal or aggressive behavior" toward oneself or others.\textsuperscript{180}

While it is laudable that the legislature now recognizes the seriousness of emotional abuse, the statute may not offer the intended protection because of the difficulty of proving causation when emotional injury is unaccompanied by physical symptoms. North Carolina courts have been reluctant to allow recovery for mental or emotional injury when unaccompanied by physical symptoms because of the difficulty of establishing a causal connection between the defendant's actions and the plaintiff's injury.\textsuperscript{181} Under the new definition of abuse, it may be equally difficult to demonstrate that the parent "created or allowed to be created" the emotional abuse. The statute may be construed, however, to presume that because the parent is responsible for the juvenile's care, the parent necessarily allowed emotional damage suffered by the juvenile.

The statutory requirement that the parent must refuse to seek, or allow the child to seek, treatment may also provide less protection than the legislature intended. The statute does not specify the conditions under which the refusal must be made. It could be construed either to mean that a refusal made to a person who is not an officer of the court, such as a social worker, is sufficient, or that the refusal must be made to a court officer during formal proceedings.\textsuperscript{182}


\textsuperscript{181} Obviously, if the causal connection between the juvenile's emotional abuse and the parent's acts or omissions is established, the court should interpret refusal of treatment as broadly as possible to include the situation in which the parent refuses treatment for himself or the child after a request by a social worker. The statute will likely be construed, however, to mean that only the parent's refusal to allow or participate in treatment when requested by a court is sufficient. Any other interpretation of the statute would create insurmountable problems of proof. For example, the social worker could claim that a request has been made and the parent could simply deny it. It would, therefore, be difficult for the state to meet its burden of proof. Moreover, if refusal were construed to mean refusal to a social worker, this interpretation could lead to inconsistent results. Without uniform guidelines for when a request for treatment should be made each social worker's decision would be based on his individual judgment, and would not be reviewable.
However these statutory requirements are construed, the legislature clearly could have provided greater protection for emotionally abused children by requiring either refusal of treatment or emotional abuse, but not both. The reason for this is simple: whether the emotional abuse is caused or allowed to be caused by the parent or a totally unrelated person, the child in either case needs treatment. By refusing treatment for the child, the parent is guilty of allowing the abuse to continue. As written, the statute places a heavy burden of proof on the State and leaves emotionally abused children with limited protection.\textsuperscript{183}

The definitional section also expands the definition of a juvenile to include the juvenile's attorney whenever rights and privileges are involved.\textsuperscript{184} The reason for this new definition of "juvenile" is not altogether clear.\textsuperscript{185} Apparently, with the addition of new statutory procedures for pretrial discovery\textsuperscript{186} and venue,\textsuperscript{187} the legislature felt it was necessary to clarify that the attorney may make the motions permitted under these provisions, but the attorney's right to make these motions is clear without expanding the definition of "juvenile" to include attorneys. The new definition merely reflects the Code's emphasis on protecting the juvenile's constitutional rights.

Finally, the definitional section imposes new age parameters on "delinquent"\textsuperscript{188} and "undisciplined"\textsuperscript{189} children; it establishes a minimum age for inclusion in these categories and makes the upper age  

\textsuperscript{183} One problem the legislature may have considered, however, is that a parent might be unable to recognize when he is inflicting emotional abuse. The legislature may have added the requirement that the parent refuse to permit, provide for, or participate in treatment to the definition of abused juvenile to prevent penalizing a parent for this shortcoming.  


\textsuperscript{185} A literal interpretation of this section leads to absurd results. For example, under N.C. GEN. STAT. § 7A-595(a)(4) (Cum. Supp. 1979), a juvenile must be told prior to questioning that he has the right to an attorney. Does this mean that the juvenile's attorney must be informed of this right and that the attorney also has this right?  

\textsuperscript{186} Id. §§ 7A-618 to -621. See text accompanying notes 230-33 infra.  

\textsuperscript{187} Id. § 7A-558. See text accompanying notes 241-43 infra.  

\textsuperscript{188} A delinquent juvenile is defined as a "juvenile less than 16 years of age who has committed a criminal offense under State law or under an ordinance of local government, including violation of the motor vehicle laws." N.C. GEN. STAT. § 7A-517(12) (Cum. Supp. 1979).  

\textsuperscript{189} An undisciplined juvenile is defined as "[a] juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home." Id. § 7A-517(28). See Thomas, supra note 175, at 21 for a discussion of the difference between undisciplined juveniles, also called status offenders, and juvenile delinquents. An allegedly delinquent child is afforded a higher standard of due process than an undisclipned juvenile because the delinquent juvenile may lose his freedom. Id. at 8.
limit the same for both. Now, a child may not be found to be delinquent or undisciplined unless he is at least six years old, and undisciplined juveniles, as well as delinquent juveniles, must be under sixteen. As under earlier law, different limits apply to juveniles alleged to be abused, dependent, or neglected: these juveniles may be brought within the court's jurisdiction at any time up to age eighteen. Also, the new statute provides that the age at which an offense is committed is the age that determines the jurisdiction of the court.

Two of the most important changes in the Juvenile Code concern the screening procedures for delinquent and undisciplined juvenile complaints, and for abuse, neglect, or dependency complaints. Generally, under the former Code, after a delinquency or undisciplined petition was filed, thereby invoking the jurisdiction of the juvenile court, the judge could arrange for the case to be evaluated by the Department of Social Services, the chief family counselor, or other personnel available to the court. Thus, the statute authorized diversion only after a

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190. N.C. Gen. Stat. § 7A-523 (Cum. Supp. 1979). This minimum age limit has no counterpart in the former Code and was not a part of the Juvenile Code Revision Committee's proposal. Final Report, supra note 173, at 111-12. The legislature apparently inserted this provision because of the unlikelihood that children less than six years old would meet the statutory definitions of undisciplined or delinquent. Further, the idea of subjecting a child under age six to court proceedings apparently repulsed the legislature's sense of justice.


192. N.C. Gen. Stat. § 7A-523, -524 (Cum. Supp. 1979). Any child who once comes under the jurisdiction of the court remains within its jurisdiction until he becomes eighteen or until released by court order. Criminal offenders over the age of sixteen, however, may be prosecuted in superior court. Id. § 7A-524. Prosecution as an adult is not required under these circumstances unless the juvenile allegedly committed a felony. Id. § 7A-608 (formerly codified at N.C. Gen. Stat. § 7A-280 (1978)). The Committee noted that these statutes are intended to allow a juvenile, after termination of supervision by the superior court, to be returned to the jurisdiction of the juvenile court if he commits another offense or is alleged to be undisciplined. Final Report, supra note 173, at 114.

193. N.C. Gen. Stat. § 7A-523 (Cum. Supp. 1979). In setting the age at which an offense is committed as the determinant of the juvenile court's jurisdiction, the Committee settled the issue under prior law whether the juvenile or superior court had jurisdiction when a juvenile committed several offenses immediately before his sixteenth birthday. Final Report, supra note 173, at 112-13.


195. Law of June 19, 1969, ch. 911, § 2, 1969 N.C. Sess. Laws 1047 (formerly codified at N.C. Gen. Stat. § 7A-281 (Cum. Supp. 1977) (repealed 1979)). Although the court generally could not divert the case before a petition alleging that the child was undisciplined or delinquent was filed, the prior statute did authorize the chief court counselor to establish screening services to be used prior to the filing of the petition. The decision to establish these services was left up to each judicial district. Law of April 12, 1973, ch. 1339, § 1, 1973 N.C. Sess. Laws, 2d Sess. 709.
petition had been filed and the juvenile was before the court as an allegedly undisciplined or delinquent juvenile.

The new Code changes the former law in two important respects. First, diversion can now occur prior to the filing of the petition unless the juvenile allegedly committed one of a specified list of crimes.\textsuperscript{196} An intake counselor, who is a member of the staff under the chief court counselor, now receives and screens the petitions without invoking the court's jurisdiction. Second, certain procedures in screening the petition that were left to the counselor's discretion under the prior Code are now mandatory.\textsuperscript{197} Whereas the former Code merely instructed the intake counselor to be guided by the "best interests of the juvenile" in gathering evidence and making a decision on whether to divert,\textsuperscript{198} the present Code requires the counselor to interview the complainant, the victim, the juvenile, his parents or custodian, and any other person who has information about the case.

In addition, the counselor must render a decision on whether to divert within fifteen days of receipt of the complaint, with a possible extension of an additional fifteen days.\textsuperscript{199} If the counselor determines that a petition should not be filed, the complainant must now be notified of this decision, including the reasons therefor, in writing.\textsuperscript{200} The complainant then has five days from receipt of the notice to request review of the decision by the prosecutor.\textsuperscript{201} If the prosecutor re-

\textsuperscript{196} If the intake counselor has reasonable grounds to believe that a juvenile has committed a crime against nature, murder, rape, arson, first degree burglary, any felony involving willful infliction of serious bodily injury or use of a deadly weapon, or any violation of the North Carolina Controlled Substances Act that would be a felony if committed by an adult, he must authorize the filing of a petition and cannot divert the case. N.C. GEN. STAT. § 7A-531 (Cum. Supp. 1979). The Committee considered including all felonies as nondivertible, but rejected that idea as too "far-reaching." \textit{Final Report, supra} note 173, at 117. Because the statute does not specify whether the judge may divert the case after the petition is filed, diversion for these offenses arguably is not completely eliminated.


\textsuperscript{199} N.C. GEN. STAT. § 7A-533 (Cum. Supp. 1979). Formerly, an intake counselor had to complete his inquiry within 15 days, but did not have to render a decision within a specified length of time. Law of April 12, 1974, ch. 1339, § 1, 1973 N.C. Sess. Laws 709.

\textsuperscript{200} Former law did not require the counselor to state the reasons for his decision. \textit{Final Report, supra} note 173, at 121.


\textsuperscript{202} Id. § 7A-533, -535. Former law provided for review by the judge only.

Law of April 12, 1974, ch. 1339, § 1, 1973 N.C. Sess. Laws 709 (formerly codified at N.C. GEN. STAT. § 7A-289.7 (1978)). In recommending this change, the Committee sought to remove potential prejudice to the trier of fact. \textit{Final Report, supra} note 173, at 124.
jects the decision of the counselor, the petition is filed, and the juvenile comes within the jurisdiction of the juvenile court, where he may be adjudicated delinquent or undisciplined. If a petition is not approved for filing, it is destroyed. In the event of diversion, the juvenile must contact the resource to which he is referred; if the juvenile does not do so, the intake counselor can authorize the filing of a petition. A counselor has no authority to file a petition if he does not follow these procedures.

The new Code provides for similar screening of abuse and neglect complaints by the Director of the Department of Social Services. Initially, all reports of abuse or neglect are channeled to the Director of the Department of Social Services in the county in which the juvenile resides or is found. The Director may pass any of these reports on to a law enforcement agency, which is required by statute to investigate upon request by the Director.

The provisions requiring screening of abuse and neglect complaints have been expanded in several respects. First, a duty has been placed on every citizen to report abuse and neglect. Prior law required only professional people to report both abuse and neglect and

203. The prosecutor may overrule the counselor's decision within twenty days; at the conclusion of this review he may file a petition. N.C. Gen. Stat. § 7A-536 (Cum. Supp. 1979).

204. Id. § 7A-533.

205. If, after a confirmation of delinquency, a judge does not divert, but instead commits a juvenile to the Division of Youth Services, the judge must consider all potential alternatives in the best interests of the child. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979). Although In re Hardy was decided under the previous North Carolina statute, the mandatory language of the court's decision is clear and is equally applicable to the new Juvenile Code.


The Committee did not want to require the intake counselor to decide whether the services the juvenile received were effective; however, the wording of the statute leaves open the possibility that all the juvenile need do to preclude the filing of a petition is contact the resource, without following any of the resource's directions. See Final Report, supra note 173, at 123.

207. A neglected juvenile is defined as one

who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law. N.C. Gen. Stat. § 7A-517 (21) (Cum. Supp. 1979).

208. Id. § 7A-542, -552.

209. Id. § 7A-543. While the Director may utilize his staff in carrying out his investigation, he must make the final decision. Id. § 7A-544.

210. Id. § 7A-543.

211. Id. Although every person is required to report abuse or neglect, the statute provides no sanctions for those who fail to report.
required other persons merely to report abuse. Second, as required of the intake counselor in screening delinquent and dependency cases, the Director of the Department of Social Services must notify the person who reported the abuse or neglect if a petition is not filed. This notice must specify either that the Director found no abuse or that the Department of Social Services is taking action. The Director may then either remove the juvenile from his home, if necessary for his protection, or provide for protective services, which include county services and casework. If the person who made the initial report is not satisfied with the actions of the Director, he may appeal to the prosecutor.

The screening procedures to be used prior to the filing of a petition are laudable in that they seek to match appropriate community resources to the needs of the juvenile. The community and the juvenile both benefit: the juvenile receives the most appropriate care and the community corrects a delinquent child. Furthermore, the screening procedures preclude court participation prior to the juvenile hearing, thereby promoting judicial economy and avoiding extraneous influence on the judge's subsequent determinations of fact. By requiring a more thorough review of each case, the new mandatory procedures eliminate the potential for abuse of discretion that results when individual counselors make the final decision.

Another important provision of the new Juvenile Code more clearly details the procedures for taking a juvenile into temporary custody. These procedures are intended to protect the juvenile's rights. Although prior law made it clear that a juvenile could be taken into custody pursuant to a court order, the proper grounds for taking a juvenile into custody without a court order remained unsettled. Officers

214. Id. § 7A-542, to -544.
215. Id. § 7A-546. The appeal procedures to the prosecutor are virtually identical to those for undisciplined and delinquency petitions referred to in note 197 supra. Prior law contained no procedure for review of a Director's decision not to file a petition. FINAL REPORT, supra note 173, at 132.
216. The new Code greatly expands the dispositional alternatives for juveniles who have been adjudicated delinquent. N.C. GEN. STAT. § 7A-649 (Cum. Supp. 1979). Included in the possibilities are restitution, fines, performance of community service, and vocational education. Id. The alternatives for juvenile offenders in general have remained virtually unchanged. Id. § 7A-648. For example, the judge may continue the case to allow more appropriate care to be provided, to place the juvenile under a court counselor's supervision, or to excuse the juvenile from compulsory school laws in order to find more appropriate alternatives. Id.
217. FINAL REPORT, supra note 173, at 154.
were assumed to act under the broad authority of *parens patriae*\(^{218}\) in taking juveniles into custody without a court order but the officers had no statutory guidelines. The statute now specifies that a juvenile may be taken into temporary custody without a court order upon the existence of: grounds sufficient to arrest an adult; a reasonable basis to believe a juvenile is undisciplined; a danger that the juvenile who is alleged to be abused, neglected, or dependent will be injured if he is not taken into custody; or reasonable grounds to believe that the juvenile has absconded from training school.\(^{219}\)

The current statute also outlines in more detail the procedures to be followed once a child has been taken into temporary custody. A juvenile taken into custody without a court order cannot be held for more than twelve hours without judicial involvement. Within this twelve hours either a petition or motion for review must be filed by an intake counselor or by the Director of the Department of Social Services and a court order issued authorizing secure or nonsecure custody,\(^{220}\) or the juvenile must be released.\(^{221}\)

The criteria for ordering secure or nonsecure custody also have been more clearly delineated. Prior North Carolina law simply authorized immediate custody when a child was in danger or when custody was in the best interests of the child.\(^{222}\) Under the current Code, a

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219. N.C. GEN. STAT. § 7A-571 (Cum. Supp. 1979). A police officer may take the juvenile into custody in all situations that are authorized under the statute. *Id.* A court counselor may take a juvenile into custody if there are reasonable grounds to believe the child is undisciplined or if there are reasonable grounds to believe the juvenile is an absconder from training school. *Id.* A department of social services worker may take the juvenile into custody if there are reasons to believe that the juvenile is abused, neglected, or dependent and that the juvenile might be injured if he is not taken into custody. *Id.* Employees of the Division of Youth Services may take a juvenile into custody if he is believed to be an absconder from training school. *Id.*

A police officer, acting pursuant to a custody order, is not liable for executing the order if it is complete and regular on its face. *Id.* § 7A-575.

220. Secure custody entails detention of the juvenile and generally is ordered only when a child may be adjudicated delinquent. Thomas, supra note 175, at 27-28. Nonsecure custody usually involves placement in a foster home or a facility operated by the Department of Social Services. *Id.* § 7A-576.

221. See *id.* § 7A-572. The new statute outlines specific procedures to be followed by the person who takes the juvenile into custody, including giving notice to the juvenile's parents, guardian, or custodian and procedures for requesting that a petition be drawn. *Id.*

A judge may, by filing an administrative order in the office of the clerk of superior court, delegate the court's authority to issue secure and nonsecure custody orders. *Id.* § 7A-573. This authority is similar to that given under the former provision, which allowed the court to delegate authority to issue detention orders when the district court was not in session. Law of April 26, 1973, ch. 269, § 1, 1973 N.C. Sess. Laws 259 (formerly codified at N.C. GEN. STAT. § 7A-281 (Cum. Supp. 1977) (repealed 1979)).

juvenile may be placed in nonsecure custody in the following situations: when he has been abandoned; when he has suffered “physical injury or sexual abuse or is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian has inflicted” or allowed to be inflicted the injury or abuse, or has failed to provide adequate supervision; when he needs treatment, and the parent or guardian is unable to or fails to provide it; or when his parent or guardian consents to the order. Similarly, the Code lists nine circumstances in which a secure custody order may be issued including when the juvenile is charged with a nondivertible offense or with one or more felonies, and when the juvenile has a history of violent conduct resulting in physical injury, the petition alleges delinquency, and the charge involves physical injury.

Following either a secure or nonsecure custody order, the juvenile cannot be held for more than five days without a hearing on the merits or a hearing on the need for continued custody. While this section more fully secures the juvenile’s due process rights, as a practical matter the statute may create difficulties in scheduling juvenile court sessions in smaller districts.

Once a juvenile is taken into custody, either temporarily by the police or pursuant to a court order, he is protected in various ways from overt or subtle pressure to make statements against his interests. Most importantly, a juvenile must be advised of his Miranda rights. In addition, if the juvenile is under fourteen years of age, no admission or confession resulting from interrogation may be admitted into evidence unless it is made in the presence of the juvenile’s parent, guardian, custodian, or attorney. Furthermore, a juvenile’s parent, guardian, or

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224. Id. § 7A-574(b).
225. Id. § 7A-577. Former North Carolina law required that a juvenile could not be held in a detention house or jail for more than five calendar days without a hearing to determine the need for continued detention. Law of June 19, 1969, ch. 911, § 2, 1969 N.C. Sess. Laws 1047 (formerly codified at N.C. GEN. STAT. § 7A-286(3) (Cum. Supp. 1977) (repealed 1979)). The current statute expands the law to include any custody, apparently including both secure and nonsecure custody.
226. For example, in many counties one judge is assigned to hear criminal and civil cases. This judge will now have to interrupt his schedule to hear the juvenile cases that have been given priority under G.S. 7A-577.
228. N.C. GEN. STAT. § 7A-595(b) (Cum. Supp. 1979). The North Carolina Court of Appeals has indicated that when a confession is made, the age of the person making the confession is an additional factor that the court must take into consideration in deciding if the confession was voluntary. In re Meyers, 25 N.C. App. 555, 558, 214 S.E. 2d 268, 270 (1975); In re Simmons, 24
custodian may not waive any of the juvenile's rights.\textsuperscript{229}

In addition to clarifying custody procedures, the Code contains a new section on discovery. Previous North Carolina law did not provide guidelines for pretrial discovery in juvenile cases. According to the Committee, this section was added to balance the investigative resources between the state and the juvenile, expedite trials and satisfy the juvenile's constitutional rights,\textsuperscript{230} including the sixth amendment right to counsel and the fourteenth amendment right to due process.\textsuperscript{231}

As provided in this section, discoverable evidence includes names of witnesses, documents, photographs, motion pictures, and reports of examinations and tests.\textsuperscript{232} Upon written motion by a party, however, the judge may issue a protective order denying, restricting, or deferring discovery.\textsuperscript{233}

The new Juvenile Code also adds a procedure for the emancipation of individuals under eighteen\textsuperscript{234} and declares that all married

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\item N.C. App. 28, 32, 210 S.E. 2d 84, 87 (1974); \textit{In re} Ingram, 8 N.C. App. 266, 268, 174 S.E. 2d 89, 91 (1970). This emphasizes the necessity of giving \textit{Miranda} warnings to a juvenile.
\item The statute may be criticized for allowing into evidence statements made by the juvenile in the presence of his parents, guardian, or custodian, because they may subtly pressure the child into making statements an attorney would discourage.
\item \textit{In re} Gault, 387 U.S. 1 (1967), sets forth the basic constitutional rights of juveniles, which include notice, right to counsel, right to confront witnesses, and a privilege against self incrimination. In discussing juvenile rights, the United States Supreme Court stressed that protecting these rights is more important than the state's interest in maintaining special procedures for children. The unique benefits of the system "will not be impaired by constitutional domestication." \textit{Id.} at 22. Juveniles lack, however, the constitutional rights of adults to indictment by a grand jury, bail, public trial, and trial by jury. \textit{Id.} at 14.
\item FINAL REPORT, supra note 173, at 203.
\item N.C. GEN. STAT. § 7A-618 (Cum. Supp. 1979). In proposing this new section the Committee was concerned that allowing the juvenile to obtain from the petitioner a "copy of the record of witnesses under the age of 16" if this record is accessible to the petitioner, as provided in G.S. 7A-618(b), would "negate the confidentiality of juvenile records and proceedings." FINAL REPORT, supra note 173, at 204. The Committee concluded, however, that limiting discoverable information under this provision to that accessible to the petitioner adequately protected the confidentiality of juvenile records.
\item Although not discussed by the Committee, disclosure of a juvenile's record in a criminal case may be constitutionally required. \textit{See} Davis v. Alaska, 415 U.S. 308 (1974). In \textit{Davis} the Alaska trial court upheld the assertion of a vital witness that he did not have to testify about his juvenile record. The United States Supreme Court overruled the trial court and the state supreme court, holding that "[w]hatever temporary embarrassment might result from the testimony of a crucial identification witness." \textit{Id.} at 319. The Court based its decision on the sixth amendment right of an accused to confront witnesses. \textit{Id.} at 315.
\item \textit{Id.} § 7A-717 to -726.
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juveniles are emancipated. Prior to the enactment of the Code, no statute authorized emancipation. In order to utilize the new procedure, a juvenile must be sixteen or older and have been a resident of North Carolina for six months. In addition, the petitioner must establish that emancipation is in his best interests. The statute lists factors the judge must consider in determining whether emancipation is in the child's best interests, including the parental need for petitioner's earnings, the petitioner's ability to function as an adult, and the juvenile's employment status. Upon emancipation the juvenile has the same right to make contracts as an adult, and the parent is relieved of duties owed to petitioner and is divested of all rights over him. The decree is irrevocable.

