Survey of Developments in North Carolina Law, 1981

North Carolina Law Review

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

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol60/iss6/1
TABLE OF CONTENTS

I. ADMINISTRATIVE LAW ........................................... 1165
   A. Environmental Law ........................................ 1165
      1. Waste Management Act .............................. 1165
      2. Water ............................................... 1168
   B. Health and Medical Law .................................. 1170
      1. Residents' Bill of Rights ......................... 1170
      2. North Carolina Biologics Law .................... 1172
      3. Nursing Practice Act ............................... 1173
      4. Involuntary Commitment ............................ 1175
   C. State and Local Government ................................ 1177
      1. Sunset Law .......................................... 1177
      2. Social Services .................................... 1178
      3. Public Employees ................................... 1179
      4. Public Records ..................................... 1182
      5. Municipalities' Authority ......................... 1186
   D. Utilities Regulation ...................................... 1189
   E. Workers' Compensation .................................. 1190
      1. Legislative Action .................................. 1190
      2. Judicial Action ..................................... 1192
         a. Procedure ....................................... 1192
         b. Terminology ..................................... 1192
         c. Causation and Apportionment .................... 1194
         d. Benefits ......................................... 1197
   F. Insurance ................................................ 1198
      1. State Regulation .................................... 1198
      2. Policy Coverage .................................... 1201

* This Survey discusses significant decisions handed down in 1981 by the North Carolina Supreme Court, North Carolina Court of Appeals and the North Carolina Federal District Court and 1981 Statutory Developments.

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

NOTE: Cases discussed in text have been Shepardized through April 1982.
Reinsurance Facility: Recoupment Surcharges .. 1201

G. Employment ............................................. 1208
1. Unemployment Compensation .................. 1208
2. Dismissal & Demotion of Public Employees ... 1209

H. Professional Standards and Administration of Justice ........................................... 1210

I. Election Law ................................................................. 1212

J. Alcoholic Beverage Control .................................................. 1212

II. Civil Procedure ................................................................. 1214
A. Jurisdiction ................................................................. 1214
1. Personal Jurisdiction ............................... 1214
2. Subject Matter Jurisdiction .................. 1219

B. Voluntary Dismissal—Effective Date in Diversity Actions ............................................ 1220

C. Service of Process .......................................................... 1221

D. Appeal and Error ......................................................... 1222

E. Pleading ................................................................. 1226

F. Default ................................................................. 1228

G. Rule 60(b): Relief from Judgment ........................................... 1230

H. Rule 50 Motion for Directed Verdict and JNOV ......................................................... 1234
1. JNOV ................................................................. 1234
2. Directed Verdict ........................................... 1235

I. Statutory Developments ..................................................... 1236

III. Commercial Law ................................................................. 1238
A. Contracts ................................................................. 1238
1. Interpretation of Insurance Contracts in General .......................................................... 1238
2. Formation ................................................................. 1242
3. Consideration .......................................................... 1243
4. Assignment of Indemnity Judgment .................. 1245
5. Agency ................................................................. 1247

B. Uniform Commercial Code .................................................. 1248

C. Unfair Trade Practices ....................................................... 1254

D. Securities ................................................................. 1260

E. Consumer Finance: Usury .................................................. 1265

F. Other Statutory Developments .................................................. 1267
1. Banks and Banking ..................................................... 1267
2. Consumer Protection ................................................. 1269
3. Mobile Home Regulation ............................................ 1269
4. State Building Code .................................................. 1270
5. Credit Unions: Confidentiality .................................... 1270
6. Debtor Exemptions from Money Judgments ...................... 1271

IV. CONSTITUTIONAL LAW ............................................. 1272
   A. Freedom of Speech .................................................. 1272
   B. Fifth Amendment: Self-Incrimination ............................ 1276
   C. Fourteenth Amendment: Equal Protection ....................... 1276
   D. Fourteenth Amendment: Due Process ............................. 1277
      1. Civil Paternity and Right to Counsel ....................... 1277
      2. Procedural Due Process ......................................... 1280
   E. North Carolina Constitution ..................................... 1283
      1. Separation of Powers ............................................ 1283
      2. Access to the Courts .......................................... 1285
      3. Right to Jury Trial ............................................ 1286
      4. Education .................................................... 1287

V. CRIMINAL LAW ......................................................... 1289
   A. Abolition of Distinction Between Accessories Before the Fact and Principals .... 1289
   B. Homicide .......................................................... 1290
   C. Rape ............................................................. 1291
   D. Armed Robbery ................................................... 1294
   E. Embezzlement ..................................................... 1295
   F. Hit-and-Run ....................................................... 1296
   G. Contempt ........................................................ 1296
   H. Defenses .......................................................... 1298
      1. Voluntary Intoxication ......................................... 1298
      2. Entrapment .................................................... 1299
   I. North Carolina Drug Paraphernalia Act ......................... 1300
   J. Impersonation of Fireman and Emergency Services ............. 1301

VI. CRIMINAL PROCEDURE ................................................ 1302
   A. Searches and Seizures ............................................ 1302
      2. Stop and Seizure .............................................. 1311
      3. Legitimate Expectation of Privacy ................................ 1313
4. Searches Under Warrant ........................................ 1315
5. Exceptions to the Warrant Requirement .................. 1317

B. Miranda Warning .............................................. 1318

C. Double Jeopardy ............................................... 1325

D. Right to Speedy Trial ......................................... 1338
   1. Pre-indictment Delay ....................................... 1338
   2. Constitutional Right to a Speedy Trial ............... 1340
   3. Speedy Trial Act ......................................... 1341

E. Right to Counsel .............................................. 1346
   1. Standard to Determine Competence ...................... 1346
   2. Indigent’s Right to Substitute Counsel .............. 1348

F. Jury Instructions .............................................. 1350
   1. Lesser Included Offenses ................................ 1350
   2. Court Modification of Submitted Instructions ....... 1353

G. Probation and Parole ......................................... 1353

H. Other Cases .................................................. 1355

VII. Evidence .................................................... 1359

A. Impeachment .................................................. 1359
   1. Prior Acts .................................................. 1359
   2. Witness Credibility ...................................... 1361

B. Scientific Proof .............................................. 1362
   1. Generally ............................................... 1362
   2. Experimental ............................................ 1363

C. Hearsay ....................................................... 1365

D. Prior Acts as Substantive Evidence ....................... 1368

E. Cautionary Instructions ..................................... 1370

F. Opinion ........................................................ 1372

G. Testimony ..................................................... 1374

H. Statutory Developments ..................................... 1375
   1. Privilege for Records of Medical Review
      Committees ............................................. 1375
   2. Spousal Competency ..................................... 1376
   3. Photographs ............................................. 1377

VIII. Family Law .................................................. 1379

A. The Parent-Child Relationship ............................... 1379
   1. Establishing Paternity .................................. 1379
   2. Termination of Parental Rights ......................... 1380
3. Adoption ........................................ 1384
4. Child Abuse .................................... 1384

B. Divorce ........................................ 1385

C. Child Custody & Support ........................ 1387
   1. Child Custody and Visitation ............ 1387
   2. Jurisdiction in the Child Custody Area ... 1389
   3. Child Support ................................ 1394

D. Property Settlement and Alimony .............. 1396
   1. The Equitable Distribution Act ........... 1396
   2. Note, The Discretionary Factor in the Equitable
      Distribution Act ............................ 1399
   3. Other Developments ......................... 1415

IX. Property ........................................ 1420
   A. Joint Ownership .............................. 1420
   B. Eminent Domain ................................ 1424
   C. Restrictive Covenants ....................... 1430
   D. Warrant of Habitability ..................... 1436
   E. Foreclosure .................................. 1439
   F. Landlord/Tenant ................................ 1442
   G. Recording ..................................... 1445
   H. Easements .................................... 1447
   I. Land Use ...................................... 1448
   J. Zoning ........................................ 1449
   K. Wills, Trusts & Estates ...................... 1450
      1. Construction .............................. 1450
      2. The Rule in Shelley’s Case ............... 1451
      3. Marital Property ......................... 1453
      4. Rights of Adoptees ....................... 1455
      5. Caveats, Attorneys’ Fees & Procedure .... 1457

X. Taxation ......................................... 1460
   A. Inheritance Tax: Definition of “Debts of Decedent” 1460
   B. Statutory Developments ..................... 1460
   C. Property Tax .................................. 1461
   D. Unemployment Tax: Church Employee Exemption 1463

XI. Torts ............................................ 1465
   A. Products Liability ............................. 1466
      1. Dangerous Chemicals ...................... 1466
2. Crashworthiness .......................... 1468
3. Breach of Warranty & Tort ............. 1471

B. Loss of Consortium ........................ 1472
C. Mental Distress ........................... 1474
D. Liability Without Privity ............... 1475
E. Immunity .................................. 1476
   1. Parent/Child ............................ 1476
   2. Municipal Defendants ................. 1478
F. Releases ................................... 1480
G. Res Ipsa Loquitur .......................... 1482
H. Minors .................................... 1483
I. Damages .................................... 1483
I. ADMINISTRATIVE LAW

A. Environmental Law

The most significant development in environmental law in 1981 was the passage of the Waste Management Act. Less comprehensive measures enacted by the General Assembly included the following: increased penalties under the Pesticide Law of 1971; realignment of control over water districts; amendment of procedural provisions of the Water Use Act of 1967; and classification of sea turtles as an endangered species. In a statement referring to the General Assembly as a “trustee for future generations,” the legislature symbolically affirmed its commitment to environmental protection.

1. Waste Management Act

“The General Assembly of North Carolina . . . [found] . . . that the safe management of hazardous wastes and low-level radioactive wastes, and par-


2. Law of June 17, 1981, ch. 592, 1981 N.C. Sess. Laws, 1st Sess. 861 (codified at N.C. Gen. Stat. §§ 143-440 to -470 (Cum. Supp. 1981)). The major amendments to the Pesticide Law included the authorization of the board, when it deems necessary, to “require the manufacturer or distributor of any pesticide, for which registration has been refused, cancelled, suspended or voluntarily discontinued, or which has been found adulterated or deficient in its active ingredient, to remove such pesticide from the marketplace,” N.C. Gen. Stat. § 143-442(e) (Cum. Supp. 1981), and the provision for the board to levy a civil penalty of not more than two thousand dollars against anyone who violates any one or more of ten enumerated prohibitions. Id. § 143-469(b).


The General Assembly of North Carolina recognizing the profound influence of man’s activity on the natural environment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality shall be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the state to seek, for all its citizens, safe, healthful, productive and aesthetically pleasing surroundings, to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the historic and cultural elements of our common inheritance.

7. “Hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

a. Cause or significantly contribute to an increase in mortality or in serious irreversible or incapacitating reversible illness; or

b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

N.C. Gen. Stat. § 130-166.16(4) (Cum. Supp. 1981). For purposes of the Act, “solid waste” includes “solid, liquid, semisolid, or contained gaseous material resulting from industrial, institutional, commercial, and agricultural operations, and from community activities.” Id. § 130-166.16(16).
particularly the timely establishment of adequate facilities for the disposal and management of hazardous wastes and low-level radioactive wastes is one of the most urgent problems facing North Carolina." In response to this problem, the legislature passed the Waste Management Act of 1981 to provide for the uniform management of hazardous waste and to prevent local governments from interfering with this management.