Several sections of the Code either slightly modify prior statutory law or codify existing case law. Under the Code's new section on venue, for example, when a juvenile is alleged to be delinquent or undisciplined proper venue lies in the district where the offense occurred. Formerly, proper venue lay in the district where the child lived or was found. The new venue section also establishes a flexible procedure for transferring a case, when appropriate, to the district where the juvenile resides. As an additional procedural protection, a juvenile's right to an attorney has been statutorily extended. Under the prior Code a juvenile had the right to an attorney either when he was alleged to be undisciplined or delinquent, or when he could be committed to a state institution. Now a juvenile is presumed to be indigent and therefore

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235. Id. § 7A-726.
238. Id. § 7A-720.
239. Id. § 7A-721.
240. Id. § 7A-724.
241. Id. § 7A-558(a).
243. N.C. Gen. Stat. § 7A-558 (Cum. Supp. 1979). See Final Report, supra note 173, at 141-42. Article 45 of the Juvenile Code on venue, petitions, and summons also designates the pleading in a juvenile action as a petition and the process as a summons, id. § 7A-559, and establishes that a case commences either on the date when the petition is filed in the clerk's office or on the date when a petition is issued by a magistrate. Id. § 7A-563; Final Report, supra note 173, at 148.
245. N.C. Gen. Stat. § 7A-554(b) (Cum. Supp. 1979). The North Carolina Supreme Court had held that an undisciplined child had no right to counsel although a delinquent child did have
has the absolute right to court-appointed counsel. In delinquency cases, the judge is required to appoint counsel and apparently, under the statutory additions, this counsel cannot be waived. The parent in abuse, neglect, or dependency cases also has the right to a court-appointed attorney in cases of indigency.

The new Code codifies procedures to be followed during the juvenile hearing. When a juvenile is not capable of proceeding during a delinquency case because he is unable to assist his attorney, he may proceed through the statutory procedure on incapacity formerly available only to adults. Juveniles had been committed under prior North Carolina law, but without a statutory basis.

The new Code notably changes the public nature of juvenile hearings. As under prior law, the judge decides in his discretion whether a hearing is open to the public. A new section provides, however, that a request by the juvenile for a public hearing must be granted. This right. The reason for this difference was the possibility of commitment for the delinquent child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

246. N.C. GEN. STAT. § 7A-584 (Cum. Supp. 1979); Bowman, supra note 169, at 20. The statute explicitly states that the judge must appoint an attorney, thereby creating the inference that the right cannot be waived.

247. As under earlier law, appointment of a guardian is authorized when no parent is present at a hearing or when the judge finds it will be in the juvenile’s best interests. N.C. GEN. STAT. § 7A-585 (Cum. Supp. 1979).

The statutory section providing for appointment of a guardian ad litem has been changed to require the appointment of a guardian ad litem, who must be an attorney when a child is abused or neglected. Id. § 7A-586. This eliminates the former qualification that a guardian did not have to be appointed if it was shown that the child would not benefit from the protection.

248. Id. § 7A-587 (Cum. Supp. 1979). Under the new Code the court may require the parent or custodian to pay the fees of the attorney except when the parent or guardian is indigent. Id. § 7A-588.

249. Id. § 7A-627 to -640. A petition may now be amended after it has been filed if the amendment does not change the nature of the offense. Id. § 7A-627.

250. Id. § 7A-628.

251. FINAL REPORT, supra note 173, at 210.


The Committee discussed the holding of Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), and rejected its application to G.S. 7A-629. FINAL REPORT, supra note 173, at 211. In Oklahoma Publishing, newspaper reporters were present during proceedings in which an eleven year old boy was charged with second degree murder and were not asked to leave. As a result the juvenile was exposed to substantial publicity. Overruling the court order enjoining publication of information about the juvenile, the Court specifically avoided deciding the constitutionality of the Oklahoma statute that allowed juvenile proceedings to be held in private unless ordered by the judge to be conducted in public. 430 U.S. at 310. Rather, the Supreme Court concluded that because the press was present, and therefore lawfully acquired its information, the information was public knowledge and could be reported. Id. at 311. A public hearing in juvenile proceedings is not a due process requirement. In re Burrus, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), aff’d sub nom. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
change in the statute emphasizes the Code’s focus on protecting juvenile’s rights.

This focus is also reflected in the new Code’s procedures for authorization of nontestimonial identification, which have been expanded and clarified. Before conducting any nontestimonial identification an officer must now obtain a court order authorizing the procedure. Interpretations of the earlier statute were diverse, ranging from a total proscription of photographing or fingerprinting to authorization of fingerprinting only after the juvenile had been brought to trial. The new Code specifies that a request for authorization for nontestimonial identification may be made either prior to taking the juvenile into custody or after custody, but in either case the judge must base his authorization only on affidavits sworn before him. The grounds for the order must include: (1) probable cause to believe that the juvenile committed an offense that if committed by an adult would be punishable by more than two years in prison; (2) reasonable grounds to believe the juvenile committed the offense; and (3) a determination that the results of a nontestimonial identification would be of material

253. Final Report, supra note 173, at 185. The new Code clarifies other procedural rights as well, including the right to pretrial release, N.C. Gen. Stat. § 7A-611 (Cum. Supp. 1979); the application of double jeopardy once the judge begins to hear evidence, id. § 7A-612; the requirement that a judge apprise the juvenile of the charges against him prior to accepting an admission in court, id. § 7A-633; and the necessity of proving delinquency beyond a reasonable doubt, id. § 7A-635.


255. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979), although decided under the old Juvenile Code, offers guidelines on how the new Juvenile Code, particularly the provisions on nontestimonial identification and dispositional alternatives, is to be interpreted. In discussing the history of juvenile law in North Carolina, the supreme court stated in dictum that, whereas the former Code made no provisions for maintaining nontestimonial identification records of prior juvenile offenders, the new testimonial identification procedures will permit the criminal justice system to “track” serious youth offenders. Id. at 651, 260 S.E.2d at 599. The court emphasized that the procedures set forth in the statute for conducting and maintaining nontestimonial identification must be followed closely. Id. at 656, 260 S.E.2d at 601.

The court noted that unless the juvenile is given sufficient time to present evidence, consideration of dispositional alternatives is meaningless. Recognizing that the language of the statute did not clearly indicate “the extent to which the trial court must postpone the dispositional hearing in order to give the juvenile an opportunity to be heard,” the court stated that “the statutes . . . make clear the legislative intent that the dispositional hearing must be continued for the respondent to present evidence when he requests such a continuance.” Id. at 662, 260 S.E.2d at 605 (emphasis in original).


257. N.C. Gen. Stat. § 7A-597, -598 (Cum. Supp. 1979). The Committee discussed including the polygraph and the breathalyzer tests within this statute; however, the Committee concluded that they should neither prohibit nor authorize these procedures. Final Report, supra note 173, at 185.
If the juvenile is alleged to have committed a crime that if committed by an adult would be punishable by imprisonment for more than two years, the juvenile may request nontestimonial identification procedures. The results of this nontestimonial identification are to be destroyed in the event no petition is filed, the juvenile is found not guilty, or the juvenile is under fourteen and has committed what would be a misdemeanor if committed by an adult. The juvenile's rights are further protected by the addition of criminal sanctions for wilful violation of the provisions of the article governing nontestimonial identification.

In summary, the new Juvenile Code makes material changes in both the substance and the procedure of the earlier code. Most notably, the new Code places a greater emphasis on diverting juveniles from the court system by providing for diversion both before and after a delinquency or undisciplined petition is filed. Also, the Code clearly shows a desire to protect the juvenile's basic rights by more fully correlating the rights of juveniles with those of adults. Although the Code does not expand the rights of juveniles as far as it could, for example by guaranteeing juveniles the right to a jury trial, it is a substantial im-


259. Id. § 7A-600 (Cum. Supp. 1979). The judge has some discretion in authorizing the identification; identification must be permitted if it would materially aid the juvenile's defense. "Material aid", however, is not defined by statute.

The limitations on the juvenile's request for nontestimonial identification may seem unusually restrictive. These restrictions, however, serve to prevent an overzealous defense attorney from creating records that may later be used for investigative purposes. See id. § 7A-601.

260. Id. § 7A-601. Prior law was confusing and, although juvenile records were to be closed, the information was often used in subsequent proceedings. See Bowman, supra note 169, at 20. See also N.C. Gen. Stat. § 7A-676 (Cum. Supp. 1979), which provides for expunction of juvenile records on petition of the juvenile adjudicated delinquent if he is sixteen or older, and either the act committed by him would have been a crime if committed by an adult, or he was not thereafter adjudicated a delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation. In addition, juvenile records of persons adjudicated undisciplined may be expunged on petition by the juvenile when he reaches sixteen.

261. It is now a misdemeanor. N.C. Gen. Stat. § 7A-602 (Cum. Supp. 1979). Virginia also allows fingerprints and photographs taken of a juvenile to be retained under certain circumstances, for instance, when a child is at least fifteen and has committed a delinquent act which would be an adult felony, or been found guilty of malicious wounding or murder and is at least thirteen. Va. Code § 16.1-299 (Cum. Supp. 1980).


The 1979 court of appeals upheld earlier North Carolina law that clearly established that the Speedy Trial Act, N.C. Gen. Stat. § 15A-701(1978), does not apply to juveniles. In re Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979). Following the reasoning of In re Burrus the court concluded that the Act did not apply because juvenile prosecutions are not criminal in nature. Id. at 714, 257 S.E.2d at 644-45.
progress over prior North Carolina law.

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M. Ann Anderson
IX. Property

A. Joint Ownership

The Supreme Court of North Carolina resolved a question of first

1. In Mobile Oil Corp. v. Wolfe, 297 N.C. 36, 252 S.E.2d 809 (1979), and Bank of North Carolina v. Cranfill, 297 N.C. 43, 253 S.E.2d 1 (1979), the supreme court addressed the question whether parol testimony may be introduced that a signatory of an instrument did not intend to adopt a seal printed on the instrument as his own. In both cases the court held that where there is no ambiguity on the face of the instrument as to the adoption of the seal, parol evidence cannot be introduced.

In Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979), the court of appeals ruled that children adopted pursuant to a valid decree of another state qualify as "descendants" within the meaning of N.C. Gen. Stat. § 48-23 (1976). Thus, they can take property under a will with the same status as natural-born children unless a contrary intent appears on the face of the will. Children adopted in another state also have the right to inherit from their adopted parents under the intestacy statutes.

In an eminent domain case, the North Carolina Supreme Court in Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979), interpreted N.C. Gen. Stat. § 136-112(1) (1976), which sets forth the means by which land is to be valued in a condemnation proceeding for a partial taking. The court determined that the statute addresses only the exclusive measure of damages to be employed by the finder of fact and does not restrict a real estate expert to any particular method of calculation fair market value. Thus, an expert may use the "value to the part taken plus damages to the remainder" theory to determine the "after" value in an application of the "before and after" measure of damages.

In another case dealing with eminent domain, Board of Transp. v. Terminal Warehouse Corp., 44 N.C. App. 81, 260 S.E.2d 696 (1979), two questions were decided by the North Carolina Court of Appeals. First, the court held that the fact of a taking does not make compensable elements of damages which would otherwise be damnum absque injuria. Id. at 88, 260 S.E.2d at 700. Second, the court extended the "reasonable use rule," articulated in Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977), to govern the rights and liabilities of landowners in public condemnation actions. 44 N.C. App. at 90, 360 S.E.2d at 701.

Resolving another question of first impression for this jurisdiction, the court of appeals ruled in favor of the insured of a title insurance policy in Mortgage Corp. v. Insurance Co., 41 N.C. App. 613, 255 S.E.2d 622 (1979), rev'd on other grounds, 299 N.C. 369, 261 S.E.2d 844 (1980), by holding the insurer liable for an ineffective deed of trust and the litigation expenses incurred by the insured in defending its title. The insurer denied liability on the ground that the policy exempted coverage for defects or adverse claims against title that were "created, suffered, assumed or agreed to" by the insured. Basing its decision on similar rulings in the majority of other jurisdictions that had considered the question, the court concluded that the exclusionary language did not preclude recovery for defects resulting from conduct of the insured that was, at most, negligent. Rather, the provision was held to restrict "coverage for losses incurred because of the insured's own conduct only when it is a result of some dishonest, illegal, or inequitable dealings by the insured." Id. at 617, 255 S.E.2d at 622; see Annot., 87 A.L.R.3d 515 (1978).

In a prior action by a third party to prevent the insured from foreclosing on its deed of trust, the insurer offered to defend the suit on behalf of the insured, but with a "reservation of rights." The court determined that the insurer was not required to accept this conditional offer because of its "fear that the insurer may not be motivated to provide a vigorous defense despite its duty to use good faith in its undertaking." 41 N.C. App. at 622, 255 S.E.2d at 629. Thus, an insurer who refuses to defend without a reservation of rights must indemnify the insured for the costs of litigation if it is later determined that the loss was within the coverage of the policy.

2. In Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 729 (1979), the court of appeals discussed the legal effect the filing of a dissent to a will has on the title to real property. It conceded that "the dissenting spouse, upon filing dissent to the will, becomes vested, eo instante, as of the date of the testatrix' death, with title to the intestate share of the testator's realty which is allowed by the statutes providing for dissent." Id. at 49, 255 S.E.2d at 732. However, the court
impression in *Collins v. Quincy Mutual Fire Insurance Co.*, by holding that a statutory insurance policy provision limiting coverage to the "interest of the insured" is broad enough to permit recovery for the full value of property destroyed by fire, although the named insured is only one of several tenants in common and is acting, without notice to the insurer, as an agent for the other property owners. Plaintiff was a tenant in common with only a one-third interest in a family tenant dwelling, but he engaged a broker to insure the entire value of the unit against loss by fire. The broker communicated the request for insurance to the insurer, but he neglected to inform it of plaintiff's limited interest in the property.

Defendant issued coverage to the extent of the actual cash value of the property at the time of loss, but pursuant to G.S. 58-176 the policy provided that the amount recoverable would not in any event be for more than the "interest of the insured." The trial court equated "interest of the insured" with legal title and limited plaintiff's recovery to the amount of one-third of the appraised damage. The court of appeals reversed the trial court's grant of summary judgment against plaintiff for the remainder of his claim, holding that the question of whether plaintiff was acting as agent for the other cotenants was a triable issue of fact and that the determination of that issue in plaintiff's favor would give him an insurable interest in the whole property.

The supreme court affirmed the court of appeals decision.

The supreme court recognized the general rule that "where, by the terms of the policy, the insurer is not to be liable beyond the interest of

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5. The court took special note that the difficulty in *Collins* would not have arisen if the broker had been an agent for defendant. "In such case, the agent's knowledge that plaintiff was acting on behalf of himself and his co-tenants would have been imputed to the insurer making it liable for the full value of the property in case of loss." 297 N.C. at 686, 256 S.E.2d at 721 (emphasis in original).
6. *Id.* at 682, 256 S.E.2d at 719.
7. *Id.* at 684, 256 S.E.2d at 721.
the insured in the property, a stranger to the contract cannot collect thereon simply because he was the owner of an undivided interest in the property destroyed." The court, however, determined that a co-tenant acting as manager of property held in common may have a policy issued in his own name for himself and the benefit of the other tenants, and that failure to give notice to the insurer of the joint ownership does not void or limit the coverage under the policy. In other words, a managing cotenant has an insurable interest in the entire property within the meaning of the term “interest of the insured” and therefore he does not have to possess full legal title in order to have full recovery. If a fire insurance policy is issued for the whole property, and the premiums are paid with rents collected from the common property or with contributions from each of the cotenants, then in fairness and in accordance with the court’s view, all the owners should share in the proceeds in the event of loss.

The liberal construction given to G.S. 58-176 appears to be in line with the purpose of the statute. There are, of course, obvious reasons for limiting the coverage to the interests of the insured. If the state were to allow recovery on damaged property interests in which the policy holder has no stake, preserving the policy would be, at best, a wager on the misfortunes of others and, at worst, an incentive for the beneficiary to create the casualty. If the insurance proceeds are divided and distributed among the several cotenants in proportion to their respective property interests, however, the named insured does not stand to profit from the property loss while acting as agent for the other owners. Moreover, the insurer is not harmed since the premiums are pro-


Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof.

Id. (emphasis added)

11. 297 N.C. at 685, 256 S.E.2d at 721.
12. See Franklin Fire Ins. Co. v. Britt, 254 S.W. 215 (Tex. App. 1923). Although not expressly so described by the court, this decision seems to be merely an application of the rule that an agent may make a contract for an undisclosed principal.
14. For a case in which the tenant did profit from insurance, see Summers v. Stark County Patrons' Mut. Ins. Co., 62 Ohio App. 73, 23 N.E.2d 331 (1939), rev'd on other grounds, 63 Ohio App. 369, 26 N.E.2d 1021 (1940). The insurer examined the property in which plaintiff owned a one-third interest and issued a policy on the whole property. The court held that in the absence of
portionate to the risk assumed, and if an applicant procures the insurance by fraud or misrepresentation of a material fact, the insurer will be protected from liability.\textsuperscript{15} By adopting this sensible construction of a statute susceptible to an unduly narrow interpretation, the court protected the reasonable expectations of the insured without prejudicing the rights of the insurer.\textsuperscript{16}

In \textit{Craver v. Craver},\textsuperscript{17} a case of first impression, the North Carolina Court of Appeals held that a tenant in common in exclusive possession of a tenancy by court order cannot charge the excluded cotenant with a proportional part of the periodic costs of repairs made to property by the possessing tenant. Plaintiff retained exclusive possession pursuant to a judgment for alimony. Upon refusal by defendant to contribute for one-half of the costs of repairs, plaintiff filed suit. In upholding the trial court's judgment for defendant, the court of appeals distinguished \textit{Holt v. Couch},\textsuperscript{18} in which, upon division of the property, a cotenant in sole possession was allowed credit for the value of improvements and presumably for the costs of repairs made on the property.\textsuperscript{19} The \textit{Craver} court observed that the tenant in \textit{Holt}, unlike the plaintiff in \textit{Craver}, had made his claim at a partition and had not fraud the insurer was bound by its own examination and valuation, and, therefore, plaintiff was entitled to recover the full amount named in the policy, apparently without having to share the proceeds with the other tenants. The plaintiff in \textit{Collins}, on the other hand, if truly an agent for the other cotenants, would be required to hold the insurance proceeds for the principals' benefit.

\textsuperscript{15} 297 N.C. at 685, 256 S.E.2d at 721.

\textsuperscript{16} Although the court considered \textit{Collins} to be a case of first impression, dictum in \textit{Shores v. Rabon}, 251 N.C. 790, 112 S.E.2d 556 (1960), foretold the decision in \textit{Collins}. In \textit{Shores} the supreme court denied recovery to a cotenant not named in the insurance policy because there was "nothing in the policy . . . to indicate an intention to insure her interest" nor was the insured "her agent in the management thereof in the absence of positive evidence to the contrary." \textit{Id.} at 793, 112 S.E.2d at 559. Thus, as early as 1960 the supreme court was apparently willing to accept the principle that an insured can act as an agent for the other cotenants and that a policy issued in his name alone will inure to their benefit. The plaintiff in \textit{Shore} failed on her proof rather than on legal theory.

\textsuperscript{17} 41 N.C. App. 606, 255 S.E.2d 253 (1979).

\textsuperscript{18} 125 N.C. 456, 34 S.E. 703 (1899).

\textsuperscript{19} It is not entirely clear from the opinion in \textit{Holt} whether the tenant was credited with the expenditures made for repairs in addition to those made for improvements. The court noted that a valuation for improvements was made and that such improvements were "reasonable, necessary, and advantageous to the property." \textit{Id.} at 458, 34 S.E. at 704 (emphasis added). It is possible that repairs were included in this figure, but the court did not itemize the expenses. In any event, the court of appeals in \textit{Craver} interpreted \textit{Holt} as a case in which "a co-tenant was allowed credit in the division of the property for the value of improvements he had made to the property as well as money he had paid to maintain the property." 41 N.C. App. at 607, 255 S.E.2d at 254. \textit{But see J. Webster, Real Estate Law in North Carolina} § 109 (1971): "While North Carolina is not clear on the point, in most jurisdictions a co-tenant who is in possession of the common property is not entitled to compensation for expenditures made for repairs to the common property while he is in possession." \textit{Id.} § 109, at 118.
been in exclusive possession of the property. With respect to the present case, the court reasoned that the "'value of the possession and enjoyment of the common property is deemed to compensate the repairing cotenant.'" The court refused to speculate on what plaintiff's position would have been on a partition of the property.

It is important to emphasize that the court was not required to adopt entirely the rule of most jurisdictions that "a co-tenant who is in possession of the common property is not entitled to compensation for expenditures made for repairs to the common property while he is in possession." The court specifically limited its holding to the facts of this case—a tenant in exclusive possession suing directly for the costs of repairs. The law in North Carolina is unclear on the point. In this particular instance plaintiff had been awarded exclusive possession of the property, but the cotenant's mere possession was probably a sufficient ground to deny recovery in any case. Even if this conclusion is inaccurate and it is possible for a cotenant in possession to sue for repairs, the court's observation that the claim had not been made during a partition of the property indicates that it might have denied recovery for this reason alone. "Statements are sometimes made indicating that no affirmative relief will be afforded to the co-tenant who makes repairs and that his right to equitable contribution will be limited to cases in which an accounting is required."

Although the court was satisfied to rest its holding on the combination of facts presented in Craver, it could have justified its rejection of plaintiff's claim on any of three alternative grounds: (1) a cotenant in possession is not entitled to be compensated for the costs of repairs; (2) a cotenant in exclusive possession is clearly not entitled to contribution, regardless of what the rule is for a cotenant in mere possession; or (3) no affirmative relief can be granted to a repairing cotenant, and contribution will be granted, if at all, at the time of an accounting. While general principles of judicial restraint support the court's decision not to go beyond the facts, the opinion leaves the law on this subject some-

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20. 41 N.C. App. at 607, 255 S.E.2d at 255 (quoting J. Webster, supra note 19, § 109, at 118).
21. It is important to distinguish "repairs" from the payment of taxes, insurance, or installation of improvements. Although a tenant in possession may be denied credit for the costs of repairs, there may be an allowance for other expenditures. See Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938) (tenant in possession credited for improvements upon partition); Holt v. Couch, 125 N.C. 456, 34 S.E. 703 (1899) (tenant in possession given credit upon partition for the payment of taxes and insurance).
22. J. Webster, supra note 19, § 109, at 118.
23. See note 19 and accompanying text supra.
24. J. Webster, supra note 19, § 109 (1971) (footnotes omitted; emphasis in original).
what unclear. The court's cautious approach is understandable, but is nevertheless a source of frustration for the attorney who is unable to fit his client's cause into the Craver mold.

### B. Land Use

In Wilcox v. Pioneer Homes, Inc.\(^{25}\) the North Carolina Court of Appeals for the first time addressed the question whether an existing violation of public restrictions on the use of real property constitutes an encumbrance within the meaning of the covenant against encumbrances in a warranty deed.\(^{26}\) Defendant conveyed a house and lot to plaintiffs by warranty deed,\(^{27}\) and plaintiffs subsequently entered into a contract to sell the property. Prior to closing the sale they discovered that the lot was narrower than the defendant had represented, in violation of a minimum side lot requirement under a city ordinance.\(^{28}\) To make the lot comply with the ordinance, plaintiffs purchased a triangular strip of property adjacent to the lot for $1,500. They then brought this action to recover the money, alleging breach of the covenant against encumbrances contained in the warranty deed.\(^{29}\) Determining that the failure to comply with the restrictions did not breach the covenants in the deed, the trial court ordered summary judgment for defendant.\(^{30}\)

The court of appeals reversed, holding that the existing violation of the municipal ordinance did constitute an encumbrance on the property.\(^{31}\) The general view is that an encumbrance does not arise from the mere existence of a public restriction on the use of real property.\(^{32}\) As the court pointed out, however, there is a split of authority on the question whether an existing violation gives rise to an encumbrance.\(^{33}\) Courts that have found an existing violation to be an encumbrance have done so on the theory that marketable title cannot be transferred

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27. 41 N.C. App. at 140, 254 S.E.2d at 214. Defendant agreed to convey a “good and marketable title, free of all encumbrances.” Id.

28. Additionally, the house violated a restrictive covenant providing that no structure can be located less than a certain distance from the side lines of the lot. Id. at 141, 254 S.E.2d at 214.

29. Id. at 141, 254 S.E.2d at 214.

30. Id.

31. Id. at 143, 254 S.E.2d at 216.

32. Id. at 142, 254 S.E.2d at 215 (citing Annot., 39 A.L.R.3d 362 § 5 (1971); Fritts v. Gerukos, 273 N.C. 116, 159 S.E.2d 536 (1968)).

when the property is threatened with the potential for fines or litigation resulting from the violation. The mere existence of an unfavorable ordinance, though, does not necessarily subject the property to a violation and thus an encumbrance. In distinguishing between the existence of a municipal ordinance and an existing violation of an ordinance the court appears to have joined the majority viewpoint.

C. Torrens Registration

In *Richmond Cedar Works v. Farmers Manufacturing Co.*, the North Carolina Court of Appeals for the first time addressed the question of what constitutes adequate notice for a Torrens registration of title pursuant to G.S. 43-10. In August of 1972 Samuel Chesson filed

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34. See *Lohmeyer v. Bower*, 170 Kan. 442, 452, 227 P.2d 102, 110 (1951) the court stated: A marketable title to real estate is one which is free from reasonable doubt, and a title is doubtful and unmarketable if it exposes the party holding it to the hazard of litigation. ... We have little difficulty in concluding the violation ... of the ordinances ... as well as the violation of the restrictions ... so encumber the title ... as to expose the party holding it to the hazard of litigation and make such title doubtful and unmarketable.


38. "Torrens Law" is a specialized method of land transfer developed by Robert Richard Torrens of Australia in the late 1850's. 6a R. Powell, *Powell on Real Property* § 919, at 302 (rev. ed. 1979). Chapter 43 of the North Carolina General Statutes codifies the Torrens Law in North Carolina. N.C. Gen. Stat. §§ 43-1 to -64 (1976). The Torrens system is designed to facilitate land transfers efficiently and accurately through registration. A certificate of title is first obtained by a decree of court. The certificate gives its owner a title impregnable against any attack. Any subsequent transfers, encumbrances, or proceedings affecting the title are then placed on the certificate and a page of the register. The certificate, as the memorial of title, becomes the exclusive evidence of ownership. With each sale of the parcel a new certificate is issued and the old surrendered. Thus, at any time, the certificate is the complete repository of all that may affect the title to the land. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914). "The basic principle of this system is the registration of the title to land, instead of registering, as the old system requires, the evidence of such title." State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N.W. 175 (1902) (holding constitutional 1901 Minn. Laws, ch. 237, establishing title registration in Minnesota).

39. N.C. Gen. Stat. § 43-10 (1976). The statute requires that notice of the petition for Torrens registration, containing a short but accurate description of the land and the relief demanded, be published in some secular newspaper in the county where the property is located. The notice must set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern." There is also provision for the serving of personal notice when the interested party is ascertainable by the record. Id.

The recital in a final Torrens decree of registration that "publication of notice has been duly made" is conclusive evidence of such publication. Any attempt to invalidate a certificate after 12 months from the time of the decree is barred by G.S. 43-26. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

State v. Johnson, however, was not controlling in this action as the 12 month period provided in G.S. 43-26 had not yet expired. *See Brief for Appellee at 6, Richmond Cedar Works v. Farmer's Mfg. Co.*, 41 N.C. App. 233, 254 S.E.2d 673 (1979). Assuming, *arguendo*, that the wait-
a petition and motion to have certain land registered in the Torrens system. Chesson alleged that he had purchased the land from Richmond Cedar Works but that Richmond had lost its certificate, which had been issued in 1928. Notice of the petition was published in the Gates County Index and read in part: "The lands covered by said certificate of title are described as follows: Being Registered Estate No. 9, Book 1, Page 33, of Gates County Public Registry, to which reference is made for a more full and complete description." The clerk of superior court issued the new certificate to Chesson on September 15, 1972, but on August 31, 1973, Charles Edwards filed a motion to vacate the order, contending that the purported notice of publication was invalid and that he and the other plaintiffs held record title superior to Chesson's. Edwards claimed that he purchased the land in question from Richmond prior to Chesson, but that Richmond had failed to surrender its certificate at the time of the transfer.

Chesson defended his claim by relying on the certificate of title issued to him by the clerk of superior court, alleging that the certificate, once issued, was conclusive against adverse claimants. Chesson also argued that Edwards' action was barred by Edwards' negligence and by operation of the doctrine of laches. The court, however, affirmed the trial court's decision to vacate the September 15 issuance of title.

The trial court made its determination by relying on Rule 60 of the Rules of Civil Procedure. The provisions and purposes of the land registration statute. See notes 51-55 and accompanying text infra.

40. 41 N.C. App. at 233, 254 S.E.2d at 674.
41. Id. at 234, 254 S.E.2d at 675.
42. Id. at 238, 254 S.E.2d at 677.
43. Id. at 234, 254 S.E.2d at 675. Edwards and the other plaintiffs alleged that they were bona fide purchasers for value of the land by reason of a mesne conveyance of Richmond to Edwards. Id.
44. Id.
45. Id. As a general rule a purchaser for value in good faith who relies on the certificate of title to registered land and seeks to register his newly acquired title will be protected against any unregistered claims to the land even though such claims may be prior in time to the purchaser's acquisition of title. 66 AM. JUR. 2d Registration of Land Titles § 1 (1973).
46. 41 N.C. App. at 234, 254 S.E.2d at 675.
47. Id.
48. Id. at 236, 254 S.E.2d at 676. N.C.R. Civ. P. 60(b)(1). The trial court vacated the order of the superior court under Rule 60(b)(1), holding that the inadequate notice led to "surprise." 41 N.C. App. at 236, 254 S.E.2d at 676. The rule permits relief for "mistake, inadvertence, surprise, or excusable neglect" from a final order if the motion is made within a year after the judgment was entered. N.C.R. Civ. P. Rule 60(b). The court also might have relied upon N.C. GEN. STAT. § 43-26 (1976). The statute provides, in pertinent part:
After affirming the order vacating Chesson's certificate of title, the court next confronted the crucial issue of notice. G.S. 43-10 requires that notice be published "with a short but accurate description of the land" for valid registration. The court found the notice provided by Chesson's registration inadequate, noting that a complete and adequate description of the land was available to Chesson and that no reason was shown why a fuller description was not given. It is clear, however, that a full description is not necessary, since the court indicated it would be satisfied with notice that clearly calls the attention of adjoining landowners and other interested persons to the particular property. Having invalidated Chesson's certificate of title, the court granted title to Edwards, the holder of a prior deed in the chain of title, under the common source doctrine.

The court's decision in Cedar Works reflects the frustration that the Torrens system has encountered in this and other states. Torrens registration has been on the decline since its inception, largely as a result of sloppy administration and adverse decisions that undermine the conclusiveness of registered title. While the Cedar Works court correctly determined that the purported notice given here was inadequate,
and thus that the statutory requirements of G.S. 43-10 were not met, it could have taken the opportunity provided by these facts to strengthen the certainty of Torrens registration. This could have been accomplished by indicating that had adequate notice been given, Edwards’ claim could not defeat a bona fide purchaser’s reliance on a reissued certificate of title when Edwards failed to use all available means to secure a certificate on his purchase. Such a statement would lend much needed support for the Torrens concept and help avoid its further dismantlement.

D. Wills, Trusts, and Estates

1. Constructive and Resulting Trusts

In Cline v. Cline the Supreme Court of North Carolina found plaintiff’s evidence sufficient to create either a constructive or resulting trust in realty held by her former husband. While the imposition of a constructive trust was supported by well-settled legal principles in this state, for the first time in North Carolina the court held that a purchase money resulting trust could be created in favor of a person who, prior to the delivery of the deed, promises the grantee to pay for the property and in accordance with that promise pays the grantee the agreed upon amount. Plaintiff alleged that while they were married, she agreed with defendant to move onto a farm owned by his mother and had promised him that she would contribute toward the removal of an existing mortgage on the property. In return for her promise, plaintiff was assured by defendant that they would both take title to the property when the mortgage was paid. Shortly after they moved to the farm, however, title was placed solely in the name of the defendant.

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55. See note 39 supra. See generally Annot., 42 A.L.R.2d 1387 (1955). In addition, an argument can be made that even though Edwards brought a Rule 60 or G.S. 43-26 action within the 12 month limitation period, he should not prevail over Chesson in spite of his superior title. When Edwards purchased from Richmond he apparently was aware that Richmond had originally recorded the property in the Torrens system, and he therefore should have had a new certificate issued in his name. See N.C. GEN. STAT. §§ 43-33, -37, -39 & -40 (1976). Even if Richmond “failed to surrender” its certificate of title as Edwards contended, Edwards could have petitioned the court for a certificate. Id. § 43-17.1. Edwards’ failure to do so, whether intentional or negligent, left the register and certificate without a reference to the conveyance from Richmond to Edwards and thus made possible a false reliance on either indicator of title. It is arguable, then, that Edwards’ failure to register should estop him from attacking a validly registered subsequent conveyance. In essence, an affirmative duty to register would be placed on the purchaser. That way, the certificate of title would be more clearly the memorial of all conveyances, and reliance on it would be more justified.


57. Id. at 345, 255 S.E.2d at 405.
without plaintiff's knowledge. Several years later, after she had paid for one-half of the mortgage and was divorced from defendant, plaintiff discovered the true nature of the title and sued for one-half interest in the land.

One of the theories upon which plaintiff relied was a constructive trust.\textsuperscript{58} The court determined that, assuming plaintiff's evidence to be true, "defendant clearly breached this confidential relationship [of husband and wife] when he took title to the farm in his name alone after representing to his wife that the land would be theirs jointly after the mortgage was paid."\textsuperscript{59} A constructive trust arose at the time defendant took title, and as plaintiff had fulfilled her promise to pay one-half the mortgage, the equities remained in her favor and entitled her to enforce the trust.\textsuperscript{60}

The court found, somewhat surprisingly, that plaintiff's claim could also be sustained on the basis of a purchase money resulting trust. Under this theory, if both A and B pay for the property, but only A takes title, there is a rebuttable presumption that B intended to share in the beneficial enjoyment of the property and, therefore, a proportionate part of the property will be held in a resulting trust for B.\textsuperscript{61} The person alleging a resulting trust, however, must prove that he or she furnished part of the consideration for purchase. "The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes."\textsuperscript{62} The question that arose in \textit{Cline} was whether plaintiff had actually contributed anything toward the purchase price of the property, or had merely aided defendant with the mortgage payments \textit{after} the sale of the property. The court determined that a resulting trust can arise if the claimant "proves a payment on the purchase price made to the grantee or grantor after the delivery of the deed but pursuant to a promise made to the grantee before the deed was delivered."\textsuperscript{63} According to the court, "There is no difference in principle between paying money toward the purchase price at the

\textsuperscript{58} Whenever one obtains legal title to property in violation of a duty he owes to another who is equitably entitled to the land or an interest in it, a constructive trust immediately comes into being." \textit{Id.} at 343, 255 S.E.2d at 404.

\textsuperscript{59} \textit{Id.} at 344, 255 S.E.2d at 404. \textit{Accord}, V. A. SCOTT, THE LAW OF TRUSTS \S 499 (3d ed. 1967).

\textsuperscript{60} 297 N.C. at 344, 255 S.E.2d at 404.

\textsuperscript{61} \textit{Id.} at 345, 255 S.E.2d at 405.

\textsuperscript{62} \textit{Id.} at 344, 255 S.E.2d at 405.

\textsuperscript{63} \textit{Id.} at 345, 255 S.E.2d at 405 (citing G. BOGART, TRUSTS AND TRUSTEES \S 456 (2d ed. 1977)).
time of the delivery of a deed and contracting at that time to pay the
same sum later and then paying it as promised."64

While its reasons for adopting this new rule may have been sound,
the court failed to recognize that plaintiff's evidence was insufficient in
another respect to establish a resulting trust. Plaintiff never intended
for title to be put in defendant's name alone; in fact, she did not learn
of the conveyance from her mother-in-law until almost twenty-five
years later.65 In order to create a resulting trust, the person paying the
purchase price must intend to vest the grantee with legal title, while
retaining an equitable interest in the property.66 If plaintiff was igno-
rant of the transfer, she could not have intended her husband to have
sole title to the property. According to one authority,

The situation is different [from a resulting trust] where A did not
consent to the use of his money in making the purchase or did not
consent to the conveyance to B. Thus if B uses A's money without
his consent in purchasing land, A can follow the money into the land
by enforcing a constructive trust. Similarly A can enforce a construc-
tive trust where he directed B to use A's money in purchasing land in
the name of A, but B wrongfully used A's money in purchasing the
land in his own name. . . . In these cases B holds the land upon a
constructive trust rather than upon a resulting trust. His duty to sur-
render the property to A arises not because A intended to permit him
to have legal title but did not intend him to have the beneficial interest,
but because B would be unjustly enriched if he were permitted to
retain the property which he has wrongfully acquired with A's
money.67

Thus, plaintiff's proof was inadequate to sustain a resulting trust along
with a constructive trust in the property,68 even though her contribu-
tions toward the purchase price were held to relate back to the time of
transfer of title.69

64. Id. at 346, 255 S.E.2d at 406 (citing G. Bogart, supra note 63, § 456).
65. Id. at 339, 255 S.E.2d at 402.
66. See V. A. Scott, supra note 59, § 440.1.
67. Id. (emphasis added).
68. There are situations, however, in which it would be proper to impose both a resulting and
constructive trust. "Where A purchases property in the name of B intending that B should hold
the property in trust for A, and A was induced to do so by fraud or undue influence exercised by
B, there are grounds for imposing either a resulting trust or a constructive trust." Id.
69. It is significant to note that, although defendant took title from his mother twenty-four
years before plaintiff brought suit, the court did not find the plaintiff's claim to be barred by the
statute of limitations. "So long as an equitable owner retains possession, nothing else appearing,
the statute of limitations does not run against him. The statute begins to run only from the time
the trustee disavows the trust and knowledge of his disavowal is brought home to the cestui que
2. Discretionary, Protective, Spendthrift, and Support Trusts

In 1979 the North Carolina General Assembly passed an act to clarify the law on the alienability of beneficial interests held in trust. Under the new G.S. 36A-115, equitable interests are freely transferable, either voluntarily or involuntarily, unless those interests are created by a discretionary trust, a support trust, a protective trust or any combination of the three. The act specifically repealed a former spendthrift trust statute.

Before passage of the new act, North Carolina settlors were able to...
impose very limited spendthrift restrictions on trust property.\textsuperscript{75} According to a statute enacted in 1872,\textsuperscript{76} an income interest in trust could be burdened with a disabling restraint\textsuperscript{77} to immunize it from assignment or attachment, provided that at the time the trust was created the annual income from the property did not exceed five hundred dollars. In addition, spendthrift trusts were permitted only to the extent the income interests were for the "support and maintenance" of close relatives.\textsuperscript{78} As indicated above, the new act repealed the 1872 spendthrift statute.\textsuperscript{79}

While the repeal of the spendthrift statute may be cause for concern for those settlors who wish to place their property beyond the reach of their beneficiary's creditors, they should not overlook the other alternatives provided by the General Assembly. Although the spendthrift trust is no longer available as a method for placing restrictions on equitable interests, a skillful use of the other devices can clearly approximate its protective shield. One author has suggested the following as an alternative way to control the property:

A testator provides that the income of the trust estate shall be paid to a beneficiary, but it is provided that if he should alienate his interest or should become bankrupt or if his creditors should seek to reach it by attachment or other judicial process, his right to receive the income shall cease and thereupon the trustee may in his discretion apply the income for the benefit of the beneficiary or of some other designated person.\textsuperscript{80}

Thus, through a combination of protective and discretionary trust provisions, a settlor can provide substantial protection against the beneficiary's own imprudence or creditors.