To effectuate uniform hazardous and low-level radioactive waste management, the General Assembly specifically preempted the authority of local governments—county, city, or otherwise—to adopt ordinances that prohibit or have the effect of prohibiting properly approved hazardous or low-level radioactive waste facilities and landfills. Although preemption is a little-used power, there should be no bar to its exercise by the legislature. The counties, cities, towns or other governmental subdivisions are creations of the legislature. Consequently, the legislature "may give such powers and duties to [them] as it may deem advisable." A necessary corollary to this principle is that the legislature may restrict or abrogate any power previously conferred. Endowed with this authority, the legislature’s preemption of local powers should be beyond question.

A second of the Act’s requirements for implementing uniform management of hazardous and low-level radioactive waste is the proclamation that the State shall be the sole owner of these facilities. All land presently used as a hazardous or low-level radioactive waste facility or landfill must be conveyed in fee simple to the State. As consideration for the conveyance, the State will then lease the facility to the operator for a nominal yearly fee. In an apparent attempt to comply with federal constitutional requirements of just compensation, the General Assembly set the term of the lease as the estimated life of the facility. Whether the constitutional requirements are satisfied,

---

8. "Low-level radioactive waste" is defined in the negative as "radioactive waste not classified as high-level radioactive waste or spent nuclear fuel as defined by the U.S. Nuclear Regulatory Commission, transuranic waste, or byproduct material as defined in Section 11(e)(2) of the Atomic Energy Act of 1954, as amended." Id. § 104E-5(9a).
9. Id. § 143B-216.10(a) (footnotes added).
12. Id. §§ 104E-6.2(a), 130-166.17B(a).
13. Federal preemption hardly can be doubted due to the supremacy clause of article VI, section 2 of the United States Constitution.
17. See 49 N.C. Atty Gen. Rep. 178 (1979) (city or county cannot prohibit establishment of a hazardous waste facility) (opinion provided under statute with no specific preemption).
19. The annual rent will be fifty dollars. Id. §§ 104E-6.1(a), 130-166.17A(a).
20. U.S. Const. amends. V and XIV.
however, is open to dispute. The State may terminate the lease upon the lessee's failure to remedy violations of applicable law.\textsuperscript{22} Arguably, in view of this power, the consideration given is not just compensation for the loss.

The lease requirement provides that the State, or anyone authorized by the State, shall have "at all times the right to enter without a search warrant or permission . . . any and all parts of the premises for monitoring, inspection and all other purposes necessary to carry out the provisions of G.S. Chapter 130, Article 13B" and Chapter 104E.\textsuperscript{23} The validity of this warrantless search, although subject to question, should be upheld. Although the Supreme Court has held that, in general, warrantless searches of businesses are unreasonable,\textsuperscript{24} the Court has recognized exceptions for pervasively\textsuperscript{25} or closely regulated industries that have long been subject to close inspection and supervision.\textsuperscript{26}

In \textit{Marshall v. Barlow's, Inc.}\textsuperscript{27} the Court explained: "The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute. Some . . . statutes . . . apply only to a single industry, where regulations might already be so prevasive that a [an] exception to the warrant requirement could apply."\textsuperscript{28} Analysis under this approach leads to the conclusion that the warrantless search provision of the Waste Management Act is valid. Unlike the provisions of the Occupational Safety and Health Act involved in \textit{Barlow's}, the Waste Management Act is limited to one type of industry—the management of hazardous and low-level radioactive waste. In addition, controls imposed on toxic and radioactive waste are certainly pervasive. More important, as the General Assembly's findings indicate, the management of waste is essential to the public health and safety.\textsuperscript{29} Given this strong governmental interest in controlling hazardous and low-level radioactive waste, the authorization of warrantless searches does not seem unreasonable.\textsuperscript{30}

Another noteworthy aspect of the Waste Management Act is the creation

\begin{itemize}
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{25} United States v. Biswell, 406 U.S. 311 (1972).
  \item \textsuperscript{26} Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
  \item \textsuperscript{27} 436 U.S. 307 (1978). \textit{Barlow's} was a case involving a general grant to the Secretary of Labor to authorize agents to search, without a warrant, all employment facilities within the Act's purview. Id. at 309. The Court held that warrantless searches under the Act violated the fourth amendment's warrant requirement. Id. at 311.
  \item \textsuperscript{28} Id. at 321.
  \item \textsuperscript{30} See Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980), reviewing \textit{Camara}, \textit{See} and \textit{Barlow's} and concluding that warrantless and unannounced inspections of coal mines do not violate the warrant requirement of the fourth amendment "because of the strong governmental interest . . . , the limitations placed on the search by the statutes, and the pervasive governmental regulation of the mining industry." Id. at 38. The court in \textit{Sink} also relied on the lack of criminal penalties for violations to support its decision. This rationale should apply equally to the Waste Management Act. See N.C. Gen. Stat. § 104E-24 (Cum. Supp. 1981) (administrative penalties and judicial review).
\end{itemize}
of a nonreverting Hazardous Waste Fund to defray the costs of monitoring the hazardous waste facilities and landfills and, more importantly, to ensure the care of these facilities long after they have ceased operating. This innovative and long-term approach to effective waste management should be encouraged to carry out the environmental policies of the State.

2. Water Use and Management

Significant developments in the area of water use and management included amendment of the Water Use Act of 1967 and judicial interpretation of the Environmental Policy Act of 1971. The amendment to the Water Use Act of 1967 was a legislative response to court decisions interpreting the Act. Although the amendment is solely procedural, it nevertheless is useful in securing or protecting rights of parties affected by administrative action.

The facts that gave rise to the judicial-legislative interplay are as follows. As part of its investigation of the feasibility of a proposed Duke Power nuclear power plant, the Environmental Management Commission held a public meeting to declare the site a capacity use area. "As a result of the public meeting, 'the Commission decided to hold two public meetings to consider whether a capacity use [area] should be declared and/or an order issued to Duke [Power] pursuant to N.C.G.S. 143-215.13(d).'" Subsequently, the Commission announced a resolution refusing to issue the order pursuant to G.S. 143-215.13(d) or to declare the site a capacity use area. High Rock Lake Association sought to have this resolution reviewed by the superior court. On appeal from an order dismissing the case, the court of appeals held that the resolution issued by the Commission refusing to stop Duke Power from constructing the nuclear power plant was not an "order" within G.S. 143-215.13(d) requiring judicial review. The court also pointed out that judicial review would not be appropriate until all administrative avenues had been foreclosed.

32. See note 6 supra.
37. Hereinafter referred to as the Commission.
38. 39 N.C. App. at 701, 252 S.E.2d at 111.
39. Id. (footnote omitted).
40. Id. at 702, 252 S.E.2d at 111.
41. Id. at 702, 252 S.E.2d at 112.
42. Id. at 704, 252 S.E.2d at 113.
43. Id. at 707, 252 S.E.2d at 114. The Administrative Procedure Act permits a party to seek a declaratory ruling from the appropriate agency, N.C. Gen. Stat. § 150A-17 (1978), and these rulings are subject to judicial review. Id. § 150A-43.
Subsequently, the General Assembly responded to the court of appeals' holdings, both the interpretation of an "order" and the need to exhaust all administrative remedies, by rewriting G.S. 143-215.13(d):

Any person who is adversely affected by a rule of the Environmental Management Commission issued pursuant to this subsection shall be entitled to an administrative hearing before the Environmental Management Commission to contest the rule or the application of the rule to such person. . . . Any person who is aggrieved by a final decision of the Environmental Management Commission in a contested case shall be entitled to judicial review of such decision in accordance with Article 4 of Chapter 150A of the General Statutes.\textsuperscript{44}

Thus, the strict requirement of an "order" has been diminished to a "rule," and the subsection clearly directs the party through the steps necessary for judicial review.\textsuperscript{45}

A second significant development in the area of water use and management was the North Carolina Court of Appeals decision in \textit{In re Environmental Management Commission},\textsuperscript{46} in which the court of appeals, for the first time, interpreted part of the Environmental Policy Act of 1971.\textsuperscript{47} The issue before the court was whether authorization to the Orange Water and Sewer Authority to acquire the necessary water rights and land for the Cane Creek reservoir project had to be preceded by an environmental impact statement prepared by the Environmental Management Commission.\textsuperscript{48} The court held that the Environmental Policy Act requires the Commission to prepare an environmental impact statement before it could authorize the Orange Water and Sewer Authority to proceed.\textsuperscript{49}

The Environmental Policy Act requires State agencies, to the fullest extent possible, to "include in every recommendation or report on proposals for legislation and actions involving expenditure of public monies for projects significantly affecting the quality of the environment in this State, a detailed statement" of all environmental impacts, proposals and alternatives.\textsuperscript{50} Focusing on this section of the Act the court concluded that the certification by the Commission to proceed was sufficient state action to require the Commission to prepare an environmental impact statement. To reach this result the court

\textsuperscript{45} Following the suggestion of the court of appeals, 39 N.C. App. at 708, 252 S.E.2d at 115, the High Rock Lake Association sought administrative review and then appealed the decision affirming the prior Commission ruling. A different three-judge panel of the court of appeals upheld the Commission's decision to allow Duke Power to proceed. \textit{High Rock Lake Ass'n v. Environmental Management Comm'n}, 51 N.C. App. 275, 276 S.E.2d 472 (1981).
\textsuperscript{46} 53 N.C. App. 135, 280 S.E.2d 520 (1981).
\textsuperscript{48} 53 N.C. App. at 138-39, 280 S.E.2d at 525.
\textsuperscript{49} Id. at 145, 280 S.E.2d at 527. The court rejected the Commission's contentions that the public hearings held before certifying the authorization or the environmental impact statement to be filed by the U.S. Army Corps of Engineers were adequate alternatives. Id. at 144, 280 S.E.2d at 526-27.
\textsuperscript{50} N.C. Gen. Stat. § 113A-4(2) (1978). The section specifically requires the responsible official to cover six separate topics in the statement.
relied not only upon analogous requirements at the federal level, but also upon the function of the Commission. The court reasoned that the legislature intended the Commission to consider the effect of "development on present beneficial users within the watershed." In conclusion the court stated, "It becomes apparent that the certification action by the Commission is State action which, if it significantly affects the environment, necessitates an impact statement."

B. Health and Medical Law

1. Domiciliary Home Residents' Bill of Rights

On July 10, 1981, the North Carolina General Assembly enacted the Domiciliary Home Residents' Bill of Rights. "It is the intent of the General Assembly that every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and that the facility shall encourage and assist the resident in the fullest possible exercise of these rights." The protection afforded extends not only to residents of a domiciliary home but also to residents of family care homes, homes for the aged and disabled, and group homes for developmentally disabled adults.