Enactment of G.S. 36A-115 and repeal of the prior spendthrift

\textsuperscript{75} "Trusts in which the interest of a beneficiary cannot be assigned by him or reached by his creditors have come to be known as 'spendthrift trusts.'" II A. Scott, supra note 59, § 151. The spendthrift trust imposes a direct, or "disabling restraint" on alienation, whereas the protective trust places an indirect or "forfeiture restraint" on alienation. See note 73 supra. The beneficiary of a spendthrift trust retains his interest although he attempts to convey it or his creditors try to reach it; his interest is not terminated by such attempts as is the interest of the beneficiary of the protective trust. This is the distinction between a disabling restraint and a forfeiture restraint. See Christopher, Spendthrift and Other Restraints in Trusts: North Carolina, 41 N.C.L. Rev. 49 (1962).


\textsuperscript{77} See note 75 supra.


\textsuperscript{80} II A. Scott, supra note 59, § 150.
provision is certainly consistent with the common law of this state. For example, in the area of restraints on equitable interests, North Carolina has typically followed English law which authorizes the use of protective trusts but not spendthrift trusts.\(^\text{81}\) Therefore, the spendthrift statute might appropriately be viewed as a century-old aberration in the North Carolina trust law that no longer exists.\(^\text{82}\)

Although the decision to expressly legitimize the protective trust\(^\text{83}\) and emphatically deny the spendthrift trust is consistent with North Carolina common law, the broader question seems to be whether such action by the legislature constitutes an acceptable compromise between the necessarily conflicting interests of settlors and creditors in this state. From the former's point of view, the spendthrift trust is better suited to insure that the only beneficiary of the trust property will be the one intended by the settlor. As far as creditors are concerned, no permissible restraint on equitable interests is the better option. There is significant merit to the settlor's argument that a person should be able to do with his property as he pleases, and if he chooses only to enrich his beneficiary and not an unforeseen creditor, then this desire should be respected by the law. On the other hand, it is unfair to allow an extravagant beneficiary to enjoy an uninterrupted flow of trust income while his creditors are made to suffer the burden of his unpaid debts. Perhaps the more equitable solution to this dilemma is the one adopted by the General Assembly: recognition of the protective trust and prohibition against the spendthrift trust. With the protective trust a settlor can be assured that his property will ultimately pass only to those of his own choosing, though they may not be his first choice, and a beneficiary will not be permitted to multiply with impunity his insolvency to the interest he holds in the trust. Thus, the new act achieves a proper balance of the competing demands of those who are concerned with restrictive trusts and, in any event, is much more sensible than the watered-down spendthrift trust statute that preceded it.

3. Intestate Succession

In *Mitchell v. Freuler*\(^\text{84}\) the North Carolina Supreme Court sus-

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81. See Christopher, *supra* note 75, at 50-56.
82. *Id.* at 66.
83. Although the matter was somewhat uncertain, it was previously assumed on the basis of dicta in several North Carolina cases that a protective trust was enforceable in this state. See Christopher, *supra* note 75, at 53-54.
tained the constitutionality of G.S. § 29-19, 85 which restricts the right of an illegitimate child 86 to inherit from his father in intestate succession. Relying on the recent United States Supreme Court decision in *Lalli v. Lalli*, 87 the North Carolina court did not find the equal protection clause of the United States Constitution a bar to denying illegitimate children inheritance rights when certain prerequisites for proof of paternity are not met.

Plaintiff claimed to be the illegitimate son of William Henry Freuler, who died intestate. Though Freuler never adopted nor legitimated plaintiff, he lived with plaintiff's mother during his last seven years, purchased insurance policies for him, maintained savings accounts for him and had plaintiff work in his automobile shop. Although he had expressed an intention to provide for plaintiff after his death, he died suddenly without having executed a will. 88 Upon Freuler's death, plaintiff brought a declaratory judgment action 89 to invalidate G.S. 29-19 as "an invidious discrimination on the basis of illegitimacy" . . . in violation of the Fourteenth Amendment. 90 The trial court dismissed plaintiff's case and the North Carolina Supreme Court allowed discretionary review under G.S. 7A-31(a), 91 bypassing the court of appeals. 92

Plaintiff based his claim entirely upon the United States Supreme

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85. N.C. Gen. Stat. § 29-19 (1976 & 1979 Cum. Supp.). G.S. 29-19 and 49-12 provide for inheritance by an illegitimate child from his father if: (1) a judicial decree determining paternity is entered in either a civil or criminal proceeding. *Id.* § 29-19 (1976). (At the time *Mitchell* was decided, the 1977 amendment adding the criminal proceeding to accepted methods of proving parentage was not in effect. This did not influence the resolution of the case, however, as Freuler was never charged with nonsupport of the plaintiff); (2) the father acknowledges paternity by a written admission recorded in his lifetime and filed with the appropriate office of the clerk of superior court; (3) the father acknowledges paternity in his duly probated will; (4) the intermarriage of the mother and putative father takes place at any time after the birth of the illegitimate child. *Id.* § 49-12. In all other cases an illegitimate child is barred from inheriting from his father by intestate succession.

86. See Comment, Domestic Relations—Illegitimacy in North Carolina, 46 N.C.L. Rev. 813 (1968).


88. 297 N.C. at 207, 254 S.E.2d at 762.

89. The defendants in the action were Freuler's two daughters, their husbands, and Freuler's administrator. *Id.*

90. Plaintiff relied on the United States Supreme Court decision in *Trimble v. Gordon*, 430 U.S. 762 (1977), which invoked the equal protection clause of the fourteenth amendment to invalidate an intestate succession scheme that distinguished between legitimate and illegitimate children. See notes 93-96 and accompanying text infra.


92. Plaintiff's prayer for relief on appeal was that the court "(1) set aside the State's intestate succession statutes insofar as they operate to prevent plaintiff from sharing Freuler's estate equally with his two daughters, and (2) order Freuler's administrator to distribute his net estate in equal shares to the two daughters and plaintiff." 297 N.C. at 207, 254 S.E.2d at 763.
Court decision in *Trimble v. Gordon.* In *Trimble* the Supreme Court struck down an Illinois statute which provided that an illegitimate child could not inherit from his intestate father unless the father acknowledged the child as his own and married the child’s mother. In an opinion by Justice Powell, the Court balanced the difficult problems of proof in a paternity-related action, which might justify demanding a higher standard of proof for illegitimates in intestate descent, against the exclusion of significant categories of illegitimate children whose inheritance rights could be recognized without jeopardizing the state’s interest in the orderly disposition of decedents’ property.

The Court concluded that the Illinois intestacy statute unjustifiably excluded those illegitimates whose status as children of the intestate had been demonstrated in ways other than that provided by the statute. The statute thus violated the fourteenth amendment’s guarantee of equal protection.

The North Carolina Supreme Court, however, found that *Trimble* did not control the present action, asserting that the Illinois statute differed significantly from the North Carolina statute before the court. Instead, it relied on *Lalli v. Lalli,* a more recent Supreme Court case.

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93. 430 U.S. 762 (1977) (5-4 decision).
95. In *Trimble,* the putative father of the illegitimate child had neither acknowledged the child nor married the child’s mother, though he was determined to be the natural father of the child in a judicial proceeding that ordered him to contribute towards her support. When the father died intestate, the Illinois statute barred the illegitimate daughter from inheritance since the father had not married the child’s mother. If the daughter had been legitimate she would have inherited the entire estate. 430 U.S. at 764.


96. The Court held that a statute that places exceptional burdens on illegitimates must be “carefully tuned to alternative considerations.” 430 U.S. at 772.
98. 297 N.C. at 215, 254 S.E.2d at 768. The court determined that it was the Illinois statute’s insistence on intermarriage of the mother and the intestate father that constituted the constitutional flaw. North Carolina’s statute, by providing alternate means of proving paternity, avoids that defect. N.C. GEN. STAT. § 29-19(b)(l) (1976).
which upheld a New York statute that also distinguished between legitimate and illegitimate children for purposes of intestate succession. Under the New York statute, the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father. The Court found that the disruption of property disposition caused by difficulties of proof in paternal inheritance by illegitimates justified the restrictions in the New York statute, especially since the statute would not disqualify an unnecessarily large number of illegitimate children. It distinguished Trimble by observing that the New York statute was concerned only with the accuracy and efficiency of proof of paternity, while the Illinois statute barred illegitimates even if paternity had been demonstrated in a judicial forum. Thus, the Court upheld the New York statute even under a Trimble analysis.

In Mitchell the North Carolina Supreme Court considered the impact of both the Trimble and Lalli decisions and determined that G.S. 29-19 manifested none of the hostility to illegitimates that plagued the Illinois statute. Under G.S. 29-19 an illegitimate child could inherit from his putative father upon proof of paternity by any one of the following methods: (1) a judicial decree during the life of the father; (2) a written, acknowledged and recorded admission; (3) the father's acknowledgement of paternity in a duly executed will; and (4) the marriage of the mother and putative father after the birth of the illegitimate child. The court reasoned that these methods afforded the illegitimate a reasonable means to secure his intestate inheritance and yet safeguarded the state's interest in a fair disposition of a decedent's property and the validity of titles passing under intestate laws.

100. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967). The statute provides, in pertinent part:

An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

101. Id.
102. 439 U.S. at 268-71.
103. Id. at 272-73.
104. Id. at 273. The Court also found significant the New York court's previous liberal interpretations of § 4-1.2. Id.
106. 297 N.C. at 215-16, 254 S.E.2d at 768.
108. 297 N.C. at 216, 254 S.E.2d at 768. The court noted that G.S. 29-19, like the New York
There is no question that G.S. 29-19 avoids the pitfalls of the Illinois statute while encompassing, and probably expanding, the protection afforded by the New York statute upheld in *Lalli*. It is questionable, though, whether North Carolina, either legislatively or judicially, should not have gone further in protecting the interests of illegitimates. In *Mitchell* the decedent acknowledged plaintiff as his son in all respects necessary to demonstrate his paternal status. Arguably, the state's interest in requiring speedy and efficient determination of paternity is completely served by public acknowledgement of parentage. It may be unrealistic to expect the institution of formal paternity proceedings when a child is openly acknowledged and supported by his father. Further, it cannot be denied that illegitimacy is a problem for which the child is not responsible. While the *Mitchell* court acted responsibly in its decision, the state must confront the difficulties inherent in this socially volatile area. Ultimately, the legislature must remove the last obstacle to full equality among offspring.

109. The North Carolina Court of Appeals noted in *Outlaw v. Planter's Nat'l Bank & Trust Co.*, 41 N.C. App. 571, 575, 255 S.E.2d 189, 191 (1979), that the "provision for this alternative method of establishing paternity [see text accompanying note 23, supra], renders G.S. 29-19 even more constitutionally sound, in our view, than the New York statute under review in *Lalli* which the Court held constitutional."

110. Justice Brennan, dissenting in *Lalli*, argued that the New York statute unconstitutionally discriminates against illegitimates because it "excludes forms of proof which would not compromise the state's interests." 439 U.S. at 279 (Brennan, J., dissenting). In *Lalli* all interested parties conceded that Robert Lalli, plaintiff, was the son of Mario Lalli. Brennan asserted that when there is no factual dispute over the relationship between the illegitimate child and the putative father, there is no justification for denying the child his intestate share. *Id.*

111. In *Lalli* Justice Brennan argued:

Social welfare agencies, busy as they are with errant fathers, are unlikely to bring paternity proceedings against fathers who support their children. Similarly, children who are acknowledged and supported by their father are unlikely to bring paternity proceedings against them. First, they are unlikely to see the need for such adversary proceedings. Second, even if aware of the rule requiring judicial filiation orders, they are likely to fear provoking disharmony by suing their father. For the same reasons, mothers of such illegitimates are unlikely to bring proceedings against the father. Finally, fathers who do not even bother to make out wills (and thus die intestate) are unlikely to take the time to bring formal filiation proceedings. Thus, as a practical matter, by requiring judicial filiation orders entered during the lifetime of the father, the New York statute makes it virtually impossible for acknowledged and freely supported illegitimate children to inherit intestate.

*Id.* at 278.

112. *Id.* See 46 N.C.L. REV. 813 (1968).
4. Self-Proving Will Statute

The General Assembly recently amended,113 and thereby improved, the “self-proving will” statute enacted in 1977.114 According to this statute, evidence that a will has been duly executed can be created by having the testator and attesting witnesses appear before a notary public115 to sign a sworn affidavit that acknowledges proper publication, attestation, and the fulfillment of all other requisites for due execution of a will.116 The will is “self-proving” because it can be admitted to probate on the strength of the accompanying affidavit without the testimony of the attesting witnesses who would otherwise be required to testify following the testator’s death.117

Originally, the self-proving will statute contemplated two separate documents—a will and an affidavit—with each requiring signatures by the testator and witnesses. The new amendment has expedited the procedure by allowing a will to be “simultaneously executed, attested, and made self-proved”118 with a single set of signatures by the testator and witnesses. Although at first glance this change seems unimportant, there is a definite advantage to the one-step method. Under the original statute, if an attesting witness overlooked the will itself and signed only the attached affidavit, the will might or might not be valid. Perhaps the will could be saved by arguing that the witness’s signature on the affidavit was at the “end” of the will, and that it worked both to validate the will and to make it self-proving. Indeed, there is authority which supports the view that signing the affidavit alone is sufficient to make the will valid.119 On the other hand, there is a persuasive argument that the affidavit can be used only to prove pre-existing will. Courts adopting this position have held that the operation of the self-proving affidavit is subject to the condition precedent of a valid will.120

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115. The statute requires the testator and witnesses to appear before an “officer authorized to administer oaths,” which would, of course, include a notary public. N.C. GEN. STAT. § 31-11.6 (Cum. Supp. 1979).
116. See id. § 31-18.1(a).
In light of this split of authority, it appears that the General Assembly has made a wise decision in eliminating the unnecessary risk presented by a two-step self-proving will statute, and the amendment, therefore, is a welcome change to the state’s probate law.

5. Spousal Intestate Share

The 1979 General Assembly amended the Intestate Succession Act to increase the share of a surviving spouse of an intestate decedent. Under the new provision, even though the intestate is survived by issue, the surviving spouse’s share is the entire net estate provided that it does not exceed $15,000. When the net estate is greater than that amount, the spouse takes the first $15,000 plus one half of the remaining net estate if the intestate is survived by one child, or the issue of a deceased child. When two or more children or the issue of two or more children survive the intestate, the spouse will receive $15,000 plus one third of the residuary estate. If the intestate leaves no lineal descendants and the net estate does not exceed $25,000, the spouse’s inheritance equals the entire amount, but if the net estate exceeds that amount and the intestate is survived by one or both parents, the spouse is entitled $25,000 in value plus one half of the balance. As before, when neither issue nor a parent survives the intestate, the entire net estate passes to the surviving spouse.

The new amendment represents a significant change in North Carolina intestacy law. Formerly, a surviving spouse automatically shared in the net estate with the intestate’s issue—taking one-half when there was one lineal descendant, or one-third when there were two or more stocks of issue—having no right to a specified minimum even though the net estate was very small. Similarly, the spouse was favored over the parents only to the extent of the first $10,000 of personal property, after which the realty and remaining personalty were divided equally. As indicated by the General Assembly’s action, the dispositional scheme established by these prior provisions failed to implement several important policies inherent in model intestacy legislation. As—

121. Under Uniform Probate Code § 2-504(a), a will may be simultaneously, executed, attested, and made self-proved. See J. Dukeminier & S. Johanson, supra note 117, at 290-91.


125. Id.
suming an intestacy statute ought to distribute the estate in a manner in which the ordinary intestate would have desired had he left a will, there is authority to the effect that most persons with relatively few assets intend for their spouses to acquire the whole estate.\textsuperscript{126} For example, one study sampling the distribution patterns of both living and deceased testators found that an overwhelming majority intended for their entire estates to be left to the surviving spouse if there were no lineal descendants or ancestors living at the time the will was drawn.\textsuperscript{127} Of course the previous intestacy statute anticipated this desire, and in this respect, has been incorporated into the present statute. More importantly, the study found that over 85\% of both decedent and living testators with surviving ancestors or issue altered the state's intestacy plan by bequeathing all to the surviving spouse.\textsuperscript{128} This preference for leaving everything to the surviving spouse was clearly more pronounced with the lesser estates.\textsuperscript{129}

Aside from more accurately approximating the presumptive intent of most decedents, the current statute apparently better coincides with the probable expectations of their heirs. In many cases children of an intestate will redistribute part or all of their share to the surviving spouse because it is the "right and proper thing to do."\textsuperscript{130} "A less charitable explanation [for children redistributing their intestate shares to the parent] is that in depriving the surviving spouse of home and hearth, it may be necessary for the child to assume financial and social responsibility for the parent at a time not suitable for the child's family."\textsuperscript{131} Thus, it seems that in many instances the children of intestate do not expect to ultimately share in the estate of their deceased parent when he or she is survived by a spouse since they feel the spouse is morally or financially more deserving than themselves.\textsuperscript{132}

Not only does the revised statute more nearly comply with the expectations of both the intestates and their heirs; it also avoids, at least in large measure, the practical difficulties associated with distributions to

\textsuperscript{127} M. Sussman, J. Cates \& D. Smith, \textit{The Family and Inheritance} 86-89 (1970). In the decedent sample the spouse was bequeathed the entire estate in 33 out of 37 cases. In the living testator population the figures were 34 and 39 respectively. \textit{Id.}
\textsuperscript{128} \textit{Id.} at 89. See J. Dukeminier \& S. Johanson, \textit{supra}, note 117, at 45-47.
\textsuperscript{129} M. Sussman, J. Cates \& D. Smith, \textit{supra} note 127, at 89-90.
\textsuperscript{130} \textit{Id.} at 127.
\textsuperscript{131} \textit{Id.} at 128.
\textsuperscript{132} \textit{Id.}
minor children. If a minor child inherits property that requires active management or some type of title recordation to make it marketable, as in the case of real estate, it may be necessary to appoint a guardian over the child’s property. Appointment of a guardian is costly in terms of time and money, and the guardian’s investment powers are severely restricted, all of which seems unwarranted if the intestate’s estate is fairly small. Under the new intestacy law, however, such problems do not arise when the net estate is no greater than $15,000, since title will vest completely in the surviving spouse and there will be no need to appoint a guardian. Although the intestate’s minor children are formally denied any portion of the estate if it is less than $15,000, they will nevertheless indirectly benefit from the decedent’s property because of the surviving parent’s obligation to provide support for the children. In addition to giving the spouse sole responsibility over the net estate until the $15,000 threshold is exceeded, the statute offers a method for hurdling certain pitfalls created when the minors are entitled to share in the property. If others are to participate in the net estate, the spouse may elect the portion of the decedent’s property, whether real or personal, that will be used to satisfy his or her fractional share. Thus, the spouse can choose to take the property that demands adult supervision or that presents possible title problems, and the minors will consequently receive the more easily managed assets of the estate. The family residence is a particularly good example

133. See Id. at 131-32:
It appears that the law governing inheritance of minors, although it has good intentions in trying to protect the rights of children, causes incalculable difficulties for parents in both psychic and monetary costs. The parent is caught in a maze of legal requirements that not only are expensive in time and money but also potentially threaten his relationship with the child or children.

Id. at 133.

134. E.g., N.C. GEN. STAT. § 33-12 (Cum. Supp. 1979) (requirement to post bond); id. § 33-31 (court approval necessary to sell minor’s estate).
135. Id. § 29-14(a), (b).
136. If . . . the surviving spouse is not entitled to the entire net estate, the surviving spouse may elect to take his or her share wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the surviving spouse may elect.
Id. § 29-14(e). There is perhaps some ambiguity in the phrase “in such proportions as the surviving spouse may elect.” One can imagine a strict interpretation which would only permit a spouse to designate the percentages of realty or personalty that will be used to satisfy his or her share (e.g., 50% real and 50% personal property), leaving the final disposition of specific assets to the administrator. This construction, however, is clearly inconsistent with the purpose of granting the spouse selection over the property in the first place. Surely the legislature did not intend for the administrator to have the ability to intervene in a spouse’s preference for a particular piece of property. As such, the administrator’s acquiescence should not be required before a spouse can elect to take the decedent’s house, or other property, which may have unique practical or sentimental value to him or her.
of the kind of property over which the spouse would prefer to have the flexibility of possessing the entire fee, whether for the purpose of selling to a third party or avoiding the administrative task of having the minor children redistribute their interests to their parent, and thus is an ideal asset over which the spouse could exercise the power of selection.\textsuperscript{137}

The rewriting of the intestacy provisions for the surviving spouse has brought about desirable changes in the operation of family inheritances. As a result of this revision, the law will conform more closely to the desires of the decedent and his or her dependents and will eliminate at least some of the hardship on the surviving spouse when the intestate has left minor children. Thus, the amendment is an evident improvement to former intestacy statutes.\textsuperscript{138}

6. Spouse's Right of Dissent

In \textit{Phillips v. Phillips}\textsuperscript{139} the North Carolina Supreme Court rendered an elaborate opinion detailing the many valuation problems encountered in determining whether a "second or successive" spouse may dissent to a decedent's will under G.S. 30-1\textsuperscript{140} and thereby receive a statutory share. The court undertook a step-by-step examination of the various effects that several common estate expenses have upon the spouse's right to a forced share. After an exhaustive attempt to transform G.S. 30-1 into a workable provision, the court called upon the General Assembly to adopt a simpler procedure for the protection of the disinherited spouse.\textsuperscript{141}

No children were born during the marriage of plaintiff and testator in \textit{Phillips}, but decedent was survived by a child from a prior marriage. Testator devised his entire estate to his child and two grandchildren and designated plaintiff as his beneficiary in a life insurance policy.\textsuperscript{142} The decision by the trial court to grant plaintiff an elective share of the net estate was affirmed by the court of appeals,\textsuperscript{143} but reversed and remanded by the supreme court.\textsuperscript{144}

\textsuperscript{137} It also should be mentioned that the election provision quite appropriately gives the marital partner first choice over the net estate when the decedent is survived by parents. \textit{Id.}

\textsuperscript{138} Section 29-14 is very similar to \textsc{Uniform Probate Code} § 2-102. Under that provision the spouse takes the first $50,000 plus one half the balance of the net estate, if the intestate is survived by issue or parents.