---

52. Id. at 142-43, 280 S.E.2d at 525-26.
53. Id. at 143, 280 S.E.2d at 526.
54. Id.
58. A "domiciliary home" is defined as any facility, by whatever name it is called, which provides residential care for aged or disabled persons whose principal need is a home with the sheltered or personal care their age or disability requires. Medical care at a domiciliary home is only occasional or incidental, such as may be required in the home of any individual or family, but the administration of medication is supervised. Domiciliary homes are to be distinguished from nursing homes subject to licensure under G.S. 130-9(e). The three types of domiciliary homes are homes for the aged and disabled, family care homes and group homes for developmentally disabled adults.
59. A "family care home" is a domiciliary home housing two to five residents. Id. § 131D-20(5).
60. A "home for the aged and disabled" is a domiciliary home with six or more residents. Id. § 131D-20(7).
The primary section of the Act sets forth the sixteen rights that every facility must ensure. The more important of these rights are: "to be free of mental and physical abuse, neglect and exploitation," to be generally "free from chemical and physical restraint"; "to have his or her personal records kept confidential and not disclosed if he or she objects in writing"; "to associate and communicate privately and without restriction with people or groups of his or her own choice on his or her own or their initiative at any reasonable hour"; and "to participate by choice in accessible community activities and in social, political, medical, and religious resources and to [be free] to refuse such participation." Also included in these sixteen rights are broader, more vague policy statements such as the right "to be treated with respect, consideration, dignity and full recognition of his or her individuality and right to privacy" and to "receive care and services which are adequate, appropriate, and in compliance with relevant federal and State laws and rules and regulations." Several other privacy rights, such as the right to access a private telephone, to prompt receipt of unopened mail and to access to writing supplies, are also guaranteed.

The Act contains several other important substantive provisions, although not specifically referred to as "rights." Among these is a provision that prohibits any facility from requiring a waiver of the sixteen enumerated rights. A second important feature of the Act is the extensive body of notice requirements: "A copy of the declaration of the residents' rights shall be posted..."
conspicuously in a public place in all facilities.”

The last major part of the Act contains enforcement provisions and remedies. Primary enforcement responsibility lies with the Department of Human Resources and county social services departments. Every resident also has the right to bring a civil action but is limited to injunctive relief. Apart from any injunction that a resident may pursue, the Department of Human Resources has the authority to revoke licenses for substantial noncompliance.

2. North Carolina Biologics Law

A second major development related to the field of medicine was the North Carolina Biologics Law of 1981. The Act’s purpose is twofold: “to provide for the production and sale of biologics for the prevention or treatment of disease in animals other than man;” and “to establish controls for the sale and use of biologics in North Carolina.”

The major effect of the Act is to prohibit the production of biologics except in a facility licensed by the North Carolina Department of Agriculture or the United States Department of Agriculture, or in an “establishment producing biologics only for use by the owner or operator . . . for animals owned by him, if the biologics are registered with the Commissioner of Agriculture.”

72. Id. The address and telephone number of the appropriate section of the Department of Human Resources responsible for enforcement and the address and telephone number of the county Social Services Department also is to be posted.
73. Id. §§ 131D-26, -30.
74. “The director of the county Department of Social Services shall monitor the implementation of the declaration of the residents’ rights and shall also investigate any complaints or grievances pertaining to violations of the declaration of rights.” Id. § 131D-26(a). The administrator of each facility is responsible for implementing the Domiciliary Home Residents’ Bill of Rights, id. § 131D-25, but the Act does not specifically provide how total enforcement shall occur. It is clear that the Department of Social Services and the Department of Human Resources have authority to investigate complaints. This, however, is not adequate protection for the residents, who may be reluctant or even unable to complain. To correct for this shortcoming, the “monitoring” provision of the Act should be read to sanction periodic yet irregular investigations of facilities.
75. Id. § 131D-28. The absence of any explicit provision for remedies other than injunctive relief suggests that none were intended. Nevertheless, a resident may be allowed to sue under common law tort principles for assault, battery or false imprisonment for some of the more egregious violations, such as unauthorized or nonemergency chemical or physical restraints. Additionally, since many of the provisions of the Domiciliary Home Residents’ Bill of Rights track the Patients’ Bill of Rights under federal regulations, federal relief also may be available.
76. Id. § 131D-29.
78. N.C. Gen. Stat. § 106-707 (Cum. Supp. 1981). “Biologics” means preparations made from living organisms and their products, including serums, vaccines, antigens and antitoxins which are used for the treatment or prevention of diseases.” Id. § 106-708(2). “Animal” is defined as all birds and mammals, excluding man, to which biologics may be administered. Id. § 106-708(1). This seems to be an unduly narrow definition. See text accompanying notes 87-89 infra.
80. Id. § 106-710(a)(2).
Moreover, the Act prohibits any sale or use of unregistered biologics within the State. The registration forms are supplied by the Commissioner of Agriculture and must, under the statute, request information showing that the biologic is produced under approved procedures; "safe and noninjurious to animals when used as directed;" labeled for proper handling, use and contents; produced in a facility licensed pursuant to the Act; and "not in violation of this [Act] or any rule or regulation" adopted under the Act.

Violation of the Act or any rules or regulations promulgated under it is punishable in a variety of ways. For example, the license of any facility or the registration of any biologic may be revoked or suspended. Violation of the Act also is punishable as a misdemeanor with a fine ranging from not less than one hundred dollars to no more than one thousand dollars, or imprisonment for no less than sixty days nor more than six months, or both.

There are several questionable aspects of the Act, one of which is its relatively narrow focus. The Act is limited to the use of biologics that are used "for the prevention or treatment of disease in animals other than man."

This limitation excludes from the scope of the Act the production, sale or use of biologics intended to clean the environment rather than to treat disease, but apparently production, sale or use of such biologics is prohibited in North Carolina.

3. Nursing Practice Act

A third major piece of health and medical legislation enacted in 1981 is the Nursing Practice Act. The Act completely rewrites and restructures the

---

81. Id. § 106-710(a)(3).
82. Id. § 106-712(a)(1) to (5). "The application for registration shall also include a protocol of methods of production in detail which is followed in the production of the biologic, a sample of the label to be placed on the biologic, and any other information prescribed by the board as necessary" to implement the Act. Id. § 106-712(b).
83. Id. § 106-711.
84. Id. § 106-713.
85. The suspension or revocation must be in accord with the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150A.
86. Id. § 106-714(a). Injunctive relief is also available irrespective of other adequate or applicable remedies. Id. § 106-714(b).
87. Id. § 106-707.
89. A liberal reading of the statute can produce an opposite result. "'Biologics' means preparations made from living organisms and their products, including serums, vaccines, antigens and antitoxins which are used for the treatment or prevention of diseases in animals other than humans, or in the diagnosis of diseases." N.C. Gen. Stat. § 106-708(2) (Cum. Supp. 1981). It is arguable that this definition does not bar biologics from environmental use by including this use within the "prevention of diseases" category. The definition of "animal," however, would have to be expanded correspondingly to cover the situation clearly.
prior Nurse Practice Act. The Act redefines nursing and the practice of nursing by a registered nurse and by a licensed practical nurse. In addition, the Act reconstitutes the compositional requirements for the Board of Nursing.

Under the definition provided by the new Act, nursing is a dynamic concept that encompasses all aspects of patient care, including prevention, convalescence and rehabilitation. Although this definition may be a proper characterization of nursing, legally the definition may impose a heavy burden on individual nurses. For example, under the Act, nurses' duties include "vigilant and continuous care" for the acutely or chronically ill. This standard would appear to be higher than that applied to other patients, possibly increasing exposure of nurses dealing with such patients to liability. A second important factor concerning the nursing definition under the Act is that, consistent with its total patient care approach, nurses are required to recognize the attainment of a dignified death as an important patient need.

The "practice of nursing by a registered nurse" has been divided into nine components. Some of the more basic functions are: "[a]ssessing the physical and mental health of the patient, including reactions to illnesses and treatment regimens; [p]lanning, initiating, delivering, and evaluating appropriate nursing acts;" recording the nursing plan, the care given and the patient's response; and "[p]roviding teaching and counseling about the patient's health care." The section defining the role of licensed practical nurses, which is broken
down into five components, merely provides that licensed practical nursing "means the performance for compensation of selected acts in the care of persons who are ill, injured, or experiencing alterations in normal health processes." The major difference between the registered nurse and the licensed practical nurse under the new Act is that discretionary functions requiring greater education in the sciences have not been vested in the licensed practical nurse.

Another major change in the Nursing Practice Act is the new composition of the Nursing Board. The most important aspect is the attempt to free the nursing profession from the influence of physicians and hospital administrators. Allowing nurses to control their profession is consistent with the definition of nursing as a dynamic discipline. Thus, as the medical needs of society evolve, nurses will be able to define independently their role to meet those needs. Nonetheless, the Nursing Board is not totally free to prescribe the areas in which a nurse legitimately may practice. "The Board is empowered to . . . [a]ppoint and maintain a subcommittee of the Board to work jointly with the subcommittee of the Board of Medical Examiners to develop rules and regulations to govern the performance of medical acts by registered nurses . . . ." Hence, the Board of Medical Examiners may still have a degree of control over certain areas of nursing practice.

4. Involuntary Commitment

Three cases reached the North Carolina Court of Appeals under the State's involuntary commitment statute. The cases evidence the judiciary's

102. Id. § 90-171.20(8)(a)-(e).
104. Examples of the functions of a licensed practical nurse include: participating in assessments of the physical and mental health of a patient, participating in the implementation of the health care plan developed by a registered nurse by performing delegated tasks under supervision of a registered nurse, and reinforcing the counseling and teaching of a registered nurse, licensed physician or dentist. Id. § 90-171.20(8).
106. The new board has been expanded to fifteen members—nine registered nurses, four licensed practical nurses and two public representatives. The old board consisted of twelve members—five registered nurses, two physicians, two hospital administrators and three licensed practical nurses. The licensed practical nurses, however, were able to participate only on matters pertaining to the education, licensure and examination of licensed practical nurses. Thus, nurses did not have the control of their profession provided by the new Act. Note also that the nurses on the board are elected from the profession rather than appointed by the Governor. Id. § 90-171.21(a)-(d).
107. See note 92 supra.
109. Id. § 90-171.20(7)(e).
110. The three cases, each decided by a different three-judge panel, were In re Crainshaw, 54 N.C. App. 429, 283 S.E.2d 553 (1981); In re Guffey, 54 N.C. App. 462, 283 S.E.2d 534 (1981); In re Holt, 54 N.C. App. 352, 283 S.E.2d 413 (1981).
goal of simplifying involuntary commitment proceedings.\textsuperscript{112}

"To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and dangerous to himself or others."\textsuperscript{113} Thus, there are two distinct requirements for commitment: (1) mental illness or inebriety, and (2) dangerousness to self or others.\textsuperscript{114} The dangerousness element of this test was the focus of the 1981 decisions.\textsuperscript{115}

Within the definitions of dangerousness to self\textsuperscript{116} or dangerousness to others,\textsuperscript{117} the court adhered to a strict burden of proof. In \textit{In re Crainshaw},\textsuperscript{118} respondent exhibited the following behavior characteristics: she burned pots and countertops by forgetting to turn off the stove; she was generally forgetful; she frequently talked to walls; and she was disoriented with her surroundings.\textsuperscript{119} The court conceded that such behavior showed an inability to conduct daily affairs or exercise self-control or judgment, but it nevertheless failed to find evidence of a "serious physical debilitation . . . in the near future."\textsuperscript{120}

\textsuperscript{112} The present version of the North Carolina involuntary commitment statute has been described as "an attempt to expedite commitment of the mentally ill to the state’s mental health facilities." Survey of Developments in North Carolina Law, 1979—Administrative Law, 58 N.C.L. Rev. 1185, 1219-20 (1980). For a discussion of civil commitment in North Carolina see Hiday, The Attorney’s Role in Involuntary Civil Commitment, 60 N.C.L. Rev. 985 (1982); Miller, Involuntary Civil Commitment in North Carolina: The Results of the 1979 Statutory Changes, 60 N.C.L. Rev. 985 (1982).


\textsuperscript{114} In re Collins, 49 N.C. App. 243, 271 S.E.2d 72 (1980).

\textsuperscript{115} In both \textit{Holt} and \textit{Crainshaw} the issue was whether the evidence was sufficient to support the trial judge’s conclusion that the respondent was dangerous to self. The issue in \textit{Guffey} involved the same conclusion with respect to dangerousness to others.

The mental illness standard typically has been met at the trial court level by having an expert diagnose the respondent as mentally ill. In \textit{Guffey}, for example, "the State presented evidence in the form of testimony from an expert witness showing that the respondent suffered from a manic depressive condition, manic phase, which was manifested by overtalkativeness and poor judgment." \textit{54 N.C. App. at 466, 283 S.E.2d at 536.} The respondent, on the other hand, offered evidence that he was quite capable of providing himself with all of the basic necessities. The court was willing to accept the doctor’s conclusion that the respondent was "mentally ill" and exercised "poor judgment."

\textsuperscript{116} From the statute the court has established a two-pronged test for dangerous to self: (1) inability for self-care regarding one’s daily affairs; and (2) "a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability."

\textit{In re Crainshaw, 54 N.C. App. at 430-31, 283 S.E.2d at 554 (1981).}

\textsuperscript{117} Dangerousness to others is manifested by three necessary elements:

(1) Within the recent past
(2) Respondent has
  (a) inflicted serious bodily harm on another, or
  (b) attempted to inflict serious bodily harm on another, or
  (c) threatened to inflict serious bodily harm on another, or
  (d) has acted in such a manner as to create a substantial risk of serious bodily harm to another, and
(3) There is a reasonable probability that such conduct will be repeated.

\textit{In re Monroe, 49 N.C. App. 23, 30-31, 270 S.E.2d 537, 541 (1980).}

\textsuperscript{118} 54 N.C. App. 429, 283 S.E.2d 553 (1981).

\textsuperscript{119} Id. at 432, 283 S.E.2d at 555.

\textsuperscript{120} Id. Compare the dissenting opinion of Judge Webb:

I . . . believe the facts recorded support a conclusion that the respondent’s behavior was ‘grossly inappropriate to the situation.’ This creates a \textit{prima facie} inference that the re-
In short, the court was unwilling to infer a physically dangerous condition from a showing of an inability to exercise self-control or judgment.

In two other cases reaching the court of appeals in 1981, In re Guffey and In re Holt, the court demonstrated a different concern. The court paid particular attention to the requirement imposed on the trial court to record the specific facts supporting its conclusions. This required the trial court to do more than simply mark the appropriate box in the commitment form. In each case the court of appeals was not content merely to rubber stamp the decision of the trial court. Rather, in both Holt and Guffey the court engaged in a close review of the record to determine whether the findings and conclusions were warranted by the evidence.

C. State and Local Government

1. Sunset Law

Hailed as one the most significant achievements of the 1977 General Assembly, the North Carolina Sunset Law fell to the legislative ax in 1981. The State's sunset program, in line with similar laws in other jurisdictions, provided for automatic review of programs and functions operated under 100 licensing and regulatory laws. The Act authorized repeal of approximately one-third of the statutes biennially over a six-year period and provided a review procedure for each program before its proposed repeal date. The North Carolina program, however, apparently was unique. Rather than setting up a permanent sunset process, the statute established only a temporary review agency, the Government Evaluation Commission, itself subject to...
The 1981 repealing statute set up a temporary Committee on Agency Review composed entirely of legislative members. The Committee will conclude evaluations on sixty laws and programs still remaining on the sunset list. The laws and programs, however, are no longer subject to automatic termination dates.

Repeal of the North Carolina program comes in response to legislative criticism that the program was too expensive in its previous form. Legislators also viewed the procedures as too time-consuming in light of the results achieved. Finally, with only five agencies abolished during the program’s existence, some criticized the device for not further reducing the size of government.

2. Social Services

Upon recommendation of the Social Services Study Commission, the General Assembly completely recodified the State’s public assistance and social service statutes. The Recodification Act rewrites and reorganizes all welfare statutes “while retaining the basic concepts and requirements of existing laws and practice in Chapter 108.” New Chapter 108A brings State law into conformity with current federal law and policy while repealing refer-

130. The Commission was a ten-member body with six gubernatorially-appointed citizens and six legislators appointed by the Lieutenant Governor and Speaker of the House; termination of Commission authority was set for June 30, 1983. N.C. Gen. Stat. §§ 143-34.15(a), -34.15(f) (1978).


132. Id. § 2 (codified at N.C. Gen. Stat. § 143-34.25 (Cum. Supp. 1981)). The Committee’s authority is to terminate on July 30, 1983, the same date the Commission’s authority would have ceased.


134. Id.


136. Id.

137. Id. at 312. The criticism aimed at the North Carolina program appears to confirm one commentator’s misgivings during the era of initial enthusiasm for sunset programs:

The sunset concept is the type of “gimmick” which all too often appeals to Americans as a facile solution to complex problems. It may, however, be doubted that sunset statutes will really resolve the problem of the agency life-cycle. Legislative review en masse of agency existence will, more likely than not, lead only to perfunctory renewal of agency mandates. Can we really expect more, given the ineptitude of our legislatures and the time pressures to which they are subjected?

Schwartz, supra note 127, at 294.

138. The social services program of North Carolina is based on the constitutional mandate that “[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian State . . . .” Social Services Study Comm’n, Internal Report 2 (May 1980).

139. The Social Services Study Commission was created in 1979 as a legislative commission consisting of twelve members appointed by the Governor, Speaker of the House and President of the Senate. Law of June 8, 1979, ch. 992, §§ 1-13, 1979 N.C. Sess. Laws 1329.


141. Id. (preamble). For a detailed outline of the recodification, see N.C. Inst. of Gov’t, supra note 135, at 262-70.
ences to obsolete federal or State programs. The Act also places public assistance and social services into two separate statutory sections, with specific authority provided for each program category. Finally, the Department of Human Services now has statutory authority to apply for any available federal welfare programs; previous authority was limited to Social Security programs.  

The appellate process for termination or modification of welfare payments also underwent clarification in 1981. In accordance with previous law, termination or modification of payment is ineffective until ten working days after notice is issued. Immediate termination, however, is now available under certain specified conditions. Recipients also are granted specific authority to examine their case files and any other documentary material to be used at an appellate hearing, provided such files and materials are not classified as confidential under federal law. A denial of access is subject to judicial review.

3. Public Employees

Laws relating to the state's public servants underwent modification and clarification in 1981. In Appeal of North Carolina Savings and Loan League the North Carolina Supreme Court denied local government employees membership in the State Employees' Credit Union. The case arose from an

---


144. Termination or modification of assistance may be effective immediately:

(1) When the modification is beneficial to the recipient; or

(2) When federal regulations permit immediate termination as soon as the notice is mailed or delivered and the Social Services Commission or Department of Human Resources has developed regulations that adopt the federal law or regulations. When federal or state regulations permit immediate termination or modification, the client has no right to continue assistance at the present level pending the local appellate hearing before the social services director or his designee.


145. Id.

146. Id.

147. Additional Developments: The legislature, in an attempt to enhance membership in independent employee associations, authorized voluntary payroll deductions for membership dues. The authority, however, is limited to domiciled state employees' associations that do not engage in collective bargaining. Law of July 8, 1981, ch. 869, 1981 N.C. Sess. Laws, 1st Sess. 1305 (codified at N.C. Gen. Stat. § 147-62 (Cum. Supp. 1981)). One commentator points out that the latter provision is to allay fears that the legislation is a first step toward state employee unionization; constitutionality of the limitation probably will have to be decided by the courts. N.C. Inst. of Gov't, supra note 135, at 256.


149. The State Employees' Credit Union, the third largest in the world, is a state-chartered financial institution with membership traditionally limited to State employees and public school teachers. Because of their favored legal status, credit unions receive numerous tax advantages including exemption from State excise and intangible taxes. The organizations also are exempt from federal income taxes. Credit unions also are free from many burdensome statutory require-
amendment to Credit Union bylaws. The bylaws change allowed for an expansion of the membership field to include employees of local government units who participate in state-administered retirement programs.\textsuperscript{150} After the North Carolina Credit Union Commission affirmed the change, the North Carolina Bankers Association, the Savings and Loan League and the Burke County Savings and Loan Association petitioned for judicial review. Petitioners contended that the members added by the amendment lacked a "common bond" with the previous membership in violation of G.S. 54-109.26.\textsuperscript{151} The trial court held in favor of petitioners, but the court of appeals reversed. Through narrow statutory interpretation, the supreme court held against the Commission and reversed the court of appeals,\textsuperscript{152} affirming the trial court decision that the expanded membership lacked the statutorily required commonality. The justices specifically rejected the court of appeals' finding of requisite similarity in occupation. According to the court of appeals, "public employees are united by the common bond of similar occupation for the simple reason that they are employed in the service of the community . . . ."\textsuperscript{153} The supreme court held, however, that the statute required similarity in actual oc-

\begin{itemize}
  \item The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the \textit{common bond} set forth in the bylaws. . . .
  \item Credit union membership may include groups having a \textit{common bond} of similar occupation, association or interest, or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons.
\end{itemize}


\textsuperscript{150} Id. at 460-61, 276 S.E.2d at 406-07. The State administers eight retirement systems including the Local Government Employees' Retirement System. Within this system fall all employees of local government units, including employees of various cities, counties, housing authorities, airports, ports, and ABC boards. Id. at 463 n.1, 276 S.E.2d at 408 n.1.

\textsuperscript{151} This statute, the source of the common bond requirement, provides:

\begin{enumerate}
  \item The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the \textit{common bond} set forth in the bylaws. . . .
  \item Credit union membership may include groups having a \textit{common bond} of similar occupation, association or interest, or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons.
\end{enumerate}


\textsuperscript{152} In accordance with the Administrative Procedures Act, a reviewing court's power to affirm an agency decision and to remand for further proceedings is unlimited. A court, however, may reverse or modify only if:

\begin{enumerate}
  \item In violation of constitutional provisions; or
  \item In excess of the statutory authority or jurisdiction of the agency; or
  \item Made upon unlawful procedure; or
  \item Affected by other error of law; or
  \item Unsupported by substantial evidence . . . ; or
  \item Arbitrary or capricious.
\end{enumerate}

N.C. Gen. Stat. § 150A-51 (1978). The trial court relied on the first, second, fifth and sixth standards in reversing the Commission decision; the supreme court, while affirming the trial court's results, found the fourth standard to be the sole applicable provision. 302 N.C. at 463-64, 276 S.E.2d at 409.