\textsuperscript{139} 296 N.C. 590, 252 S.E.2d 761 (1979).

\textsuperscript{140} N.C. GEN. STAT. § 30-1 (1976).

\textsuperscript{141} 296 N.C. at 604-07, 252 S.E.2d at 770-72.

\textsuperscript{142} \textit{Id.} at 592, 252 S.E.2d at 763.


\textsuperscript{144} 296 N.C. 590, 252 S.E.2d 761 (1979).
Plaintiff sought to establish her right to dissent under G.S. 30-1(a)(1). This statute allows the spouse to dissent to the testator's will in those cases "where the aggregate value of the provisions under the will for the benefit of the surviving spouse," when combined with the "property passing in any manner outside the will to the surviving spouse . . . is less than the intestate share of such spouse." Thus, in order to sustain plaintiff's right to a forced share the court would have had to find that the value of the insurance proceeds—the only property passing to the spouse either inside or outside decedent's will—was less than the value of one half the decedent's net estate—the amount to which plaintiff would have been entitled had the property passed by intestacy. Since the insurance proceeds were readily discernible, the critical determination in this case was the value of the spouse's intestate share in the net estate. The court's initial concern, therefore, was to determine the value of the "net estate" so that the spouse's intestate share could be ascertained and balanced against the figure payable on the insurance policy.

Section 29-2(5) of the Intestate Succession Act defines "net estate" as "the estate of a decedent, exclusive of family allowances, costs of

146. Id. Actually G.S. 30-1(a)(3) is more directly applicable to the facts of Phillips than is G.S. 30-1(a)(1), since the former provides that the spouse may dissent when the property taken under and outside the testator's will

is less than the one half of the amount provided by the Intestate Succession Act in those cases where the surviving spouse is a second or successive spouse and the testator has surviving him lineal descendents by a former marriage and there are no lineal descendents surviving him by the second or successive marriage. Id. § 30-1(a)(3). Under this subsection the insurance proceeds would only had to have been greater than one half, as opposed to the whole, of the spouse's intestate share in order to defeat her right of dissent. Since the decedent in Phillips died before the effective date of subsection (3), however, it was held to be inapplicable. 296 N.C. at 596, 252 S.E.2d at 765.

Subsection (3) was apparently enacted to eliminate an anomaly in North Carolina elective share provisions. Prior to the amendment adding this subsection the "second or successive" spouse had a right to dissent if the value of the property passing to him or her upon the death of the testator (whose descendents were all from a prior marriage) was less than an entire spousal intestate share. A "second or successive" spouse who did dissent to the will, however, was only entitled to receive one half of his or her normal intestate share. N.C. GEN. STAT. § 30-3(b). Thus, in a case such as Phillips in which the decedent died prior to the enactment of subsection (3) of G.S. 30-1(a), the spouse merely had to demonstrate that he or she had taken less than his or her ordinary intestate share upon the death of testator to have a right to dissent to the will, but upon exercise of that right, his or her actual distributive share would be limited to one half of his or her intestate share.

147. At the time of this case the share of a surviving spouse was equal to one half of the net estate when the intestate was survived by only one child. The statute has since been amended, however, to allow the spouse the first $15,000 and one half of the remaining net estate when the decedent leaves one child. N.C. GEN. STAT. § 29-14(a) (Cum. Supp. 1979). But see id. § 30-3(b), discussed in note 146 supra.
administration, and all lawful claims against the estate." 148 As a preliminary matter, the supreme court held the court of appeals to be in error in failing to deduct from the decedent's gross estate the widow's allowance and the costs of administration. 149

Perhaps the most difficult issue addressed in Phillips, however, was the proper treatment of the federal estate tax as one of the "lawful claims against the estate." The parties in this action had apparently computed the federal estate tax on the premise that the estate would be distributed in conformity with testator's will. In contrast the court held "that the estimate required by G.S. 30-(1)(a) is not an estimate of the actual tax which will be paid on the estate but rather an estimate of the tax which would be paid if plaintiff received the share of the 'net estate' specified by G.S. 30-1(a)(1)..." 150 In other words, to calculate the net estate for forced share purposes an estimate of the federal estate tax is deducted from the gross estate, such estimate being computed without regard to the testator's will and as though he had died intestate. 151 If the estate tax is to be projected on the assumption of intestacy, the executor must necessarily determine the spouse's intestate share to allow for "any marital deduction the estate would receive as a result of her taking that share." 152 Under this formula there is a potential valuation problem encountered in computing the decedent's "net estate"—whether actually for the purpose of intestacy or when intestacy is assumed for the purpose of establishing the right to dissent—when the estate tax must be deducted prior to allotting the spouse's fractional share. If the spouse takes only a fraction of the net estate and the value of that share after taxes will fall below the maximum allowable marital deduction, 153 then the problem posed for figuring the net estate is one of circular mathematics. First, one must know the value of the spouse's

149. 296 N.C. at 600, 252 S.E.2d at 767 (1979). Although the parties had agreed that the case should be decided upon the uncontroverted facts, the court nonetheless found itself compelled to remand the case on the issue of administration costs since no estimate of those costs had been included in the stipulation. The court pointed out that the estimate should encompass executor's commissions, reasonable management costs and attorney's fees. Id. at 602, 252 S.E.2d at 768-69.
150. Id. at 601, 252 S.E.2d at 768.
151. But see N.C. GEN. STAT. § 30-3(a) (1976) (distributive share of dissenting spouse, except that of a "second or successive" spouse, is not reduced by federal estate tax even though in establishing his or her right to dissent under G.S. § 30-1(a)(1) the estate tax is considered).
152. 296 N.C. at 601, 252 S.E.2d at 768.
153. In general, the maximum marital deduction allowable is the greater of (1) $250,000, or (2) 50% of the value of the adjusted gross estate. 26 U.S.C. § 2056(c)(1)(A) (1976). The "adjusted gross estate" as defined in id. § 2056(c)(1)(A) is generally the gross estate minus deductions for expenses, indebtedness, certain taxes under id. § 2053 and certain losses enumerated in id. § 2054.
share in the net estate to determine the proper marital deduction and consequent estate tax liability. In order to calculate the exact value of the spouse’s share, though, one must first decide on the correct marital deduction and resulting tax on the gross estate. Stated differently, computing the net estate may be difficult in some cases “since the amount of the [marital] deduction will depend on the amount of the tax and the amount of the tax will depend upon the amount of the deduction, with the result that there will be two mutually dependent indeterminates.”

To illustrate the problem, suppose the maximum marital deduction that can be allowed for a decedent’s estate is one half of the adjusted gross estate, and assume further that the surviving spouse is entitled by the intestacy statutes to one half of the net estate. If one half of the adjusted gross estate is used as the value of the spouse’s share, then by definition the marital deduction will equal that amount, leaving the remaining one half of the estate fully taxable. Once this tax reduces the estate the spouse will not receive one half of the adjusted gross estate as previously assumed, but something less. To be more specific, the spouse’s share will equal one half of the adjusted gross estate minus one half of the tax imposed upon the estate. Since the spouse’s share after taxes will necessarily be less than one half of the adjusted gross estate, it is apparent that it was initially improper to use that figure as a basis for the marital deduction.

Of course, the problem does not arise if the value of after-tax property passing to the surviving spouse will clearly exceed the maximum allowable marital deduction, since the deduction will be fixed at that maximum and can therefore be determined prior to fixing the spouse’s intestate share. For example, suppose a decedent’s adjusted gross estate is valued at $1,000,000 and the spouse is entitled to the entire net estate. Here, the marital deduction will be $500,000, but the spouse’s share will be greater than $500,000. While the estate tax will affect the spouse’s

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154. See id. § 2056(b)(4)(A) (effect of death taxes, both state and federal, is taken into account in determining the value of the interest passing to the surviving spouse in order to assess the amount of the marital deduction).


156. See note 153 supra.

157. For a solution to this problem see Treas. Reg. § 20.2056(b)-4(c)(4) (1958), which explains that “[m]ethods of computing the deduction, under such circumstances, are set forth in supplemental instructions to the estate tax return.”

158. See C. LOWNDES, R. KRAMER & J. McCORD, supra note 155, § 17.4.

159. The spouse’s share will in fact equal $500,000 (tax free) plus $500,000 minus the applicable tax on $500,000.
share, it will not affect the marital deduction as it is evident at the outset that the spouse will take more than one half of the adjusted gross estate. Thus, in this case, the marital deduction would not be dependent on a precise computation of the spouse's share, and therefore, the amount of the marital deduction could be calculated and deducted in advance of distributing the spouse's portion of the net estate.

Although the federal estate tax should be deducted from the gross estate, the court refused to allow a deduction for the interest and penalties owed because of the filing of a late estate tax return. While these charges may be "lawful claims against the estate" and may affect the actual distributive share of a dissenting spouse once a dissent is allowed, the court held that they cannot initially reduce the decedent's "net estate" to defeat the spouse's right of dissent. "The legislature could not have intended to confer upon executors the power to extinguish any potential right to dissent merely by delaying the filing of an estate tax return, or payment of the principal of the debt, until interest and penalty charges sufficiently erode the 'net estate.'" Apparently the reasonableness of the delay in filing a prompt tax return is immaterial in establishing the spouse's right to an elective share. The court assumed that delay would usually be unnecessary and concluded, therefore, that in an estimation of the "net estate" for purposes of G.S. 30-1(a)(1), penalties and interest should not be considered.

Finally, the court addressed the question of when the right to dissent should be determined. In repudiating the conclusion reached by the court of appeals that the right to an elective share could not be "finally established until 'net estate' is ascertained," the supreme court held that the surviving spouse's right to dissent should be determined whenever "the value of the 'net estate' can be estimated with

160. 296 N.C. at 601, 252 S.E.2d at 768.
161. Id. Note the distinction between establishing the spouse's right to dissent under G.S. 30-1 and his or her distributive share under G.S. 30-3 once a dissent has been made. See note 146 supra.
162. 296 N.C. at 601, 252 S.E.2d at 768.
163. Id. On a related issue the court held that "for the limited purpose of determining plaintiff's right to dissent," the attorney's fees generated in litigation over the determination of this right cannot be used to diminish the "net estate." A reasonable prediction of attorney's fees that will be incident to the costs of administration should be used in arriving at an estimate of the "net estate," but the actual, and perhaps extraordinary attorney's fees caused by litigation over a spouse's right to dissent are not deductible from the "net estate." Again, while the litigation fees may lessen the surviving spouse's distributive share if he or she is found to have a right to dissent, they cannot reduce his or her "intestate share" in the first instance to destroy his or her right to dissent. Id. at 603, 252 S.E.2d at 769.
164. 34 N.C. App. at 433, 238 S.E.2d at 793.
reasonable accuracy." Thus, much of the troublesome mathematics involved in computing the "net estate" can be alleviated by reasonable estimates of the estate tax that would be due had there been intestacy, the costs of administration and reasonable attorney's fees, the outstanding claims of creditors, and any other customary charges against the gross estate. Still, the court realized that there was no perfect solution to the problems created by the dissent statute. "While the use of an estimated 'net estate' may work well where that right to dissent is clear-cut, it will inevitably cause problems in cases such as this one where that right is closely contested." A possible legislative remedy proposed by the court was to grant an unqualified right of dissent to the surviving spouse and thereby avoid the necessity of estimating his or her intestate share of the net estate and measuring it against the property taken inside and outside the will. Clearly some type of legislative relief seems appropriate.

7. Trust Termination

In *Wachovia Bank & Trust Co. v. Sevier*, a decision by the trial court to terminate prematurely a trust at settlor's request on the finding that the settlor was the sole beneficiary of the trust was reversed by the court of appeals. The terms of the trust granted the income interest to settlor for life, with the trust corpus to be distributed upon settlor's death to her issue *per stripes*. In addition, settlor retained a general testamentary power of appointment over the trust principal and had explicitly stated in the trust instrument that the transfer was irrevocable. Settlor and her children, all of whom were of capacity, petitioned the court to authorize termination of the trust in order to permit an alternative disposition of the property which would avoid the enormous estate tax liability posed by the inflexible trust agreement. The guardian ad litem, who had been appointed on behalf of the minor...
grandchildren and unborn lineal descendants, filed an appeal from the trial court's judgment to revoke the trust.

The court of appeals concluded that the settlor was not the sole beneficiary, since she had granted a remainder in the trust to her issue *per stripes*. Settlor's issue held protected interests, the court observed, even though the settlor had reserved a general testamentary power of appointment which could be exercised to exclude the remaindersmen upon her death. Consequently, the settlor was precluded from unilaterally revoking the trust.

Since the settlor was not the sole beneficiary of the trust, the court was required to decide whether the trust could be discontinued by the settlor with the consent of the other beneficiaries. It held that consent could not be given by any of the beneficiaries and, therefore, there could be no early termination of the trust. According to the court, "[e]ffective consent may be given by a beneficiary in being, competent, and possessing an indefeasibly vested interest in the trust estate." Under this standard those remaindersmen who were unborn obviously could not release their interests in the trust; the settlor’s minor grandchildren were unable to consent because they lacked legal capacity; and although the children and the grandchildren who were of majority agreed to the termination, they too were held incapable of giving consent because none possessed "an indefeasibly vested interest in the trust estate."

While the court's holding is correct on these particular facts, it misstated the applicable law. In order to render effective consent the beneficiary must be competent, in being, and ascertainable, but he

170. *Id.* at 765, 255 S.E.2d at 639 (citing II A. SCOTT, *supra* note 59, § 127.1).

"If he has a general power of appointment by deed, however, he can make an appointment to a new beneficiary, thereby excluding the original beneficiaries, and may then, with the consent of the beneficiary to whom the appointment is made, revoke the trust." IV A. SCOTT, *supra* note 59, § 340. Of course the settlor in *Sevier* retained only a testamentary power of appointment.

171. The court also found N.C. GEN. STAT. § 39-6 (1976) to be inapplicable. 41 N.C. App. at 765, 255 S.E.2d at 639-40. G.S. 39-6 provides that a settlor of a voluntary trust may revoke the future contingent interests of "persons not in esse or not determined until the happening of a future event" so long as the revocation is made prior to the vesting of the future estates. Since the remaindersmen in *Sevier* were either unborn, unascertainable, or both, G.S. 39-6 would seemingly apply, but the statute further provides that "this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest." *Id.* As noted above, the settlor in *Sevier* had explicitly relinquished her power of revocation in the trust instrument.

172. 41 N.C. App. at 765, 255 S.E.2d at 639.

173. *Id.*


[If the settlor is not the sole beneficiary of the trust because there is a vested or contin-
need not possess an "indefeasibly vested interest." Of course, in most cases a beneficiary who is ascertainable will also have a vested interest, but this is not always the case. For example, suppose settlor creates a trust with income to himself for life, then upon settlor's death, to A and his heirs if A has reached age thirty before settlor dies. Assuming A is of majority and in good mental health, he and settlor should be capable of voluntarily terminating the trust since they are the
gent gift over to others, he cannot revoke the trust without their consent, and if any one of them is under an incapacity, or is not ascertained, or is unborn, the settlor cannot revoke the trust.

Id. (emphasis added).

175. 41 N.C. App. at 765, 255 S.E.2d at 639. The primary authority cited by the court, Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943), was taken largely out of context and provides little support for the proposition that a beneficiary's interest in trust must be "indefeasibly vested" before he is capable of releasing it. The controversy in Smyth did not concern a premature termination of trust; the issue was whether a remainderman could devise his equitable interest when it was vested subject to total divestiture. Greatly simplified, the essential facts in Smyth were: Testator devised property in trust, giving A an income interest during the life of B, then upon the death of B, the corpus of the trust to A in fee. Testator's will further provided that A's children would take if A predeceased B. A died before the income interest terminated and was survived by his wife and child. A had devised his equitable interest to his wife. On these facts the court in Smyth indicated merely that as a general rule, trust beneficiaries who are sui juris and whose rights are vested may ordinarily dispose of their equitable interests in the trust property. "[B]ut where the interest of a beneficiary is made defeasible upon his dying with children to whom the interest passes by substitution," the beneficiary may not dispose of his equitable interest by devising it to another. Id. at 652, 24 S.E.2d at 627. Thus, in Smyth, a beneficiary without an indefeasibly vested interest was found incapable of devising it once the condition subsequent had occurred. It does not follow, however, that a beneficiary's interest must necessarily be indefeasibly vested before it is alienable. In fact, the court went on to hold that the contrary was true.

After its discussion on the devisability of vested interests, the Smyth court proceeded to state the law applicable to the disposition of contingent interests. The court drew a distinction between those contingencies which rendered the identity of the takers uncertain, and those which created a condition precedent to the vesting of interests held by ascertainable takers. See note 176 infra. In order to illustrate a valid devise of a contingent interest, the court cited Fisher v. Wagner, 109 Md. 243, 71 A. 999 (1909), with approval. In Fisher there had been a conveyance basically of the form, "to A and her heirs, but in the event she dies without children, to B and his heirs." B predeceased A and devised his interest to his wife. The Supreme Court of Maryland held the bequest to be valid since the person to take in the event A died childless was certain. Thus, the holding in Fisher was that a beneficiary can alienate his contingent interest so long as he is ascertainable. Ironically, by adopting the decision in Fisher, Smyth more nearly supports the proposition that a trust beneficiary may give consent to terminate his interest, whether contingent or vested, provided he is ascertainable, than the contention announced in Sevier that a beneficiary's interest has to be "indefeasibly vested" before he can consent to an early termination of trust.

176. See T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 76 (1966):

Having said that a remainder is vested when (a) there is no condition precedent to the estate becoming a present estate except the natural expiration of estates which are prior to it in possession, and (b) the person or persons who will be entitled to possession if the estate becomes present are ascertainable, we can now define a contingent remainder as a remainder which lacks one or both of the characteristics of a vested remainder. A contingent remainder is one which is either subject to a condition precedent (in addition to the natural expiration of prior estates), or one owned by unascertainable persons, or both.
only two persons who possibly could be beneficially interested in the trust property. Notice that A is an ascertainable beneficiary, although he has only a contingent interest. Under the test for consent formulated by the court, A would not be able to consent to early termination of the trust because he does not have an "indefeasibly vested interest." Thus, while it is true that a remainderman vested in interest will always be ascertainable, it does not follow that a remainderman with a contingent interest will always be unascertainable, and as the example above demonstrates, the power to consent should depend on whether the beneficiary can be determined and not whether his interest is vested or contingent.

As for the parties in Sevier, of course, it was of no consequence that the court focused on the "indefeasibility of the interest" rather than the "ascertainability of the beneficiary" to decide whether the remaindermen were capable of extinguishing their rights in the trust. Since the corpus of the trust was given to settlor's issue per stirpes, the remaindermen were neither indefeasibly vested in interest nor ascertainable beneficiaries. The real problem with Sevier is that it may be used as precedent against a settlor and his contingent, yet ascertainable, beneficiaries who want to terminate a disadvantageous trust. Should such a case arise in the future, it is evident that the terms "indefeasibly vested remainderman" and "ascertainable remainderman" should not be used interchangeably.

8. Widow's Allowance

_In re Brown_ presented the court of appeals with a question as yet unanswered by any controlling authority, on the widow's allowance provisions outlined in G.S. 30-15. The court determined that the

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177. "But where the settlor and all the beneficiaries are of full capacity and consent, there seems to be no good reason why they should not have power to make such disposition of the trust property as they choose." IV A. SCOTT, supra note 59, § 338 (emphasis added).