\textsuperscript{153} 45 N.C. App. 19, 23, 262 S.E.2d 361, 364 (1980).
cupational duties and responsibilities. The court also rejected respondents' contention that the limitation of membership to local government employees covered under a state-administered retirement system provided a common bond of similar interest. The court reasoned that the only commonality shared by all persons covered by the eight separate state-administered retirement systems was that bookkeepers for each system shared a common employer, the State. The court deemed this connection remote and insubstantial.

In a well-reasoned dissent, Justice Exum concurred with the court of appeals' determination that public employees are united by the common bond of occupation. He accused the majority of protectionism, noting that the common bond requirement is for the protection of the credit union itself. The requirement is not intended to restrict size and operations to protect private financial institutions with which credit unions may compete, as the majority implied. The effect of the majority's decision, he concluded, is denial of credit to a group whose only collateral is the income derived from a steady job merely on the basis of an unsubstantiated threat to the private sector. Both majority and dissent, however, failed to recognize that many local public employees are already members of credit unions or are free to form new ones.

Several actions taken by the General Assembly in 1981 also affected public employees. The most important of these actions was the relaxation of political activity restrictions. Provided they do not use their positions to

---

154. 302 N.C. at 469, 276 S.E.2d at 412.
155. Id. at 472, 276 S.E.2d at 413.
156. Id. at 472-73, 276 S.E.2d at 414.
157. Id. at 474, 276 S.E.2d at 415.
158. ‘The acid test, as the majority correctly notes, is whether the common bond is sufficient to promote the financial stability of credit unions by requiring that the members possess substantial unity of character and interest. Only with some assurance of stability can the purpose of credit unions be achieved.’” Id. at 476, 276 S.E.2d at 416 (Exum, J., dissenting).
159. Id.
160. Id. The dissent points out that although the State Employees' Credit Union is large in comparison with others of its type, size and operational potential, even with the enlarged membership, it is small compared to the private sector. At most, the membership field would be expanded from 200,000 to 250,000 eligible members. Finally, North Carolina credit unions, including the State Employees Credit Union, account for only 4.5% of total state consumer savings. Id.
161. In fact, employees of county, municipal, and related government units (excluding employees of county departments of Social Services, Health, Mental Health and Civil Defense), who had a credit union chartered by North Carolina or by the federal government and who were included in that field of membership, were not eligible for membership in the State Employees' Credit Union even under the amended bylaws. Bylaws of the State Employees' Credit Union, art. II, § 1 (as amended Sept. 15, 1977).
162. For legislative developments in the area of public records affecting public employees, see notes 196-211 and accompanying text infra.

No member of any State Commission may (i) use his position to influence any election or the political activity of any person, (ii) serve as a member of the campaign committee of any political party, (iii) interfere with or participate in the preparation for any election or the conduct thereof at the polling place, or (iv) be in any manner concerned with the
influence "any election or political activity of any person," state commission, board, council or committee members now are free to engage in partisan politics. The legislature also relaxed political activity restrictions on corrections employees, provided they limit their political activities to off-duty hours.

4. Public Records

During 1981 both the North Carolina Court of Appeals and the General Assembly focused their attention on the rights of access to, and confidentiality of, the State's public records. The court undertook to interpret the Public Records Act for the first time in the Act's forty-five year history.

In *Advance Publications, Inc. v. City of Elizabeth City* plaintiff corporation sought to compel disclosure of a letter to defendant city from a consulting engineer who was employed to inspect construction work on the City's water treatment plant. The court held the letter to be a public record within the meaning of G.S. 132-1. In light of defendant's status as a State subdivision authorized as a public enterprise to improve and maintain a water supply and distribution system, the court held that the letter was received pursuant to law "in connection with the transaction of public business." The court

---

170. N.C. Gen. Stat. § 132-9 (1981) provides that "[a]ny person who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders."
171. N.C. Gen. Stat. § 132-1 (1981) provides in pertinent part that "'[p]ublic record' or 'public records' shall mean all . . . letters . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. . . ." (emphasis added).
173. 53 N.C. App. at 505, 281 S.E.2d at 70. For other cases in which courts found engineering reports, orders, plans and documents concerning public works projects to be public records, see Coldwell v. Board of Pub. Works, 187 Cal. 510, 202 P. 879 (1921) (engineering documents concerning construction of city water system); Egar v. Board of Water Supervisors, 205 N.Y. 147, 98 N.E. 487 (1912); In re Ihring, 181 A.D. 865, 169 N.Y.S. 273, aff'd sub. nom. Ihring v. Williams,
rejected the City's contention that public policy considerations compel the court to create an exception to mandatory disclosure of these types of communications.\textsuperscript{174} The court reasoned that the General Assembly intended no exceptions to the Act other than those set forth in G.S. 132-1.1—communications by legal counsel to governmental bodies.\textsuperscript{175} In addition to its deferral to this "clear" manifestation of legislative intent, the court viewed the basic national policy of unencumbered access\textsuperscript{176} as a bar to judicially created exceptions absent some compelling state policy consideration.\textsuperscript{177} The court also rejected the contention that the purpose of the Act is to provide for record preservation and not disclosure: "Preservation for its own sake, absent access, would be an absurdity."\textsuperscript{178} Finally, the court found the corporate plaintiff to be a "person" entitled to access within the meaning of the statute.\textsuperscript{179} The Justices believed that the General Assembly did not intend to exclude corporate entities from the scope of the statutory phrase "any person,"\textsuperscript{180} especially when the function of the corporation seeking access to public records was to inform the public.\textsuperscript{181}

In News and Observer Publishing Co. v. Wake County Hospital\textsuperscript{182} the court of appeals upheld a decision compelling disclosure of settlement terms reached in three breach of contract actions against Wake County Hospital System, Inc.\textsuperscript{183} Expense account records of the System's president and board of

\textsuperscript{174} 53 N.C. App. at 506, 281 S.E.2d at 70.
\textsuperscript{175} A number of other state statutes, however, declare various records confidential. See, e.g., N.C. Gen. Stat. § 105-259 (1979) (tax records of Dep't of Revenue); id. § 105-259 (business records used for property appraisal); id. § 163-171 (ballots); id. § 130-200 (autopsy reports available only upon court order); id. §§ 153A-98, 160A-168 (limited access to local public employee personnel records).

The 1981 General Assembly also added another specific exemption of the Public Records Act concerning public employees' insurance records. See note 196 and accompanying text infra.

\textsuperscript{176} "[G]ood public policy is said to require liberality in the right to examine public records." 53 N.C. App. at 506, 281 S.E.2d at 70 (quoting 66 Am. Jur. 2d, Records and Recording Laws § 12, at 349 (1973)). "While some degree of confidentiality is necessary for government to operate efficiently, the general rule in the American political system must be that affairs of government be subject to public scrutiny." Id., 281 S.E.2d at 70-71 (quoting Comment, supra note 168, at 1188).

\textsuperscript{177} As a result of the proliferation of government-held information on private citizens, some courts have begun to recognize legitimate private interests and have created judicial exceptions where disclosure otherwise would result in an unjustified invasion of personal privacy. Minneapolis Star & Tribune Co. v. State, 282 Minn. 86, 163 N.W.2d 46 (1968); Wisher v. News-Press Publishing Co., 310 So.2d 345 (Fla. App. 1975). See Industrial Foundry v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976). See generally Johnson and Lawrence, supra note 168, at 4-7.

\textsuperscript{178} 53 N.C. App. at 507, 281 S.E.2d at 71.

\textsuperscript{179} N.C. Gen. Stat. § 132-6 (1981) provides that "[e]very person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law" (emphasis added).

\textsuperscript{180} At common law, a person was entitled to inspect a particular public record only if he had a legal interest in the document. Brewer v. Watson, 71 Ala. 299 (1882); State ex rel. Ferry v. Williams, 41 N.J. 332 (1879); State v. Harrison, 130 W. Va. 247, 43 S.E.2d 214 (1947); see also Newton v. Fisher, 98 N.C. 20, 3 S.E. 822 (1887).

\textsuperscript{181} 53 N.C. App. at 505, 281 S.E.2d at 70.


\textsuperscript{183} The court found dispositive G.S. 143-318.11(a)(4), which requires a public body to report
directors were also subject to revelation. In granting access, the court construed the phrase “pursuant to law or ordinance in connection with the transaction of public business” to include “in addition to those records required by law, those records that are kept in carrying out lawful duties.”

A more important aspect of the decision was the court's interpretation of the agency requirement of the public records statute. The System argued that its status as a “private, non-profit corporation” and “independent contractor” removed it from the definition of agency under the statute. While noting that several courts have found similar corporate entities to be agencies of government for jurisdictional and tort liability purposes, the court did not find these decisions dispositive in interpreting the statute. Instead, the court examined the nature of the relationship between the System and the county and failed to find that the System's independent authority so overshadowed the county's supervisory responsibility as to foreclose a conclusion that the System was an “agency of North Carolina government or its subdivisions, i.e. Wake County.” Through an examination of the System's articles of incorporation, lease and operating agreements in congruence with judicial interpretation of the Municipal Hospital Facilities Act, the court concluded that the System's “independent authority” was so intertwined with the

its consideration of settlement terms in executive session by entry “into its minutes within a reasonable time after the settlement is concluded.” The court also reasoned that the public has a right to know settlement terms, because the funds from which the settlement is paid must be considered county, and thereby public, funds. 55 N.C. App. at 13, 284 S.E.2d at 549.


185. 55 N.C. App. at 13, 284 S.E.2d at 549.


Agency of North Carolina Government and its subdivision shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

187. 55 N.C. App. at 9, 281 S.E.2d at 547.

188. See, e.g., Sides v. Cabarrus Memorial Hosp., Inc., 287 N.C. 14, 213 S.E.2d 297 (1975) (county authority to levy special tax to operate and maintain hospital and substantial control of operations by county board of commissioners results in agency status for purposes of tort liability); Coates v. Sampson County Memorial Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965) (hospital organized as a non-stock, non-profit corporation deemed an agency of county for venue purposes).

189. 55 N.C. App. at 11, 281 S.E.2d at 548.

190. Id.

191. The System's articles of incorporation provided “1) that upon its dissolution, the System would transfer its assets to the county; and 2) that all vacancies on the board of directors would be subject to the Commissioners' approval.” Id.

192. The lease agreement provided that 1) the System occupy premises owned by the county under a lease for $1.00 annually; 2) the Commissioners review and approve the System's annual budget; 3) the county conduct a supervisory audit of the System's books; and 4) the System report its charges and rates to the county. Id.