178. 41 N.C. App. at 765, 255 S.E.2d at 639. See also N.C. GEN. STAT. § 39-6 (1976), discussed at note 171 supra. Section 39-6 may be illustrative of the notion that in order to give consent to trust termination the beneficiary need only be ascertainable, but not necessarily vested in interest. This section allows the settlor to revoke the future interest of a beneficiary who is either unborn or unascertainable, but it does not authorize the settlor to terminate the interest of a contingent beneficiary if he is ascertainable. Apparently the legislature realized that it is possible to obtain consent from a contingent, determined beneficiary, whereas by definition it is impossible to obtain consent from persons who are not in esse or unascertainable. Thus, the clear inference is that the line of distinction to be drawn between those who can consent and those who cannot is whether they are ascertainable, not whether they have contingent or vested interests.

179. 40 N.C. App. 61, 251 S.E.2d 905 (1979).

180. N.C. GEN. STAT. § 30-15 (1976) provides:
widow’s year’s allowance was not chargeable against the proceeds of a
life insurance policy and joint bank account, notwithstanding testator’s
attempt to make the funds part of his probate estate.

Upon testator’s death, his widow received the proceeds of a life
insurance policy and a joint bank account. Testator bequeathed one-
sixth of his net estate to the surviving spouse, with the direction that
any property passing by right of survivorship or from proceeds of life
insurance was to be considered part of his “estate” in calculating her
share. The ultimate effect of this provision was to deprive the spouse
from taking any of decedent’s personal property. The magistrate ac-
cepted the widow’s application for a year’s allowance and granted pay-
ment from the deceased’s estate, in spite of the executor’s protest that
the amount provided for in testator’s will exceeded the maximum
year’s allowance, and that the widow, therefore, was not entitled to
anything under G.S. 30-15. The executor relied principally upon statu-
tory language, applicable in cases of testacy, that the allowance must
"be charged against the share of the surviving spouse.”¹⁸¹ Despite the
executor’s tenacious efforts to deprive the widow of her yearly allow-
ance, the superior court affirmed the magistrate’s decision.¹⁸²

In a somewhat inconsistent style of statutory construction, relying
initially on the plain meaning of G.S. 30-15 and then attempting to
discern legislative intent, the court of appeals concluded that the sur-
viving spouse was entitled to her allowance. First, the court noted that
the statute required the allowance to be paid from the “personal prop-
erty of the deceased spouse.” Since the insurance proceeds and the
money in the joint bank account were not included in “personal prop-
erty of the deceased spouse,” neither could reduce the widow’s allow-
ance.¹⁸³ Actually, the proceeds and account were the widow’s own
personal property, created and transmitted by contracts unaffected by
testator’s will. Second, although G.S. 30-15 provides that the widow’s
allowance must be charged against the spouse’s legacy, the court re-
fused to believe that “the General Assembly intended that if the testa-

¹⁸¹ Id.
¹⁸² 40 N.C. App. at 63, 251 S.E.2d at 906.
¹⁸³ Id. at 62, 251 S.E.2d at 906.
tor left a will under the terms of which the surviving spouse received nothing from his personal property, that the spouse was deprived of an allowance.\textsuperscript{184} Nor did it believe "the General Assembly intended that if the deceased left a will under the terms of which the surviving spouse received only what she would have received by law as her own property, that the surviving spouse is deprived of an allowance from the deceased's personal property."\textsuperscript{185} Thus, property that does not pass under decedent's will cannot affect the determination of the widow's allowance, even if testator has expressed an intention to include such property as part of his probate estate.

E. Zoning

In a case of first impression,\textsuperscript{186} the North Carolina Supreme Court in \textit{A-S-P Associates v. City of Raleigh}\textsuperscript{187} upheld the validity of a historic district preservation ordinance,\textsuperscript{188} adopted pursuant to G.S. § 160A-395,\textsuperscript{189} in the face of challenges on constitutional and statutory grounds.\textsuperscript{190} The decision aligns North Carolina with an increasing

\textsuperscript{184} Id. at 63, 251 S.E.2d at 906.

\textsuperscript{185} Id.

\textsuperscript{186} Governmental regulation of private property for the purpose of historic preservation, however, is by no means a novelty within North Carolina. In 1965 the City of Winston-Salem passed a comprehensive zoning ordinance to create the Old Salem Historic Preservation District. See Law of May 12, 1965, ch. 504, 1965 N.C. Sess. Laws 561 (current version at N.C. GEN. STAT. § 160A-395 to -399 (1971)).

\textsuperscript{187} 298 N.C. 207, 258 S.E.2d 444 (1979).

\textsuperscript{188} Raleigh, N.C., Code, §§ 24-57 to -57.8 (1959). The ordinance established an historic district in the City's Oakwood neighborhood, created Raleigh's Historic District Commission, formulated architectural standards for the Commission in its administration of the Oakwood Ordinance and provided civil and criminal penalties for non-compliance. The ordinance required compliance with the pre-existing, underlying zoning regulations as well as the new historic district standards. A-S-P Assocs. v. City of Raleigh, 298 N.C. at 211, 258 S.E.2d at 447.

\textsuperscript{189} N.C. GEN. STAT. § 160A-395 (1976 & Cum. Supp. 1979). The statute authorizes municipalities to designate historic districts within an area as part of an enacted zoning ordinance. Such an ordinance may treat historic districts as either separate use-district classifications or as districts which overlap other zoning areas. Before it may designate one or more historic districts, a municipality must establish an historic district commission or make alternative arrangements as permitted by G.S. 160A-396. Id. § 160A-396. Once the commission is established, G.S. § 160A-397 provides guidelines for the enforcement of an historic districts zoning ordinance. See id. § 160A-397.

\textsuperscript{190} Associates made five separate major challenges to the ordinance. First, they alleged that the ordinance deprived them of property without due process of law. 298 N.C. at 213, 258 S.E.2d at 448. Second, they contended that the ordinance was an unconstitutional delegation of legislative power. Id. at 218, 258 S.E.2d at 451. Third, Associates argued that the exclusion from the historic district of nearby property owned by the North Carolina Medical Association denied Associates equal protection of the law. Id. at 224, 258 S.E.2d at 455. Fourth, they argued that the ordinance was not enacted in accordance with G.S. 160A-383, which requires a comprehensive zoning plan. Id. at 228, 258 S.E.2d at 457. Finally, they contended that the zoning regulations were not "made with reasonable consideration, among other things, as to the character of the
number of jurisdictions that accept the use of a state's police power to regulate private property in the interest of historic preservation. It further sustains the power of municipal governing bodies to delegate zoning responsibilities to appointed commissions.

On June 3, 1975, the city of Raleigh adopted two ordinances amending the city's zoning plan to create an historic district in the city's Oakwood Neighborhood, "a twenty-block area representing the only intact nineteenth century neighborhood remaining in Raleigh." The ordinances were adopted pursuant to G.S. §§ 160A-395 to -399, which authorize municipalities to designate historic districts and lay down guidelines for that purpose. Associates, owners of a vacant district and its peculiar suitability for particular uses" in contravention of G.S. 160A-383. Id. at 230, 258 S.E.2d at 459.


193. 298 N.C. at 218-24, 258 S.E.2d 451-55. The contention that an architectural zoning ordinance is unlawful because it delegates legislative power to an administrative body is a common objection to such ordinances. Courts, however, have uniformly rejected the argument. See Annot., 41 A.L.R.3d 1397 § 5 (1972).

194. 298 N.C. 209, 258 S.E.2d at 446.

195. Id. at 210, 258 S.E.2d at 446 (quoting Survey and Planning Unit Division of Archives and History of North Carolina Dept. of Cultural Resources, Statement of Significance for inclusion in National Register of Historic Places). The neighborhood is composed of Victorian houses built between the Civil War and 1914. The area contains a great variety of Victorian architectural styles representing the middle class tastes of its initial owners as well as the skill of local architects and builders. The Division of Archives and History of the Department of Cultural Resources concluded, "Oakwood is a valuable physical document of Southern suburban life during the last quarter of the nineteenth century." 298 N.C. at 210, 258 S.E.2d at 446.


197. A-S-P Associates is the first case in the country to approve the application of historic preservation to a vacant lot. The court noted that "preservation of the historic aspects of a district requires more than simply preservation of those buildings of historical and architectural significance within the district." 298 N.C. at 217, 258 S.E.2d at 451. Since the potential for incongruity with the character of the district is greater for a vacant lot than for an existing structure, the
located within the historic district, brought a declaratory judgment action challenging the validity of the ordinance. The superior court granted summary judgment in favor of defendant city and the court of appeals reversed, citing contradictory evidence presented by the city of Raleigh and a prima facie showing of unauthorized "spot zoning" as support.

In reversing the judgment of the court of appeals, the supreme court rejected both constitutional arguments advanced by Associates and those based on the state historic preservation statutes. The court first held that the state's police power "encompasses the right to control the exterior appearance of private property when the object of that control is the preservation of the state's legacy of historically significant structures." Relying on the growing body of authority in other jurisdictions, the court noted that the preservation of historic structures has educational, cultural, and economic value and is thus within the parameters of police power regulation. The court, however, was careful to distinguish the case from a sanction of zoning on purely aesthetic grounds, broader concept which it was not yet prepared to endorse.


198. 298 N.C. at 211, 258 S.E.2d at 447.


The court of appeals relied heavily on evidentiary inconsistencies and improprieties to reverse the superior court. Id. at 278. 247 S.E.2d at 805. The court also found that Associates had made a prima facie showing of "spot zoning." Id. at 277, 247 S.E.2d at 804. The term "spot zoning" has been used to describe the creation of a small area within the limits of a zone in which are permitted uses inconsistent with those permitted in the larger area. The term has also been used by some courts to indicate invalidity, rather than to describe a zoning technique. Spot zoning is not necessarily invalid, but its validity requires a reasonable justification for distinguishing the spot-zoned area. See 9 Strong's, North Carolina Index 3d Municipal Corporations § 30.9 (1977); 82 Am. Jur. 2d Zoning and Planning § 76 (1976).

200. 298 N.C. at 216, 258 S.E.2d 450. The constitutional validity of every zoning ordinance rests upon the police power. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The core of the police power concept is the promotion of the public health, safety, welfare and morals of a community, and legislation enacted pursuant to this power must promote these broad concepts and adopt means reasonably calculated to meet these ends. See J. Webster, Real Estate Law in North Carolina § 350 (1971 & Supp. 1977). The court cited strong authority to support its view that historic district preservation promoted the welfare of a community and was clearly within the state's police power. 298 N.C. at 213-18, 258 S.E.2d at 448-51.

201. See authorities cited in note 191 supra; see also State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).


203. 298 N.C. at 216, 258 S.E.2d at 450. Until quite recently, it was almost universally ac-
The court next ruled that the Oakwood ordinance did not unconstitutionally delegate legislative power to the Historic District Commission.\textsuperscript{204} It found that the limitation on the Commission to prevent only those specified activities that would be incongruous with the historic character of the district provided a sufficient contextual standard\textsuperscript{205} to guide the Commission in implementing the general policy of the statute.\textsuperscript{206} In making this determination, the court not only examined the wording of the enabling statute, but also considered evidence of the character of the neighborhood and concluded that the architectural design of Oakwood was sufficiently distinct to provide a standard against which proposed development might be measured. Any Commission action would then be subject to appellate review, adding additional protection against any unforeseen effects of delegation.\textsuperscript{207}

The court further rejected an equal protection challenge which stemmed from the defendant city's decision to include Associates' accepted that a zoning ordinance based solely or predominantly on aesthetic considerations was necessarily invalid. Annot., 21 A.L.R. 3d 1222 (1972 & Cum. Supp. 1979). The North Carolina Supreme Court has indicated that a statute or ordinance based purely on aesthetic considerations, without any real or substantial relation to the public health, safety or morals, or the general welfare, deprives adversely affected individuals of due process of law. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972); Little Pep Delmonico Restaurant, Inc. v. Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960). Although the \textit{A-S-P} court's distinction of purely aesthetic zoning from historic district zoning is consistent with other jurisdictions, see, e.g., Annapolis v. Anne Arundel Co., 271 Md. 265, 316 A.2d 807 (1974), Rebman v. Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969), its effect is to preserve a prohibition on purely aesthetic zoning in spite of the recent trend to allow such regulations. Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), appeal dismissed, 439 U.S. 808 (1978); John Donnelly & Sons, Inc., v. Outdoor Advertising Bd., 396 Mass. 206, 339 N.E.2d 709 (1975); Annot., 21 A.L.R. 3d 1222, 82 (Supp. 1979). It is significant, however, that the \textit{A-S-P} Associates decision intimated that, in the future, the court may be willing to retreat from this position and recognize a broad police power concept which includes the authority to zone for purely aesthetic reasons. 298 N.C. at 216, 258 S.E.2d at 450.

\textsuperscript{204} The vesting of legislative power exclusively in the General Assembly by Article II, Section 1 of the North Carolina Constitution and from Article 1, Section 6 form the foundation of the general rule that legislative power cannot be delegated. See Motsinger v. Perryman, 218 N.C. 15, 20, 9 S.E.2d 511, 514 (1940). That principle is not absolute, however, and bodies other than the legislature may engage in quasi-legislative actions if the enabling statute provides sufficient guidance for the body. Coastal Highway v. Turnpike Auth., 237 N.C. 52, 61, 74 S.E.2d 310, 316 (1953).

\textsuperscript{205} North Carolina had already joined the increasing number of jurisdictions which recognize that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate standards. Adams v. North Carolina Dep't. of Natural & Economic Resources, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978); K. Davis, \textit{Administrative Law Treatise} § 3.15 at 210 (2d ed. 1978).

\textsuperscript{206} 295 N.C. at 223, 258 S.E.2d at 454. The court also observed that practical necessity requires the delegation of a substantial degree of authority to administrative bodies. \textit{Id}.

\textsuperscript{207} "A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied." 298 N.C. at 222, 258 S.E.2d at 454.
property in the historic district, but to exclude property owned by the North Carolina Medical Association, which is located in the same block. The court found that a valid basis existed for excluding the Medical Society in that the Society's building was extremely incongruous with the architecture of the district, and that the Society had made a substantial investment in the foundation of the building so that further stories could be built. Associates' property, on the other hand, had been vacant since 1972. The court of appeals had previously held that Associates had made a prima facie showing of arbitrary and capricious spot zoning, but the supreme court correctly decided that this was simply not the issue. The supreme court found that no spot zoning existed because the exclusion of the Medical Society did not amount to a reclassification of a small tract surrounded by a much larger area within the technical definition of the term. Turning to the equal protection argument, the court noted that the applicable test is whether the difference in treatment has a reasonable basis in relation to the purpose and subject matter of the legislation. The court found in this determination that there is a presumption of validity and a strong deference to the legislature. Unless the distinction is wholly without basis, it is valid.

Finally, the supreme court rejected the statutory grounds of Associates' challenge, determining that the city ordinance adequately complied with state enabling statutes in that it reflected a comprehensive zoning plan, applied the regulations uniformly, and considered the "peculiar suitability" of the district for particular uses.

208. Id. at 224, 258 S.E.2d at 455.
209. Id. at 227, 258 S.E.2d at 457.
210. The court, however, disregarded the use of the spot zoning by this and other courts to cover similar facts. See Zopfi v. Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); Annot., 51 A.L.R.2d 263 (1957). A better basis for dealing with the spot zoning issue would have been to acknowledge the existence of spot zoning in the descriptive non-conclusory sense of the term, but dismiss it as valid in view of the circumstances. See note 99, supra.
211. 298 N.C. at 225, 258 S.E.2d at 456.
212. Id.
213. Id. at 226, 258 S.E.2d at 456 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).
214. 298 N.C. at 226, 258 S.E.2d at 456 (citing State v. Greenwood, 280 N.C. 651, 658, 187 S.E.2d 8, 13 (1972)).
215. Zoning ordinances passed by a municipality must be in accordance with a comprehensive plan. N.C. GEN. STAT. § 160A-383 (1976). The court found that the Oakwood Ordinance met this criterion after an examination of the various steps undertaken before passage of the ordinance such as the report of Raleigh's Planning Department. 298 N.C. at 229, 258 S.E.2d at 458. The court made it clear that a written plan is not required. Id. (citing Allred v. City of Raleigh, 7 N.C. App. 602, 173 S.E.2d 533 (1970)).

Associates further argued that the Oakwood Ordinance violated G.S. 160A-382 and 160A-383. G.S. 160A-382 requires uniformity of regulations throughout a zoning district, and G.S.
The holding in *A-S-P Associates* is well-founded and is supported by an almost unanimous line of similar decisions in other jurisdictions. The preservation of historic districts has been demonstrated to enhance the cultural and economic welfare of a community, and such desirable ends should not be sacrificed to the interests of a few. This is especially true where zoning restrictions do not prevent a reasonable use of property altogether, but merely restrain the intended use. As population density increases, a recognition of the need for historic conservation is imperative.

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160A-383 requires that the zoning plan take into consideration the suitability of a district for particular uses in order to encourage the most appropriate use of the land. N.C. Gen. Stat. §§ 160A-382 to -383 (1976). The court determined that the uniformity mandated by G.S. 160A-382 did not prevent the imposition of additional regulations through an overlay district which may have the effect of placing greater restrictions on certain structures. Further, G.S. 160A-383 did not mean that each individual tract of land must be put to its most profitable use. 298 N.C. at 230-31, 258 S.E.2d at 459. See *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

216. See authorities cited note 191 supra.

X. Taxation

A. Inheritance Taxes

Private settlements of bona fide estate disputes, when approved by a court of competent jurisdiction, are valid and binding, provided the rights of minors are protected. The beneficiary's compromise of a will contest will not, however, alter the state's entitlement to inheritance taxes. Each beneficiary's tax liability is determined by reference to what he or she would have received under the testator's will, not by reference to the share actually received under the settlement agreement. The beneficiaries may, however, include in the agreement an apportionment of the inheritance tax liability that corresponds to the amount of property received under the settlement.

These are well-settled rules concerning compromise of will contests. In In re McCoy the North Carolina Court of Appeals considered the effect on inheritance taxes of an estate settlement among beneficiaries of an intestate decedent. A number of decedent's heirs had sought a declaration of the ownership of the Ada McCoy Holding Corporation. The eight plaintiff heirs claimed that the decedent owned all the corporate stock and, therefore, that it should pass to all qualifying heirs by intestate succession. Two defendant heirs contended, however, that the decedent had transferred all of the corporate stock to them through various gifts and other transfers before his death so that the stock was no longer part of decedent's estate. Ultimately, the dispute was settled by agreement and embodied in a consent decree.

8. Id. at 53, 249 S.E.2d at 474.
9. Id. The trial court, addressing the petition for interpleader and declaratory relief filed by eight of decedent's heirs, aligned decedent's administrator as a party-plaintiff and the Ada McCoy Holding Corporation as a party-defendant. Id.
10. Id.
11. Id. The court's opinion refers to the individual defendants merely as "appellants." Examination of the record indicates, however, that defendant-appellants were also heirs of decedent. See Record at 3-5.
which recognized the corporate assets to be approximately 71% of decedent’s estate. A receiver was appointed to dissolve the corporation and distribute the estate’s assets according to certain fixed percentages that differed from the 12% shares each heir would have been entitled to receive under the North Carolina Intestate Succession Act. The agreement did not, however, provide for apportionment of tax liability.

After the consent judgment was entered, decedent’s administrator successfully petitioned the court to direct the receiver of the corporation to pay 71% of the federal estate taxes assessed against the estate, the same percentage which the corporate assets represented in decedent’s taxable estate. The court further authorized the administrator to deduct the state inheritance tax liability of each heir prior to distribution of the estate assets. Each heir’s inheritance tax obligation was computed as if he was entitled to a fixed 12% share of the estate under the Intestate Succession Act, thereby disregarding the actual shares each received by agreement. On appeal, the defendant heirs disputed this arrangement, contending that the administrator should have deducted state inheritance taxes according to the shares each heir actually received by agreement.

The McCoy court rejected this argument, however, and held that it was proper to assess the state inheritance taxes according to the 12% share each heir was entitled to receive under the Intestate Succession Act. Citing the North Carolina Supreme Court’s decision on the tax

12. 39 N.C. App. at 53, 249 S.E.2d at 474.
13. Id. See N.C. GEN. STAT. § 29-1 to -30 (1976). The two defendant heirs were each to receive 25% of the estate’s assets. Three of the plaintiff heirs were each to receive 8½% and the remaining five were each to receive a 5% share of the assets. Record at 49.
14. 39 N.C. App. at 54, 249 S.E.2d at 475.
15. Id. at 53, 249 S.E.2d at 474.
17. 39 N.C. App. at 55-6, 249 S.E.2d at 475. See note 13 supra.
18. 39 N.C. App. at 55-6, 249 S.E.2d at 475. It appears that the court of appeals was confused when it concluded that defendants were objecting to assessment of inheritance taxes on the basis of the 12% share each heir would have received under the Intestate Succession Act. Under the consent decree each defendant received 25% of the estate, see note 13 supra, and, therefore, benefited by the trial court’s tax assessment. Examination of the briefs indicates that defendants actually argued that the 12% inheritance tax shares should have been paid by the individual heirs after distribution of the estate assets and not by the administrator before distribution. Appellant’s Brief at 15. If the assets had been distributed according to the consent decree, with the individual heirs paying state inheritance taxes after distribution as if they had received 12% intestacy shares, defendants would have benefited by receiving a larger initial distribution. It is clear, therefore, that the court of appeals misinterpreted defendants’ basic contention.
consequences of a will settlement in *Pulliam v. Thrash*, the *McCoy* court noted that "tax liability [in will contests] must be assessed according to the shares that the devisees took under the will, and not according to the shares the parties received under a family settlement agreement, unless the agreement specifically provided otherwise. The same rule applies here." This decision emphasizes the importance of anticipating tax liability prior to settling any estate dispute, especially in the case of an heir who is to receive less than he or she is entitled to receive under a will or by intestacy. Unless the parties receiving more than the intestate share have agreed to pay an equal proportion of the total tax liability, the heirs receiving less than their lawful share will be required to pay a disproportionate amount of the inheritance taxes.

In another development pertaining to inheritance taxes, the General Assembly adopted in 1979 a generation-skipping transfer tax. The tax applies to transfers of property interests subject to the federal generation-skipping tax if the transferor is a North Carolina resident at the time of the original transfer or the transfer includes real or personal property situated in North Carolina. If the tax attaches because the transferor is a state resident at the time of the original transfer, the amount assessed is that sum authorized as a credit for state inheritance taxes by the federal generation-skipping tax, less an allowance for taxes actually paid to other states on the same transfer. If the transferor is not a state resident at the time of the transfer but the transfer includes property situated in the state, the tax assessed is the same percentage of the allowable federal tax credit as the value of the North Carolina property bears to the value of all property subject to the federal generation skipping tax.

The federal generation-skipping transfer tax, included as part of the Tax Reform Act of 1976, was enacted to close a tax loophole presented by a generation-skipping transfer of property. The tax im-

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27. I.R.C. § 2602(e)(5)(C).
posed by the Act generally applies, for example, to a trust formed to benefit the grantor's child for life with remainder to the grantor's grandchildren. Supra note 29. Prior to the Act, the federal estate tax would not reach the trust corpus upon the death of the grantor's child unless that child held a general power of appointment. Supra note 29. This enabled a prudent grantor to effectively bypass one generation of estate tax imposition. Supra note 29. With the changes brought about by the Act, the generation-skipping transfer tax attempts to reach the corpus of the trust as if it were included in the estate of the grantor's child at that child's death. Supra note 29.

In addition to adopting the generation-skipping tax, the 1979 General Assembly abandoned the basic inheritance tax exemption allowances for a surviving spouse or other qualifying Class A beneficiaries of a decedent in favor of a credit against taxes owed by those beneficiaries. Supra note 29. The credit is equal to the lesser of $3,150 or the total inheritance tax liability. Supra note 29. A tax credit is more equitable because it offsets tax liability dollar-for-dollar, whereas the total tax offset value of an exemption is dependent on the taxpayer's marginal tax rate. Supra note 29.


30. See Dodge, supra note 29, at 1266-67.

31. Id.; see I.R.C. § 2041.

32. See Dodge, supra note 29, at 1266-67.

33. The exceedingly complex provisions of the federal generation-skipping transfer tax are beyond the scope of this section. The topic is the subject of numerous law review articles and practice seminars. See generally Dodge, supra note 29; Lee, supra note 29; Kartiganer, Working With the Generation-Skipping Rules, 13 UNIV. OF MIAMI INST. ON EST. PLAN., chap. 17 (1979); McCaffrey & Metrick, Planning for the Generation-Skipping Transfer, 12 UNIV. OF MIAMI INST. ON EST. PLAN., chap. 20 (1978).

34. See N.C. GEN. STAT. § 105-4 (1979). In addition to the surviving spouse, Class A beneficiaries include the decedent's lineal issue and ancestors, stepchildren, adopted children and, in certain circumstances, sons and daughters-in-law. Id.

35. Revenue Act of 1979, ch. 801, § 21, 1979 N.C. ADV. LEGIS. SERV. 310-12 (codified at N.C. GEN. STAT. § 105-4(b) (1979)).

36. N.C. GEN. STAT. § 105-4(b) (1979).

37. See id. § 105-4(a). Other inheritance tax modifications include: (1) elimination of a state tax statement when decedent's estate has a gross value of less than $20,000 and all beneficiaries are in Class A of the taxing statute, id. § 105-23; (2) adoption of an unlimited exemption in place of the prior $70,000 exemption allowance for payments received by a beneficiary under a military family or survivor benefit plan, id. § 105-3(7); and (3) an increase in the exemption of life insurance proceeds from policies of decedents killed by enemy action from $10,000 to $20,000, id. § 105-3(4).
B. Property Taxes

The North Carolina General Assembly substantially revised the procedure for securing judicial review of Property Tax Commission decisions by adding Article 24 to Chapter 105 of the General Statutes. The new article, entitled "Review and Enforcement of Orders," provides for appeal of Property Tax Commission decisions by right to the North Carolina Court of Appeals. This effectively bypasses the North Carolina Administrative Procedure Act's Article Four requirement of a petition to the Superior Court of Wake County or the superior court of the county where the administrative decision was made.

All real and personal property located within the jurisdiction of North Carolina is subject to ad valorem taxation unless the state constitution or the General Assembly specifically excludes that property from the tax base. Id. § 105-274. In 1979, the General Assembly designated certain property owned by homeowner's associations to be a special class of property subject to nominal value taxation. Act of May 29, 1979, ch. 686, § 1, 1979 N.C. ADV. LEGIS. SERV. 299 (codified at N.C. GEN. STAT. § 105-277.8 (1979)). This new provision might not reduce the gross value of property subject to taxation, however, since "the enhanced value of the individual [association member's] properties because of the right to the use and benefit of the facilities [owned by the association] shall be a factor taken into consideration" in valuing the individually owned property. N.C. GEN. STAT. § 105-277.8(b) (1979).

Tax exempt status for timberland owned by the North Carolina Forestry Foundation, a non-profit organization having tax-exempt status, was denied by the North Carolina Supreme Court in In re North Carolina Forestry Foundation, 296 N.C. 330, 250 S.E.2d 236 (1979). The court noted that the property was leased for ninety-nine years and used by a paper company having virtual control over the property. This case was noted in the 1978 North Carolina survey, 57 N.C. L. REV. 1148-51 (1979).


Article 4 of the North Carolina Administrative Procedure Act (APA) grants the right of judicial review, exercised initially in superior court, to persons aggrieved by a "final agency decision under this Chapter." Id. The article applies to decisions of the Property Tax Commission. See, e.g., Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976). The right to judicial review under the APA is not available, however, if "adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." N.C. GEN. STAT. §§ 150A-43 to -52 (1978). This limitation has been construed to require that the scope of review in the other statute must be equal to that provided in the APA. See Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963) (scope of review in APA greater than in other statute). The scope of review provided in Article 24 of Chapter 105 appears to be substantially the same as that provided in Article 4 of the APA. Compare N.C. GEN. STAT. §§ 150A-51 (1978) with N.C. GEN. STAT. § 105-345.2 (1979). See text accompanying notes 54-61 infra. It would appear certain, therefore, that "adequate procedure for judicial review" is provided in Article 24 of Chapter 105, thus displacing judicial review under Article 4 of the APA. Cf. Blackwell v. Granville County Dept. of Social Serv., 39 N.C. App. 437, 439, 250 S.E.2d 695, 697 (1979) (Article 4 of the APA displaced by § 108-44(c) of the Social Services Statute). See also, Daye, North Carolina's New Administrative Procedure Act: An Interpretive Analysis, 53 N.C. L. REV. 833, 899-900 (1975); see generally Campbell, Judicial Review of Listing
Article 24 requires that an aggrieved party exhaust his or her administrative remedies prior to an appeal by securing a final order of the Property Tax Commission. To perfect an appeal, the appellant must give notice of appeal to the Commission and other parties to the proceeding within thirty days of the entry of the final order. Appellant must include with the notice of appeal all exceptions to the order and set forth the specific reasons he considers the order to be "unlawful, unjust, unreasonable or unwarranted," including any procedural errors alleged to have been committed by the Commission. After receiving notice the Commission may, by its own motion or that of any party to the proceeding, provide for a rehearing to address the listed exceptions. Pending judicial review, the Commission is authorized to postpone the effective date of any action taken by it if the Commission "finds that justice so requires." Alternatively, appellant or other parties may petition a judge of the North Carolina Court of Appeals for issuance of a stay to prevent irreparable injury or to preserve the status or rights of any party pending conclusion of the appeal. If no appeal is taken within the time prescribed by law and a party disobeys the Commission's order, the Commission may apply to a superior court justice for a writ of peremptory mandamus to effectuate its order. The grant or denial of a writ of mandamus is appealable to the court of appeals by the affected party or the Commission. In any event, the procedure for appeals to the court of appeals under Article 24 shall be provided by the North Carolina rules of appellate procedure.

When the case is heard by the court of appeals, no evidence shall

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43. See, e.g., In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963) (governmental entity can be party aggrieved by Commission decision so as to provide standing to secure judicial review).


45. N.C. GEN. STAT. § 105-345(a) (1979).

46. Id. “The failure of any party, other than the Commission, to be served with or receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.” Id. § 105-345(b).

47. Id. § 105-345(a).

48. Id. § 105-345(c).

49. Id. § 105-345.3.

50. Id. The court may require the applicant for a stay to post adequate bond. Id.

51. Id. § 105-346(a).

52. Id. § 105-346(b).

53. Id. § 105-345(d).
be received.\textsuperscript{54} If evidence has been discovered since the Commission's
decision that could not have been obtained by the exercise of reason-
able diligence for use before the Commission and the evidence will ma-
terially affect the merits of the case, the court may, in its discretion,
remand the case to the Commission for further proceedings.\textsuperscript{55} The
court of appeals is generally authorized to affirm, reverse, void or re-
mand the Commission's decision and is empowered to decide all rele-
vant questions of law, interpret constitutional and statutory provisions,
and determine the meaning and applicability of any Commission ac-
tion.\textsuperscript{56} If the Commission's decision is affirmed on appeal, the court
may include in its decree a writ of mandamus or other appropriate or-
der to enforce the Commission's decision.\textsuperscript{57} Reversal or modification
of the Commission's decision requires a finding by the court of appeals
that

the substantial rights of the appellants have been prejudiced because
the Commission's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of statutory authority or jurisdiction of the Com-
mission; or
(3) Made upon unlawful proceedings; or
(4) Affected by other errors of law; or
(5) Unsupported by competent, material or substantial evi-
dence in view of the entire record as submitted; or
(6) Arbitrary or capricious.\textsuperscript{58}

Any party may appeal to the North Carolina Supreme Court, by writ of
certiorari\textsuperscript{59} or by right,\textsuperscript{60} from the ruling of the court of appeals.\textsuperscript{61}

The grounds for modification or reversal enumerated above are
identical to those set forth in Article Four of the Administrative Proce-
dure Act.\textsuperscript{62} Therefore, precedent arising out of judicial review of Prop-
erty Tax Commission decisions under the Administrative Procedure
Act offers valuable and perhaps controlling guidance to a party appeal-
ing under Article 24 of Chapter 105.\textsuperscript{63}

\textsuperscript{54} Id. § 105-345.1.
\textsuperscript{55} Id.
\textsuperscript{56} Id. § 105-345.2(b).
\textsuperscript{57} Id. § 105-345.5.
\textsuperscript{58} Id. § 105-345.2(b).
\textsuperscript{59} Id. § 7A-31 (Cum. Supp. 1979).
\textsuperscript{60} Id. § 7A-30(3) (1969).
\textsuperscript{61} Id. § 105-345.4 (1979).
\textsuperscript{62} Id. § 150A-51 (1978).
\textsuperscript{63} See generally Campbell, \textit{supra} note 42.
It is useful to distinguish the various types of administrative property tax decisions for purposes of assessing the standards of judicial review that will likely be applied under the new article. Commentators on the North Carolina property tax system classify the decisions of property tax authorities as either appraisal or listing decisions. Appraisal decisions concern the valuation of real and personal property. Listing decisions determine whether property should be taxed and may involve questions of jurisdiction to tax, exemption or classification of certain types of property, or "qualification for favorable treatment based either on rate or appraisal reductions."

In most appraisal decisions appealed prior to the adoption of Article 24, the aggrieved party argued either that the Commission's decision was not supported by substantial evidence or that the appraisal was arbitrary and capricious—the fifth and sixth standards of review listed in Article 24 at G.S. 105-345.2(b). Courts have demonstrated a reluctance to apply a rigorous standard of judicial review to appraisal challenges; instead, the correctness and regularity of the Commission's generally factual determinations are presumed. On the other hand, courts have been more willing to overturn the Commission's listing de-

64. See id.
65. See, e.g., id. See also Lewis, supra note 39.
66. See, e.g., Campbell, supra note 42, at 1; Lewis, supra note 39, at 22-44.
69. See, e.g., Campbell, supra note 42, at 1. See, e.g., Lewis, supra note 39, at 17-22.
cisions, presumably because listing decisions generally involve questions of law, which the courts feel more competent to determine. The court opinions applying the Administrative Procedures Act to listing decision challenges have not, however, set forth a clear test for the proper scope of review. Nevertheless, grounds one, two or six of G.S. 105-345.2(b) would appear to be the most applicable to listing questions. If a particular property is not subject to being listed for tax purposes, then the imposition of a property tax based on such a listing would be either in violation of the constitution, in excess of statutory authority, without jurisdictional grounds or arbitrary and capricious.

Despite the new Article 24 appeals procedure eliminating the superior court review required by the Administrative Procedures Act, it appears likely that the review standards applied by the court of appeals to appraisal and listing decision challenges will be determined by reference to precedent arising out of similar appeals under the Administrative Procedures Act because the grounds for reversal enumerated in Article 24 are identical to those set forth in the Administrative Procedures Act. Where appraisal decisions of taxing authorities are challenged by a taxpayer, the courts probably will continue to demonstrate a marked deference to the Commission's factual determinations. If a listing decision is questioned, however, the courts are more likely to overturn the Commission's determinations of matters that are essentially questions of law.

As previously indicated, Article 24 requires a taxpayer to exhaust all administrative remedies by obtaining a "final order" from the Property Tax Commission before seeking appellate review of an allegedly erroneous appraisal or listing. It should be pointed out, however, that in certain limited situations it is possible for a taxpayer to avoid the "exhaustion" requirement of Article 24 and receive judicial review of

75. See authorities cited note 73 supra.
76. See Campbell, supra note 42, at 4.
77. See text accompanying notes 39-61 supra.
78. See text accompanying notes 56-58 supra.
79. See text accompanying notes 70-72 supra.
80. See text accompanying notes 73-76 supra.
81. See text accompanying notes 43-53 supra.
an allegedly improper imposition of property tax liability by paying the property tax assessment and suing for refund of an "illegal tax" under G.S. 105-381. Review by the Property Tax Commission is not a condition precedent to a suit for a refund under G.S. 105-381. Therefore, direct review of an "illegal tax" may be had in the court of competent jurisdiction in the county where the taxing authority is located. Whether a direct suit under G.S. 105-381 offers a viable alternative to appeal of appraisal and listing decisions through administrative channels and thus pursuant to Article 24, depends on the definition of an "illegal tax."  

Unfortunately, there are no reported cases addressing the question whether an improper property tax appraisal constitutes an illegal tax under G.S. 105-381. A definition of "illegal tax" is offered by the North Carolina Supreme Court's decision in Redevelopment Comm'n of High Point v. Guilford County. In that case a listing decision was challenged and an injunction sought against assessment of property tax on the ground that the taxpayer was exempt from the tax. The court in High Point explicitly distinguished between an illegal tax and one that is merely asserted to be erroneous. Although the court did not define an erroneous tax, it did state that an illegal tax is one imposed without authority, such as when the rate imposed is unconstitutional or the property is exempt from taxation. Appraisal decisions will be difficult to challenge under the High Point definition of "illegal tax." Generally, the issue on appeal is not whether the taxing entity has authority to levy the tax, but whether certain factors were properly con-

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83. N.C. GEN. STAT. § 105-381 (1979). See Campbell, supra note 42, at 5. A direct suit for a refund is also available if a tax is allegedly imposed through a clerical error or is levied for an illegal purpose. N.C. GEN. STAT. § 105-381(a) (1979). See also Wynn v. Trustees of Charlotte Community College Sys., 255 N.C. 594, 122 S.E.2d 404 (1961) (illegal purpose alleged).


85. See generally Lewis, supra note 39.

86. See Campbell, supra note 42, at 6.


88. See text accompanying notes 65-69 supra.

89. 274 N.C. at 587-88, 164 S.E.2d at 478.

90. Id. at 589, 164 S.E.2d at 479.


92. 274 N.C. at 589, 164 S.E.2d at 479. See, e.g., Southern Ass'v v. Palmer, 166 N.C. 75, 82 S.E. 18 (1914).
sidered in the appraisal. Such factual issues, clearly within the expertise of the Property Tax Commission, probably will not fall within the purview of an illegal tax and, therefore, will require the exhaustion of administrative review channels before judicial review can be granted under Article 24.

There is substantial support, however, for allowing a taxpayer to bypass administrative review channels and bring a direct suit for a refund under G.S. 105-381 if a listing decision challenge is involved. For example, the court in High Point specifically refers to an illegal tax as one imposed on exempt property, clearly a result of improper listing. Allowing direct judicial review of the listing decisions under G.S. 105-381 seems to be a proper result because, unlike appraisal disputes, questions that arise in listing disputes are ordinarily legal issues of the type regularly handled by courts. The argument that the appropriate administrative agencies are more competent to review such matters carries little weight. Therefore, a taxpayer’s direct suit for a refund of an “illegal tax” under G.S. 105-381 remains a viable alternative to Article 24 for obtaining judicial review of property tax listing decisions.

C. Income, Sales, and Intangibles Taxes

To provide North Carolina citizens with relief from inflationary

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93. Campbell, supra note 42, at 7. See, e.g., Lewis, supra note 39.
94. See Campbell, supra note 42, at 7.
95. See id. at 6-7. See, e.g., King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970) (taxpayers seeking to compel revaluation of county property by writ of mandamus and seeking injunction against assessment arising out of alleged undervaluation of rural land at expense of urban land required to exhaust administrative review remedies prior to attempting judicial review).
97. See text accompanying notes 87-92 supra.
98. See Campbell, supra note 42, at 7-8.
99. For a complete listing of miscellaneous taxation measures adopted by the General Assembly in 1979, including changes in income, sales, inheritance, intangibles and license taxes see Liner, State Taxes, in NORTH CAROLINA LEGISLATION 1979, 266-74 (Institute of Government, University of North Carolina 1979).

In a case law development, the Supreme Court of North Carolina considered whether an automobile rental company, which paid sales tax on the leasing of its automobiles, should be exempted from the state sales tax upon sale of its automobiles to private individuals, not for resale. Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979). Plaintiff argued that the payment of sales tax on its lease transactions satisfied the sales tax requirements. The court of appeals agreed. 39 N.C. App. 709, 713, 251 S.E.2d 917, 920 (1979), rev’d, 298 N.C. 559, 259 S.E.2d 564 (1979). The supreme court concluded that the leasing of autos and the ultimate sale of the same autos were separate transactions, each subject to the sales tax. 298 N.C. at 563, 259 S.E.2d at
increases in their total tax burden, the North Carolina General Assembly passed the Revenue Act of 1979. This measure marked the first general tax relief provided to state taxpayers since the 1930's. The legislature increased all existing personal income tax exemptions and the standard deduction by ten percent, raised the dependency exemption by one-third over a two-year period, and modified the allowable deduction for expenses incurred in the care of dependents.

Of further interest is the legislature's adoption of an elective measure allowing taxpayers over fifty-five years of age to exclude from gross income gains from the sale or exchange of a principal residence. The exemption is limited to $100,000 per taxpayer or $50,000 per spouse on property held by husband and wife as joint tenants with rights of survivorship or as tenants by the entirety. This exclusion is substantially similar to the parallel federal provision, which is elective and uses the same age threshold and dollar ceilings.

The court of appeals' decision in In re Alamance Memorial Park, Inc. addressed the issue of valuation of promissory notes for intangibles tax purposes. Because promissory notes are important commercial instruments, it is necessary that businesses be appraised of the tax consequences of holding notes payable that arise out of the operation of the business. The most prevalent problem is valuation of promissory notes that represent the sales price of a particular good and include an allocable portion of the taxpayer's cost of doing business. In determining the "actual value" of such notes the taxpayer may deduct

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567. Therefore, payment of sales tax on the rental of autos did not exempt the company from payment of sales tax on the resale of those autos to private individuals. Id. Prior to the supreme court's decision the North Carolina General Assembly acted to mandate the result reached. Act of May 8, 1979, ch. 527, § 1, 1979 N.C. Adv. Legis. Serv. 140 (codified at N.C. GEN. STAT. § 105-164.4(1), -164.6(3A) (1979)).