193. The operating agreement provided that 1) the System be financed by county bond orders; 2) revenue collected pursuant to the bond orders be revenue of the county; and 3) the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent. Id., 281 S.E.2d at 548-49.

county that agency status was an inescapable conclusion.\textsuperscript{195}

Legislative action in 1981 also affected the public records area. A major focus was access to public employment records. Information obtained from an insurer of teachers and state employees now statutorily is held confidential and exempt from the Public Records Act.\textsuperscript{196} Changes in the Personnel Privacy Act\textsuperscript{197} also afford greater protection to local public employees as well as responsible public officials.\textsuperscript{198} By expanding the definition of "employee" under the Act, the legislature has provided former local civil servants the same confidentiality as that afforded current public employees.\textsuperscript{199}

The new law also creates certain exceptions to the nondisclosure rules. It allows public officials to defend their specific personnel decisions by providing that otherwise confidential personnel information may be released upon concurrence of the local governing body if disclosure is deemed essential to maintaining public confidence.\textsuperscript{200} A governing body now may also authorize access to personnel files for statistical, research and reaching purposes provided the investigator certifies that employee identification will not be released.\textsuperscript{201} The legislation also requires malice\textsuperscript{202} as an essential element in any criminal prosecution resulting from unlawful release of confidential personnel information.\textsuperscript{203} Finally, the statute makes it clear that an employee may authorize written release of otherwise confidential information.\textsuperscript{204}

The recodification of the State's social service laws incorporated two new public records components.\textsuperscript{205} Social services board members now have authority to inspect social service records.\textsuperscript{206} Previously, access of board members was limited to public assistance records.\textsuperscript{207} In addition, confidentiality of

\textsuperscript{195} 55 N.C. App. at 12, 281 S.E.2d at 549.
\textsuperscript{198} One commentator notes that the new legislation unfortunately does not help district health and mental health directors to determine whether they are subject to the Personnel Privacy Act or still are operating under G.S. § 132. N.C. Inst. of Gov't, supra note 135.
\textsuperscript{201} Id. §§ 153A-98, 160A-168.
\textsuperscript{202} Legal malice does not necessarily mean a malicious or malevolent purpose, personal hatred or hostility toward another; it is a state of mind that shows a heart unmindful of social duty and fatally bent on mischief, or that prompts a person to do an injurious act willfully to the injury of another. It sometimes is defined as any willful or corrupt intention of mind. 22 C.J.S. § 31(2) (1961).
public assistance and social service records now is mandated, with the exception of a recipient check register made available monthly to each county auditor. The law, however, specifically prohibits the use of such lists for political or commercial purposes. Violation of the provision is a general misdemeanor.

5. Municipalities' Authority

Appellate courts scrutinized actions by various North Carolina municipalities in 1981. In *Porsh Builders, Inc. v. City of Winston-Salem* the North Carolina Supreme Court narrowly interpreted G.S. 160A-514 to limit severely municipalities' discretionary powers in accepting redevelopment bids from private developers. The court affirmed a court of appeals decision that the city was not free to reject the higher bid on a redevelopment parcel in favor of a lower cost proposal deemed to comply more closely with the area redevelopment plan. The court specifically rejected the contention that by use of the word "responsible" the legislature intended to give municipal governing boards discretion to accept a lower bid if the body determines the proposal would make a more effective contribution to the redevelopment plan. The court held that the statutory language gave a municipality discretion only to the extent of determining whether a bidder has the resources and financial ability to carry out his proposed project. In an effective dissent, Justice Carlton condemned the majority decision as seriously impairing the ability of municipal officials to manage responsively a city's business affairs. The result denigrates bid approval virtually to a ministerial and mechanical act per-

208. Id. § 108A-121.
209. Id. A recipient check register is a public record open to inspection.
210. Id.
211. Id.

(c) A commission may sell, . . . real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan . . . provided that such sale . . . may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as specified in subsection (d) . . . . Subsection (d) sets forth the process for advertising sale and receipt of bids, and states that "[a]fter receipt of all bids, the sale shall be made to the highest responsible bidder. All bids may be rejected. All sales shall be subject to the approval of the governing body of the municipality . . . ." (emphasis added).

214. Defendant city received two acceptable bids on a parcel of land in the Crystal Towers Redevelopment area. Plaintiff builder submitted a bid of $6550 with a proposal to move a single family dwelling onto the parcel in question. Although the local planning staff concluded that both proposals satisfied the area's residential purpose, the lower bid proposal more nearly complied with the redevelopment plan. 302 N.C. at 551-52, 276 S.E.2d at 444.
215. Id. at 554, 276 S.E.2d at 445-46. The trial court, on the other hand, found that defendant-city had statutory authority to consider the plan of each bidder, city housing needs and policies and long term revenues to be derived from each proposal, as well as the dollar amount of each bid. Id., 276 S.E.2d at 445.
216. Id., 276 S.E.2d at 446.
217. Id. at 557, 276 S.E.2d at 447 (Carlton, J., dissenting).
formable by a city employee simply comparing bid amounts.\textsuperscript{218}

In \textit{Town of Spring Hope v. Bissette}\textsuperscript{219} an action by plaintiff town to recover sewer service charges, the court of appeals confirmed a municipality’s authority to charge higher rates for treatment plant facilities under construction.\textsuperscript{220} Defendant user denied the indebtedness claiming that the higher rates were unjust and illegal because the new facility was not open during the time covered by his bill.\textsuperscript{221} The court chose to follow the great weight of authority\textsuperscript{222} upholding a municipality’s right to include in its water and sewer charges not only operating expenses and depreciation but also the capital costs associated with actual or anticipated growth or improvements of facilities necessary to provide adequate service.\textsuperscript{223} The court deemed the proper test to be not whether any particular customer has directly benefited from the use of a particular component of a utility plant, but whether municipal authorities have acted arbitrarily in establishing rates.\textsuperscript{224}

The courts also reviewed several annexation decisions\textsuperscript{225} by local North Carolina municipalities.\textsuperscript{226} The supreme court in \textit{In re Annexation Ordinance No. 300-X}\textsuperscript{227} set forth judicial guidelines for the content of annexation reports

\begin{unnumbered}.
218. Id. at 558, 276 S.E.2d at 448.
220. N.C. Gen. Stat. § 160A-314(a) (1976) grants authority to North Carolina municipalities to set rates and charges for water and sewer services: “A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise.”
221. 53 N.C. App. at 212, 280 S.E.2d at 491.
223. 53 N.C. App. at 213, 280 S.E.2d at 492.
224. Id.
225. The purpose of annexation is to provide urban areas with governmental services needed therein for public health, safety, protection and welfare. Abbot v. Town of Highlands, 52 N.C. App. 69, 73, 277 S.E.2d 820, 823 (1981).
227. 304 N.C. 549, 284 S.E.2d 470 (1981). The issue of the level of specificity required also was raised in \textit{In re Annexation Ordinance 301-X}, 304 N.C. 565, 284 S.E.2d 475 (1981), but summarily was disposed as resolved in the previous case.
\end{unnumbered}
required by G.S. 160A-47(3). Plaintiffs contended that any plan is deficient unless it specifies the number of personnel and amount of additional equipment required to extend municipal services to the annexed area. The court disagreed, holding that a report need contain only (1) information on the level of services then available; (2) a commitment to provide this same level of services in the annexed area within the statutory period of one year; and (3) the method by which the city plans to finance extension of the services. The court reasoned that the central purpose of the report procedure is to assure that, in return for the added financial burden of municipal taxation, residents will receive all major services available to current residents. Thus, the city need provide only the information necessary to allow for a public and judicial appraisal of the city's commitment to provide a non-discriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. Regarding the required disclosure of financial data, the court found no problem with the City of Charlotte's report statement that services would be paid out of general revenues. G.S. 160A-47(3)(d) requires only that the method be disclosed, not that the precise source of each dollar be pinpointed.

In *Food Town Stores, Inc. v. City of Salisbury* plaintiffs challenged the power of the Salisbury City Council to amend an annexation report and ordinance pursuant to court instructions. The court determined that when the changes are purely administrative in nature and necessitated by the lack of authority of a court to make the necessary corrections, the city is not required to make new findings of fact and hold additional public hearings prior to amendment.

Legislative action in 1981 also affected local governments. A statute of limitations now is set for all actions challenging the validity of any zoning laws.
ordinance. Petitioners must bring their charge within nine months of enactment or amendment. Another statute specifically mandates that local governing bodies follow procedures applicable to boards of adjustment when issuing special or conditional use permits.

D. Utilities Regulation

In Utilities Commission v. Intervenor Residents the North Carolina Court of Appeals considered the validity of certain expenses claimed by a public utility as a basis for a rate increase request. The utility, Carolina Water Service (CWS), claimed as expenses services that it had received from Water Service Corporation (WSC). CWS and WSC were both subsidiaries of Utilities, Inc., a holding company that was the parent company of public utilities in several states. The controversy arose when during the course of hearings on a rate increase request, it was discovered that CWS had failed to obtain the Commission's approval of its service contracts with WSC as required by G.S. 62-153. The court of appeals held that, although G.S. 62-153(b) prohibits payments to affiliated companies under contracts not approved by the Commission, the statute does not prohibit the Utilities Commission from considering fees owed to affiliated corporations under such unapproved contracts as the public utility's expenses for purposes of ratemaking. Such fees, however, must be just and reasonable, and may not be for the purpose of concealing or diverting profits from the public utility to its affiliate. In remanding

238. Petitioners challenging county and city zoning enactments effective before July 9, 1981 must bring action within nine months of June 26, 1981 and September 1, 1981, respectively. Id. §§ 153A-340 (counties), 160A-381 (municipalities). Boards of adjustment are bound by a four-fifths voting requirement; local governing bodies may grant permits via a simple majority. For procedures applicable to boards of adjustment, see id. §§ 153A-345 (counties), 160A-388 (municipalities).
241. According to the evidence, CWS provided some operating, engineering and administrative services in connection with providing water and sewer service to residents of the Bent Creek/Mt. Carmel area of Carteret County. The remainder of the management, administrative, engineering, legal and personnel services were provided by WSC, whose headquarters were in Illinois. Id. at 223-24, 278 S.E.2d at 761.
(a) All public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency. . . . The Commission may disapprove, after hearing, any such contract if it is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility. Such contracts so disapproved by the Commission shall be void and shall not be carried out by the public utility which is a party thereto, nor shall any payments be made thereunder. . . .
(b) No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. . . .
243. 52 N.C. App. at 229, 278 S.E.2d at 766.
244. Id. In determining whether to grant a rate increase, the Commission must give a major
the case to the Utilities Commission, the court held that the Commission must, in performing its statutory duty to establish reasonable rates, examine each component of a utility's expenses. More specifically, the utility must sustain the burden of showing that the price it paid its affiliate was reasonable. The court recognized as evidence relevant to the determination of reasonableness such factors as the costs of such services on the open market, the costs similar utilities pay their service companies and the books and records of corporations affiliated with the regulated utility.

E. Workers' Compensation

1. Legislative Action

The General Assembly enacted several statutes modifying the Workers' Compensation system in 1981. These new statutes relate to interest on compensation awards, medical payments, limitations periods, and minimum and maximum benefits.

Newly enacted G.S. 97-86.2 provides that an employer or insurance carrier who appeals a workers' compensation award made pursuant to a hearing must pay interest in the event the award is sustained on appeal. The amount of interest shall be determined in accordance with G.S. 24-12 and is payable only on the part of the award that remains unpaid pending appeal. Interest must be paid in full to the claimant and may not increase or become a part of attorneys' fees.

Another statute modifying the Workers' Compensation system deals with medical payments. G.S. 97-59 requires employers to pay medical treatment expenses for disability or damage to organs resulting from occupational disease when the treatment "may reasonably be required to tend to lessen the period of disability or provide needed relief." The statute requires Industrial Commission approval of bills for such treatment before payments can be made, and in the event of a controversy between employer and employee re-

consideration to the utility's profits. Deducting expenses for services rendered reduces profits and makes a rate increase appear justified. Yet the effect where the company paying these expenses is affiliated with the company receiving the payments may be merely to afford the utility the appearance of a lower level of profits than is actually the case. Because utility rates are based upon a certain guaranteed level of profit than is permissible, "inflated charges to operating companies may be a means to improperly increase the allowable revenue and raise the cost to customers of utility service as well as an unwarranted source of profit to the ultimate holding company." Id. at 231, 278 S.E.2d at 767 (citing Utilities Comm'n v. Telephone Co., 281 N.C. 318, 346, 189 S.E.2d 705, 723 (1972) (emphasis in original)). See N.C. Gen. Stat. § 62-153 (1975), note 242 supra.

245. 52 N.C. App. at 232, 278 S.E.2d at 767.
246. Id., 278 S.E.2d at 768.
247. Id. Presumably, such costs paid by similar utilities are for the same or similar services.
251. Id. § 97-59.
garding continuation of treatment, the Commission has the discretion to determine whether the treatment shall be continued.252

The General Assembly also modified G.S. 97-58(a) by extending the time limits for filing claims for Workers' Compensation benefits in asbestosis and, most likely, silicosis actions.253 The time limit for filing a claim for asbestosis is extended to ten years by the Act, but the time limit for lead poisoning claims remains at two years.254 Although the title of the bill purports to extend the time limit for both asbestosis and silicosis claims, the new statute,255 unlike the one it replaces,256 makes no mention of silicosis. Given the apparent intent of the legislature to extend the time limit for silicosis claims and the distinct possibility that omission of silicosis from the new statute was merely an oversight, courts should have little difficulty construing the new statute accordingly.257

Another modification of the Workers' Compensation Act is the revision of minimum and maximum benefits. The minimum amount of weekly workers' compensation benefits as provided in G.S. 97-13(c), -29, -38, and -61.5(b) has been increased from twenty to thirty dollars.258 Senate Bill 205 clarifies the law on maximum benefits allowable.259 The ceiling of eighty dollars weekly compensation awarded pursuant to G.S. 97-29, -30, -38, -61.5(b) and 61.6 is replaced by a maximum amount established annually to be effective October 1 as provided in G.S. 97-29.

252. Apparently, this enactment is to ensure the Commission's authority to give broad relief, because the statute now specifically authorizes "medical, surgical, hospital, nursing services, medicine, sick travel, rehabilitation services and other treatment as may reasonably be required" in the discretion of the Commission. Id.


(a) Except as otherwise provided in G.S. 97-61.6, an employer shall not be liable for any compensation for asbestosis unless disablement or death results within 10 years after the last exposure to that disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of 10 years limited herein, and for which compensation has been paid or awarded or timely claim made. An employer shall not be liable for any compensation for lead poisoning unless disablement or death results within two years after the last exposure to that disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made.

255. Id.

256. Id. § 97-58(a).

257. The former statute limited the time for filing claims for asbestosis, silicosis, and lead poisoning to two years. The new section mentions both asbestosis and lead poisoning and their now different limitations periods. Given the title of the Act, An Act to Extend Time Limitations for Proof in Asbestosis and Silicosis Claims (emphasis added), and the context of the new section, it appears that mention of silicosis was intended to be made, and the conclusion that silicosis was intended to be accorded the same treatment as asbestosis seems likely.


2. Judicial Action

   a. Procedure

In *Poythress v. J.P. Stevens and Company* the North Carolina Court of Appeals held that the time limit for filing claims for occupational diseases under G.S. 97-58(c) "is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear" such claims, and is not in the nature of a statute of limitations, which, if not raised as a defense, is waived. Accordingly, the burden rests upon the claimant to show timely application for a Workers' Compensation award.

In *Shore v. Chatham Manufacturing Co.* claimant challenged the deputy commissioner's authority to order, on his own motion, the taking of a deposition of claimant's physician to provide evidence necessary to a determination of claimant's entitlements. The court of appeals recognized the deputy commissioner's authority to act based on the Commission's authority to make rules for carrying out provisions of the Workers' Compensation Act. The court upheld the Commission's rule XXA, which authorizes the hearing officer to order deposition of medical witnesses "when additional testimony is needed to the disposition of a case."

   b. Terminology

Several decisions considered the meanings of particular terms in the Workers' Compensation Act. The courts construed the meanings of "accident," "disfigurement" and "injury to the leg" under the schedule of payments provided by the Act.

Since recovery under the Act must be based on an "accident," courts frequently have been called upon to define that term for workers' compensation purposes. Three cases decided by the North Carolina Court of Appeals de-

---

261. Id. at 382, 283 S.E.2d at 577.
262. Id. The two year limitation for review of a compensation award due to change of condition pursuant to G.S. 97-47, however, has continued to be construed as a statute of limitations, which, if not timely raised as a defense, is waived. Gragg v. W. M. Harris & Son, 54 N.C. App. 607, 609, 284 S.E.2d 183, 185 (1981). The court in Gragg expressly recognized that the limitations period in G.S. 97-47 is distinct from that in G.S. 97-58(c), which is a condition precedent. Id. at 609, 284 S.E.2d at 185.
263. 54 N.C. App. 678, 284 S.E.2d 179 (1981).
264. "Our legislature has empowered the Industrial Commission to make rules 'not inconsistent with this Article, for carrying out the provisions of this Article.' G.S. § 97-80(a)." Id. at 680, 284 S.E.2d at 180.
265. Id. at 680-81, 284 S.E.2d at 181.
269. N.C. Gen. Stat. § 97-2(6) (Cum. Supp. 1981) provides that "[i]njury and personal injury" shall mean only injury by accident arising out of and in the course of employment." As such, entitlement to benefits under the Act is predicated upon the occurrence of an "accident."
fined accident in the context of actions to secure payment of benefits under the Act. In the first of these cases, *Dyer v. Mack Foster Poultry & Livestock, Inc.*, an employee brought a workers' compensation claim as a result of injuries she sustained to her back while working for her employer. Plaintiff's work duties included packing and grading eggs and lifting boxes. Because of the absence of other employees at work one day, plaintiff was assigned a task "which involved a greater volume of lifting than [her] ordinarily assigned task." The court held that even though plaintiff was performing the work of two other employees, there was competent evidence supporting the hearing Commissioner's conclusion that there was no interruption of plaintiff's "normal work routine" or the introduction of some new circumstance not part of the usual work routine. Thus, there was no "accident" causing plaintiff's injury.

In another back injury case, *Locklear v. Robeson County*, plaintiff employee, an ambulance attendant, suffered a ruptured disc while removing an accident victim from her automobile for transportation to a hospital. The evidence showed that while plaintiff and another ambulance attendant were removing the woman from her car, they experienced a sudden, unexpected jerk. The court held that "[s]uch sudden jerking and near loss of load support[ed] the conclusion that plaintiff's injury resulted from an unlooked for and untoward event not expected or designed by the employee" and affirmed the Industrial Commission's award to plaintiff.

The third of these "accident" cases also involved a back injury. The court apparently adhered to the doctrine that injuries due to ordinary exertion, as in *Dyer*, are not compensable, while injuries resulting from unusual exertion, as in *Locklear*, are. Plaintiff in *Trudell v. Seven Lakes Heating & Air Conditioning Co.* was employed to install air conditioning systems. Because one of his duties involved installation of air ducts, plaintiff worked in low, confined areas where it was necessary for him to crawl. Plaintiff, although he had been working for his employer performing similar tasks for more than two and one-half years, testified that the crawl space in the current project was the lowest in which he had worked. The court, noting that evidence disclosed that "plaintiff's task involved no unusual exertion or twisting," nevertheless held that plaintiff's ailment was not the result of an accident. Because plaintiff had been working on the new project for one to two weeks before he experienced his back pain, the court agreed with the Commission that the low crawl space had become part of plaintiff's "normal work routine."

---

271. Id. at 293-94, 273 S.E.2d at 323 (emphasis in original).
272. Id.
274. Id. at 98, 284 S.E.2d at 542.
276. Id. at 91, 284 S.E.2d at 540.
277. Id.
The courts also interpreted the term "disfigurement." In *Carrington v. Housing Authority of Durham* the court of appeals held that the loss of the tip of plaintiff's finger, where "no area below the end of the nail . . . [was] gone but the very fleshy part of the end . . . [was] gone . . . [and plaintiff had] some small linear scars, not really very discolored" did not constitute "disfigurement" within the meaning of the Act, and accordingly, plaintiff was denied recovery. In *Weidle v. Cloverdale Ford* the court of appeals addressed the question whether a slight scar resulting from a cut finger constituted disfigurement. The evidence showed that the nail and the area just beneath the nail were scarred and the fingernail itself had a "roughish appearance" and some deformity. The injury, however, did not cause plaintiff embarrassment or impair him in any way in the performance of his duties as an automobile body repairman. The court held that plaintiff had suffered no "serious bodily disfigurement" entitling him to recovery.

Finally, the court of appeals was called upon to define the scope of the limited schedule recovery under the Workers' Compensation Act. In *Gasperson v. Buncombe County Schools* the court was willing to be flexible with the schedule and held that an injury to the hip can be considered an "injury to the 'leg,' which is a 'scheduled injury' under G.S. 97-31."

c. Causation and Apportionment

Perhaps the most significant issue presented to the courts in 1981 was

---

278. N.C. Gen. Stat. § 97-31(22) (1979) provides:

In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

280. Id. at 159-60, 282 S.E.2d at 542.
282. Id. at 556, 274 S.E.2d at 263.
283. Id. at 557, 274 S.E.2d at 264.
286. Id. at 157-58, 277 S.E.2d at 875.
287. The courts decided several other cases in 1981 in which causation was at issue. In *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56 (1981), the court of appeals affirmed a Commission award for total disability even though the evidence suggested the conditions of employment were not the exclusive cause of the disease because the plaintiff was a cigarette smoker.