101. Liner, supra note 99, at 266.


103. Id. § 44 at 327 (codified at N.C. GEN. STAT. § 105-149(a)(5) (1979)).

104. Id. § 45 at 328 (codified at N.C. GEN. STAT. § 105-147(26) (1979)). The allowable expense deduction for the care of dependent children or invalid adults was raised to $2,000 per person with an overall ceiling of $4,000 per year. The taxpayer must be able to demonstrate that the expenses were necessary to allow him to remain employed. Id. The prior ceilings had been $100 per month per individual and $400 per month total. N.C. GEN. STAT. § 105-147(26) (Cum. Supp. 1975) (amended 1979).

105. Id. § 38 at 320-25 (codified at N.C. GEN. STAT. § 105-141(b)(22) (1979)).

106. See I.R.C. § 121.


"like evidences of debt"\textsuperscript{109} owed by the taxpayer as of the valuation date but may not deduct accounts payable,\textsuperscript{110} amounts held in reserve accounts, or secondary liabilities.\textsuperscript{111} The Secretary of Revenue has adopted a regulation setting forth the methods for determining the "actual value" of promissory notes. According to this regulation, actual value is to be determined by:

1. the closing price quoted by security exchanges,
2. the final bid price listed for over-the-counter securities,
3. the outstanding or unpaid balance as of the valuation date, or
4. the appraised value.\textsuperscript{112}

The Secretary's methods of valuation were challenged in the \textit{Memorial Park} case, which concerned the valuation of notes receivables held by appellant arising out of its sale of cemetery plots, markers, and crypts on a "preneed" basis.\textsuperscript{113} Appellant sought to deduct 25\% from the face value of these receivables to cover money placed into its perpetual care funds, reserves arising out of the sale of preneed markers and vaults, and the commissions payable to its employees because of the sales.\textsuperscript{114} The Secretary of Revenue refused to allow such a deduction.\textsuperscript{115} Upholding the Secretary's actions, the court of appeals determined that appellant's desired deductions were merely costs that were incident to appellant's form of conducting business and thus were not factors to be considered in the valuation of a note receivable or other evidence of debt.\textsuperscript{116} The court held that the value of a note or similar evidence of debt is synonymous with market value, or what a willing buyer would pay for the note.\textsuperscript{117} Appellant did not show that the Secretary's regulations, designed to determine actual market value, were illegal or arbitrary.\textsuperscript{118} Therefore, the court of appeals held that the regulations provided reasonable methods of determining the "actual value" of a note for purposes of the intangibles tax.\textsuperscript{119}

\textbf{Lawrence K. Rynning}

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} \S 105-202(1).
\textsuperscript{111} \textit{Id.} \S 105-202(3).
\textsuperscript{112} \textit{See} 1 N.C. STATE TAX REP. (CCH) \S 28-905.
\textsuperscript{113} 41 N.C. App. at 278, 254 S.E.2d at 671.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 281, 254 S.E.2d at 673.
\textsuperscript{117} \textit{Id.} at 280-81, 254 S.E.2d at 673. \textit{See} N.C. GEN. STAT. \S 105-283 (1979) (appraisal of property at "true value" means market value).
\textsuperscript{118} 41 N.C. App. at 281, 254 S.E.2d at 673.
\textsuperscript{119} \textit{Id.} at 279-80, 254 S.E.2d at 673.
XI. Torts

A. Abatement of Wrongful Death Actions

In 1969 North Carolina joined the numerous jurisdictions that measure damages for wrongful death by the resulting loss to decedent’s beneficiaries,1 as opposed to the resulting loss to decedent’s estate.2 The majority of these jurisdictions hold that a wrongful death action abates upon the death of the last surviving beneficiary.3 In Willis v. Duke Power Co.,4 however, the North Carolina Court of Appeals held that the action does not abate upon the death of the sole beneficiary.5

The court relied heavily on Van Beeck v. Sabine Towing Co.,6 in which the United States Supreme Court held that a death action brought under the Merchant Marine Act of 19207 does not abate upon the death of the sole beneficiary,8 and on Neil v. Wilson,9 in which the North Carolina Supreme Court found that a right of action under the pre-1969 version of North Carolina’s wrongful death statute vests in the decedent’s estate at the time the action accrues10 and is not divested by the beneficiary’s later death.11

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2. The former damages statute provided: “The plaintiff (the deceased’s representative), in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.” An Act Concerning the Settlements of the Estates of Deceased Persons, ch. 113, § 71, 1868-69 N.C. Pub. Laws 257 (formerly codified at N.C. Gen. Stat. § 28A-174).
3. See Comment, Wrongful Death Damages in North Carolina, 44 N.C.L. Rev. 402, 425 (1966). The deceased beneficiary’s estate in some states, however, might still be able to recover damages that accrue from the date of decedent’s death to the time of the beneficiary’s death. Id. When all beneficiaries are dead the deceased’s personal representative is still left to bring the cause of action. See N.C. Gen. Stat. § 28A-18-2(a)(1976).
8. 300 U.S. at 347-51. See Willis, 42 N.C. App. at 587-89, 257 S.E.2d at 475-76.
9. 146 N.C. 242, 59 S.E. 674 (1907).
11. 146 N.C. at 245, 59 S.E.2d at 675. “[T]he statute . . . indicate[s] the purpose of the Legislature to impress upon the right of action the character of property as a part of the intestate’s estate [and such right is] fixed and determined as of the time when the intestate dies.” Id. See Willis, 42 N.C. App. at 587, 257 S.E.2d at 475.

The Willis court also found support in Warner v. West. North Carolina R.R., 94 N.C. 250 (1886), in which the supreme court held that the existence of beneficiaries need not be alleged in a wrongful death action and suggested that the existence of beneficiaries is not even required for
Although the *Willis* court noted that North Carolina's wrongful death statute was drastically amended in 1969, it found that the portions of the statute relating to the issue remained unchanged. The court stated that those states which follow the general rule of abatement upon the death of the sole beneficiary are "jurisdictions having entirely different statutory provisions with respect to those entitled to recovery." In North Carolina recovery is distributed according to the Intestate Succession Act, not according to the loss to the individual beneficiaries; thus the recovery is treated more as an asset of the decedent's estate than as an asset of the beneficiaries for purposes of distribution. The *Willis* court also found a provision in the statute which allows recovery of nominal damages, in addition to recovery of the loss to the beneficiaries, as an indication that the legislature did not intend the action to abate. The general rule governing abatement is based not on the provisions governing the identity of the beneficiaries but on those governing the measure of damages, and in North Carolina, as well as in the states referred to by the court that follow the general rule requiring abatement, damages are measured by the loss to the beneficiaries caused by decedent's death.

Because plaintiff in *Willis*, the sole surviving beneficiary of her intestate son, died between the filing of the action and the date of trial, the question remains whether the result would differ had the sole beneficiary died before the action was filed. Courts have not expressed any policy reasons to distinguish between the abatement of pending wrongful death actions and that of those not yet filed at the time of the sole recovery. *See* *Willis*, 42 N.C. App. at 585-87, 257 S.E.2d at 473-75. *Warner* was decided under a version of the wrongful death statute that measured damages by the loss to decedent's estate. The *Warner* court distinguished cases from other jurisdictions holding the wrongful death actions to abate upon the death of the last beneficiary on the ground that in those states damages were measured by the loss to the decedent's beneficiaries. 94 N.C. at 258.

13. 42 N.C. App. at 589, 257 S.E.2d at 476.
14. 42 N.C. App. at 590, 257 S.E.2d at 476 (emphasis added).
17. *Id.* § 28A-18-2(b)(6).
18. 42 N.C. App. at 590, 257 S.E.2d at 476.
19. *Id.* at 589, 257 S.E.2d at 476.
22. *See* note 1 *supra*.
23. 42 N.C. App. at 584, 257 S.E.2d at 472-73.
beneficiary's death, but at least one court has made such a distinction.\(^\text{24}\)

**B. Contributory Negligence**

In North Carolina, plaintiff's contributory negligence is a complete bar to recovery for injuries caused by defendant's ordinary negligence.\(^\text{25}\) When defendant's conduct amounts to willful and wanton negligence, plaintiff's ordinary negligence does not bar recovery.\(^\text{26}\) If plaintiff's own conduct amounts to wilful and wanton negligence, however, the majority of pure negligence jurisdictions hold that plaintiff cannot recover from even a wilful and wanton defendant.\(^\text{27}\) The rationale for the rule is that although a victim's mere carelessness should not negate liability for gross conduct, when both parties contribute to injuries by gross conduct they are in *pari delicto* and the courts will not decide the losses.\(^\text{28}\) In the 1979 case of *Harrington v. Collins*\(^\text{29}\) the North Carolina Supreme Court adopted this majority rule.\(^\text{30}\)

*Harrington* arose when plaintiff was injured while riding in defendant's car during a pre-arranged drag race. Defendant claimed that plaintiff was contributorily negligent in allowing himself to be in the car when he should have known that a dangerous race was about to occur.\(^\text{31}\) Although the court adopted the majority position, it refused to hold that a failure to remonstrate and demand to be let out of a car operated by a reckless driver constituted wilful and wanton conduct as a matter of law.\(^\text{32}\)

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\(^{25}\) See, e.g., Weatherman v. Weatherman, 270 N.C. 130, 153 S.E.2d 860 (1967).

\(^{26}\) Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); Brendle v. Spencer, 125 N.C. 474, 34 S.E. 634 (1899).


\(^{28}\) This is consistent with the rule that rejects comparative negligence and completely bars a contributorily negligent plaintiff from recovering from an ordinarily negligent defendant.


\(^{30}\) Id. at 538, 259 S.E.2d at 278. The North Carolina Supreme Court took notice of the wilful-wanton contributory negligence rule 12 years before *Harrington* in Pearce v. Barham, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967). Despite having a fact situation appropriate for implementation of the rule, the court declined to adopt it because defendant failed to allege more than ordinary negligence on the plaintiff's part. *Id.*

\(^{31}\) 298 N.C. at 535, 259 S.E.2d at 277.

\(^{32}\) The supreme court held that a directed verdict for defendant was improper. *Id.* at 541, 259 S.E.2d at 279.
C. Liability Without Privity

North Carolina has been reluctant to discard the privity requirement for tort actions based on negligent performance of contractual obligations, and has done so only where there has been resulting personal injury or property damage, as in products liability cases. In 1979, the North Carolina Court of Appeals, in two cases decided by separate panels, considered the validity of a cause of action against an architect for negligent performance of a contract brought by a third party with whom the architect was not in privity. In *Davidson and Jones, Inc. v. New Hanover*, the court held that an architect may be liable to persons not a party to his contract for negligent performance of that contract. In *Shoffner Industries, Inc. v. W.B. Lloyd Construction Co.*, the court limited its holding to allow recovery only against an architect put into a supervisory position.

In *Davidson* plaintiffs, general contractors, entered into a construction contract with defendant, property owner, who contracted with architects to design the structure. Damage to an adjacent building owned by defendant occurred during construction. Plaintiffs sued defendant for payments due under the contract and expenses incurred in repairing the adjacent building. Defendant counterclaimed for costs of certain repairs that were allegedly not made. Plaintiffs then filed a third party complaint against the architects, with whom they had no contract, for indemnity for any liability that they may incur under the counterclaim. The architects moved to dismiss on the grounds that they had no duty to plaintiffs, contractual or otherwise, by virtue of their contract with defendants.

In reversing a summary judgment for the architects, the *Davidson* panel held that "an architect in the absence of privity of contract may be sued by a general contractor . . . for economic loss foreseeable
resulting from breach of an architect's common-law duty of due care in the performance of his contract with the owner.\textsuperscript{40} The court's holding put no apparent limit other than foreseeability on the liability to which an architect is subjected by breach of the duty of due care.

In \textit{Shoffner}, plaintiff contracted to supply building materials to defendant contractor, who in turn had contracted with the local board of education to construct a facility. The board, in addition, contracted with an architect to design the structure. In plaintiff-supplier's suit for payment due under a contract, defendant-contractor counterclaimed for delivery of defective materials and impleaded the architect on the ground that he had approved the materials, seeking damages from the architect for costs of additional labor and materials. The trial court granted the architect's motion to dismiss on the ground that he had no legal duty to the defendant.\textsuperscript{41}

In reversing the trial court's dismissal,\textsuperscript{42} the court of appeals held that an architect can be liable in the absence of privity when he is a supervisory architect, as opposed to a mere advisory or "arbitrating" architect.\textsuperscript{43} Because defendant's counterclaim alleged that the architect was acting in a supervisory capacity, the court did not decide whether the architect would be liable if he were not a supervisory architect.\textsuperscript{44} The court indicated, however, that a nonsupervisory architect would be free from liability for negligence in the absence of privity.\textsuperscript{45} In addition, the \textit{Shoffner} court refused to decide whether damages for economic loss, that is pecuniary loss, consisting of one or both of the loss of bargain and consequential loss of profits, could be recovered.\textsuperscript{46} The court held that the costs of additional labor and material incurred because of defects in the original materials were a "loss as a result of

\textsuperscript{40} \textit{Id.} at 667, 255 S.E.2d at 584.
\textsuperscript{41} 42 N.C. App. at 259-60, 257 S.E.2d at 53.
\textsuperscript{42} \textit{Id.} at 272, 257 S.E.2d at 58.
\textsuperscript{43} \textit{Id.} at 269-70, 257 S.E.2d at 55-56.
\textsuperscript{44} \textit{Id.} at 267, 257 S.E.2d at 56.
\textsuperscript{46} The court stated: "Assuming, arguendo, that there is validity to that subtle distinction [between economic loss and property or personal damages], the cause of action here is for an economic loss as a result of alleged property damages." 42 N.C. App. at 271, 257 S.E.2d at 58 (latter emphasis added). The \textit{Shoffner} court apparently allowed damages for economic loss. \textit{See} 41 N.C. App. at 667, 255 S.E.2d at 584.
alleged property damages" and thus recoverable from an architect.

Davidson also held valid, absent privity, a cause of action against soil engineers for damages proximately resulting to contractors who submitted a bid and conducted work in reliance on negligently prepared soil test reports. In addition, the court made clear that the engineers were not immune from liability by virtue of a provision in the contract between the general contractor and the landowner stating that the general contractor would rely solely on his own judgment in preparing his bid. Shoffner, however, could change this result.

In another case involving the issue of liability without privity, the court of appeals refused to allow a cause of action. In Petro v. Hale plaintiff-doctor brought an action for negligent performance of a contract against an attorney who, on behalf of his client, had earlier sued plaintiff for malpractice without properly inquiring into the merits of his client's case. The court held that a lawyer who fails to inquire properly into the merits of his client's case is not liable to the adverse party for negligently bringing suit against him. A lawyer is under a duty to advocate in favor of his client's interest and should not be required to protect simultaneously the rights of an adverse party. In addition, the state's interest in having disputes settled in the courts outweighs the interest of plaintiffs in reducing the number of frivolous actions brought against them. The court did not make clear whether a duty did in fact run from a lawyer to the adverse party, but did hold that mere negligence in bringing suit would not subject an attorney to liabil-

47. Id. at 271, 257 S.E.2d at 58 (emphasis added). The Davidson court also held that recovery for certain property damage is allowed:

Where an architect's negligence in performing his contract contributes to a defective building and damage to adjacent property by means of a concurrent breach of the common law duty of care arising out of the circumstances surrounding the parties [the architect will be held liable to the injured parties].

48. 41 N.C. App. at 668, 255 S.E.2d at 584 (distinguishing McKinney Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472, 248 S.E.2d 444 (1978), in which recovery for damage to property covered by the construction contracts, as opposed to adjacent unrelated property, was not allowed).


50. See text accompanying notes 43-45 supra.

51. 43 N.C. App. 655, 260 S.E.2d 130 (1979).

52. Id. at 661, 260 S.E.2d at 135.

53. Id.

54. Id.
ity to the adverse party.\textsuperscript{55} Thus, the court leaves open the door for similar actions grounded upon an attorney's gross negligence or intentional institution of frivolous suits.

\section*{D. Standard of Care}

The court of appeals considered the appropriate standard of care to be applied to a professional in two different contexts. In \textit{Heath v. Swift Wings, Inc.},\textsuperscript{56} the court of appeals held erroneous a trial court's jury instruction on the proper standard of care required of an airplane pilot. The improper instruction was "negligence \ldots the failure to exercise that degree of ordinary care and caution, which an ordinary prudent pilot \textit{having the same training and experience} as [defendant], would have used in the same or similar circumstances."\textsuperscript{57} The court held the instruction improper on the ground that it introduced a subjective standard of care into the definition of negligence, when an objective standard is appropriate.\textsuperscript{58}

The court in \textit{Heath} correctly characterized the standard of care of a professional as an objective one, and properly held that the special training and experience of a member of a class of specially skilled persons is not to be considered in determining the existence of negligence.\textsuperscript{59} Instead, the degree of care required is "that degree of care which the great mass of men, or an ordinarily prudent or reasonable person, would use under the same or similar circumstances."\textsuperscript{60} The result of \textit{Heath} is that all pilots will be held to the same standard of care—that of the reasonably prudent pilot—regardless of special abilities some pilots possess.

The court of appeals considered the standard of care required of a

\begin{itemize}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} 40 N.C. App. 158, 252 S.E.2d 526 (1979).
\item \textsuperscript{57} \textit{Id.} at 162, 252 S.E.2d at 529 (emphasis added).
\item \textsuperscript{58} \textit{Id.} at 163, 252 S.E.2d at 529.
\item \textsuperscript{59} In North Carolina the standard of care required to be exercised is the same in every case: the conduct of the reasonably prudent person under the same or similar circumstances. Because the circumstances vary from case to case, however, the degree or amount of care required is not always the same. Finyan v. Settle, 263 N.C. 578, 582, 139 S.E.2d 863, 866 (1965). The special occupation one is engaged in is an example of such varying circumstances. \textit{See}, e.g., Dickens v. Everhart, 284 N.C. 95, 199 S.E.2d 440 (1973) (general practitioner); Belk v. Schweiser, 268 N.C. 50, 149 S.E.2d 565 (1966) (orthopedic surgeon); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (attorney); Buckner v. Wheelon, 225 N.C. 62, 33 S.E.2d 480 (1945) (orthopedic surgeon). The degree of care required of those engaged in different professions varies from case to case; the standard of care is always that of the reasonably person, however, and the requisite degree of care is constant among cases involving similar professions.
\item \textsuperscript{60} Scarboro v. Pilot Life Ins. Co., 242 N.C. 444, 448, 88 S.E.2d 133, 137 (1955) (citation omitted).
\end{itemize}
podiatrist for the first time in Whitehurst v. Boehm. Plaintiff in Whitehurst attempted to introduce testimony of an orthopedic surgeon on the standard of care required of a podiatrist. The court of appeals held the introduction of such testimony improper because a podiatrist is held to the degree of care and skill ordinarily exercised by other podiatrists. This holding is consistent with the general rule that a practitioner is judged according to the standards of his own school of medicine without regard to the standards of other schools.

E. Intentional Infliction of Emotional Distress

The North Carolina Supreme Court in Stanback v. Stanback recognized "the tort of intentional infliction of serious emotional distress." Plaintiff in Stanback alleged that her husband intentionally caused her mental anguish and anxiety by breaking their separation agreement. The court held that although it is necessary for recovery that plaintiff at trial show some resulting physical injury, an allegation that she suffered "great mental anguish and anxiety" is sufficient to survive a motion to dismiss.

The court, in adopting the tort of intentional infliction of mental distress, took a minority position in requiring proof of physical injury to sustain such an action. Also, in characterizing the action as recovery for "serious emotional distress," the court implies a quantum of injury that has not been required in other North Carolina cases which

62. Id. at 675, 255 S.E.2d at 765.
64. In McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979), the court of appeals considered a novel basis for a tort action based on emotional distress. Plaintiff brought an assault and battery suit against defendant for smoking a cigar in plaintiff's presence with full knowledge that plaintiff was allergic to smoke and took offense to smoking. The court held that neither the apprehension of smelling cigar smoke nor the inhalation of the smoke will support an action for assault and battery. "This is an apprehension of a touching and a touching which must be endured in a crowded world." Id. at 217, 252 S.E.2d at 252. The court, however, expressed no opinion on whether an allegation of resulting physical injury would survive a motion to dismiss. Id.
66. Id. at 196, 254 S.E.2d at 621-22. Recovery for the intentional infliction of emotional distress has been allowed in other North Carolina cases but never under this label. See, e.g., Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).
68. See RESTATEMENT (SECOND) OF TORTS § 46, Comment k (1965).
69. 297 N.C. at 196, 254 S.E.2d at 621.
allow recovery for mental anguish.\textsuperscript{70} In allowing the complaint to stand upon the facts alleged,\textsuperscript{71} however, the court indicated that these above two requirements will not be stringently interpreted.\textsuperscript{72}

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\textsuperscript{71} 297 N.C. at 198-99, 254 S.E.2d at 623.

\textsuperscript{72} For a full discussion of the emotional distress issue in \textit{Stanback}, see Byrd, supra note 70, at 450-63.