In *McKee v. Crescent Spinning Co.*, 54 N.C. App. 309, 284 S.E.2d 175 (1981), medical testimony indicated that plaintiff suffered from chronic obstructive lung disease, chronic bronchitis and probably byssinosis. The court held that because evidence established that both disorders were related to plaintiff's exposure to cotton dust, the Commission's failure to find that plaintiff's chronic bronchitis contributed to his disability was not an error that would preclude plaintiff's award for total disability.
whether the Workers' Compensation Act requires apportionment of the award when neither the occupational disease nor the preexisting disease alone produce total disability, but the combined effect of the two does.\textsuperscript{288} This issue was decided by the supreme court in \textit{Morrison v. Burlington Industries}.\textsuperscript{289} In \textit{Morrison} plaintiff contracted the occupational disease byssinosis, which, when combined with her existing ailments—bronchitis, phlebitis, varicose veins and diabetes—rendered her totally disabled. Fifty-five percent of her disability was found to be the result of her occupational disease, and the remaining forty-five percent was the result of her preexisting infirmities. The Commissioner ordered full recovery. The full Commission reduced the award to compensate only for the byssinosis. The court of appeals, however, reversed and remanded, ordering the Commission to grant total recovery. On appeal to the supreme court, the case was ordered remanded for further findings of fact concerning "the interrelations, if any, between the cotton dust exposure and claimant's other infirmities."\textsuperscript{290} After additional evidence was taken, the Commission ordered recovery for fifty-five percent partial recovery and again this award was appealed to the supreme court. A majority of the supreme court held:

(1) An employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, when a pre-existing, non-disabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable.\textsuperscript{291}

Finally, the court expressly authorized apportionment:

When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational

\begin{itemize}
  \item \textsuperscript{288} In particular, resolution of this issue requires interpretation of G.S. 97-29 and other relevant sections.
  \item \textsuperscript{289} 304 N.C. 1, 282 S.E.2d 458 (1981).
  \item \textsuperscript{290} Id. at 3, 282 S.E.2d at 461 (quoting Morrison v. Burlington Industries, 301 N.C. 226, 231, 271 S.E.2d 364, 367 (1980)). In the earlier case, the court specified the evidence necessary for "effective appellate review:"
    \begin{itemize}
      \item (1) what percentage, if any, of plaintiff's disablement, i.e., incapacity to earn wages, results from an occupational disease; (2) what percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease; and (3) what percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were not accelerated or aggravated by plaintiff's occupational disease.
    \end{itemize}
  \item \textsuperscript{301} N.C. at 231, 271 S.E.2d at 367 (emphasis in original). These three questions, needed to clarify the medical evidence, were noted in the second Morrison opinion. 304 N.C. at 3 n.1, 282 S.E.2d at 461 n.1.
  \item \textsuperscript{291} 304 N.C. at 18, 282 S.E.2d at 470.
\end{itemize}
disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.292

Justice Exum, in a vigorous and lengthy dissent joined by Justice Carlton, argued that if an occupational disease combines with preexisting infirmities so as to render a worker totally incapacitated to work, the Workers' Compensation Act permits an award for total disability when the preexisting, non-job-related physical infirmities in themselves, absent the occupational disease, are insufficient to cause incapacity to work.293 The majority, although recognizing this argument, apparently believed that such an expansive interpretation of the Act was more appropriately a matter for the legislature.294

In Hansel v. Sherman Textiles295 the court of appeals found that the necessary causal connection between plaintiff's alleged exposure to disease-causing agents during employment and her disabling condition was absent. Plaintiff already suffered from chronic bronchitis and asthma before working in the weave room of defendant's textile plant, where she allegedly was exposed to cotton dust. A medical expert testified that he was unable "to separate out any specific symptoms related to byssinosis that . . . [plaintiff] has that cannot be explained by the other two conditions that . . . [were] present."296 The expert also noted that he "was unable to repose much confidence in a diagnosis of byssinosis" because of the absence of "information about the extent of [plaintiff's] exposure to cotton dust."297 The court held that this absence of specific findings could not support a conclusion that plaintiff was disabled as a result of her contracting an occupational disease and vacated the award of the Commission.298 "[P]roof of a causal connection between the disease and the employee's occupation is an essential element in proving the existence of a compensable 'occupational disease.'"299 In a lengthy dissent300 Judge Wells contended that there was sufficient evidence to support the finding by the Commission that plaintiff contracted byssinosis as a result of her employment. In the view of Judge Wells, "when the evidence shows that it is probable that plaintiff has byssinosis," despite "uncertainties" and "the possibility of other contributing causes," the Commission is justified in making a finding that plaintiff has contracted an occupational disease, which finding a

292. Id. (emphasis added).
293. Id. at 19, 282 S.E.2d at 470 (Exum, J., dissenting).
294. Id. at 18-19, 282 S.E.2d at 470: "It is our duty to interpret the Act as it exists. This court is not philosophically opposed to the result sought by Mrs. Morrison, but expansion of the law to permit such recovery is the legislature's prerogative, not ours."
296. Id. at 3, 270 S.E.2d at 586.
297. Id. at 7, 270 S.E.2d at 589.
298. Id. at 8, 270 S.E.2d at 589.
299. Id. at 6, 270 S.E.2d at 588.
300. Id. at 8, 270 S.E.2d at 589 (Wells, J., dissenting).
The supreme court reversed, finding that there was competent evidence to support the findings of the Commission. The court, however, was unable to say that the Commission's findings justified its conclusion that the disability was entirely work related: "Because of the presence of [plaintiff's] . . . other infirmities [which were non-occupational in their origin] and because this [was] . . . a case of partial disability as opposed to one of total disability, it must be determined what percentage of claimant's disability [was] . . . due to her occupational disease." Accordingly, the supreme court remanded the case to the Industrial Commission to make the necessary findings. In reaching this conclusion, the court focused on the same lack of medical specificity that had led the court of appeals to deny compensation altogether.

In *Buck v. Proctor & Gamble Manufacturing Company* the court of appeals considered the type of expert testimony that will support a finding that an accident created or contributed to a physical injury leading to disability. Plaintiff fell at work while performing her normal work duties. Subsequently she experienced back pain, which surgery revealed was the result of a protruding disc. Testimony about the cause of the disc protrusion suggested that plaintiff's condition may have been the result either of her fall at defendant's plant or of her preexisting degenerative back condition. A medical expert testified that he could not choose which "was the single most probable cause without engaging in speculation." The court held that an expert need only "express an opinion that a particular cause was capable of producing the injurious result." Accordingly, the Commissioner, in making an award to plaintiff, did not engage in impermissible speculation.

d. Benefits

In *Chinault v. Floyd S. Pike Electrical Contractors* the court of appeals reviewed the amount of compensation to which a deceased worker's widow...
and three daughters were entitled under the Worker's Compensation Act.\textsuperscript{309} The court held that the Act fixed each recipient's share at the death of the worker. The weekly compensation award was divided four ways and remained fixed for the duration of the compensation period, which would be 400 weeks for the widow and the period of minority for each child. Although the younger children would receive compensation for a longer period, the court held that this was an anomaly under the Act for the General Assembly to resolve.\textsuperscript{310} The statute did not require a redistribution of the widow's share after 400 weeks or a non-minor child's share upon her reaching majority to meet the requirement that the "entire compensation" be paid.

\section*{F. Insurance}

\subsection*{I. State Regulation\textsuperscript{311}}

In separate actions, the Commissioner of Insurance challenged two rate provisions proposed by the North Carolina Rate Bureau. In \textit{Commissioner of Insurance v. North Carolina Rate Bureau}\textsuperscript{312} the court of appeals faced the issue whether the Rate Bureau may withdraw a proposed rate revision without the Commissioner's consent. The Rate Bureau withdrew a proposed rate increase after the Commissioner had set a hearing date. The court allowed withdrawal of the proposal without the Commissioner's consent because the withdrawal of a proposed rate increase benefits the public. The court found no indication that the General Assembly did not intend such a power.

In a second rate revision challenge, \textit{Commissioner of Insurance v. North Carolina Rate Bureau},\textsuperscript{313} the Commissioner had disapproved a rate increase proposed by the Rate Bureau because, even with the proposed increase, an inadequate rate would have been put into effect in violation of G.S. 58-124.19, which prohibits "excessive, inadequate or unfairly discriminatory" rates.\textsuperscript{314} The court of appeals reversed and vacated the Commissioner's disapproval of the rate increase,\textsuperscript{315} observing that the terms "inadequate" and "excessive," as

\begin{itemize}
\item \textsuperscript{309} Id. at 605, 281 S.E.2d at 462. The relevant portion of N.C. Gen. Stat. § 97-38 (1979 & Cum. Supp. 1981) is as follows:
\begin{quote}
"If death results proximately from the accident . . . the employer shall pay . . . to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable."
\end{quote}
\item \textsuperscript{310} 53 N.C. App. at 606-07, 281 S.E.2d at 462.
\item \textsuperscript{312} 52 N.C. App. 79, 277 S.E.2d 844 (1981).
\item \textsuperscript{313} 54 N.C. App. 601, 284 S.E.2d 339 (1981).
\item \textsuperscript{315} 54 N.C. App. at 606, 284 S.E.2d at 343. For the scope of appellate review, see N.C. Gen. Stat. § 150A-51 (1978).
\end{itemize}
they are used in the statute, are intended to assure the insurance companies of adequate rate levels and that disapproval of the rate increase would have left even more inadequate rates in effect.\textsuperscript{316}

The supreme court addressed the issue whether G.S. 58-155.60 could be applied retroactively in \textit{State ex rel. Ingram v. Reserve Insurance Co.}\textsuperscript{317} This statute, called the Quick Access Statute, provides that an insolvent insurer's deposit with the state Treasurer can be advanced to the North Carolina Guaranty Association\textsuperscript{318} to pay claims against the insolvent insurer. Retroactive application of the Quick Access Statute might have conflicted with G.S. 58-185, which grants certain rights, including liens on the insolvent insurer's deposit, to the company's policyholders. The court held that G.S. 58-155.60 applied retroactively but did not affect the policyholders' rights under G.S. 55-185.

In \textit{State ex rel. Ingram v. North Carolina Farm Bureau Insurance Agency, Inc.}\textsuperscript{319} the court of appeals was asked to interpret G.S. 58-53.3, which requires any unlicensed insurance agency that "procures insurance" to remit five percent of the premium revenues to the Commissioner. Defendant had formed an agency to place with the North Carolina Farm Bureau Insurance Company types of insurance and participating risks that the North Carolina Farm Bureau's insurance agents could not place. Defendant then sent applications for insurance to potential customers, billed insureds and collected premiums but transmitted all monies to an out-of-state insurance company. Defendant argued that its role was merely administrative and presented evidence that it actually had not received any applications for insurance. The court of appeals held that the agency had "procured" insurance within the meaning of the statute and was liable for the statutory amount. The dissent,\textsuperscript{320} however, argued that defendant's action was insufficient to constitute the procurement of insurance and asked the legislature for an amendment to tax the "collection" rather than the "procurement" of premiums paid to companies not licensed to do business in North Carolina.

The 1981 General Assembly enacted the Insurance Information and Privacy Protection Act\textsuperscript{321} to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions. The Act is a regulatory scheme to enable persons to obtain access to this information and to allow an applicant or policyholder to obtain the reasons for any adverse underwriting decision.\textsuperscript{322} Information that is incorrect must be either

\begin{flushleft}
\textsuperscript{316} The Rate Bureau's filing proposed an average increase of 12.4% in the overall level of workers' compensation rates but still projected an underwriting loss of $19,672,124. 54 N.C. App. at 605-06, 284 S.E.2d at 341.

\textsuperscript{317} 303 N.C. 623, 281 S.E.2d 16 (1981).

\textsuperscript{318} The North Carolina Guaranty Association was a third-party plaintiff in this case. Id.


\textsuperscript{320} The decision was 2-1 with Judge Hill writing for the majority and Judge Arnold dissenting.


\end{flushleft}
corrected or noted in the insurance records as disputed, and notice must be sent to anyone who received the erroneous or disputed information. Disclosure of information in the insurance records may be made only with the insured's permission, with limited exceptions, which include disclosure to medical professionals and actuarial or research study groups if certain conditions are met. In addition, an adverse underwriting decision may not be based on a previous adverse underwriting decision or previous coverage through a residual market mechanism unless further information regarding that decision or coverage was first obtained.

The Commissioner has the power to investigate and to hold hearings on alleged violations of the Act. He then may issue a cease and desist order or apply to a court of competent jurisdiction for an order directing payment of a monetary penalty. Any person whose rights have been violated also may bring suit for compensatory damages. An immunity is provided for those acting in compliance with the Act and for those persons furnishing personal or privileged information to a government institution, agent or support organization unless the disclosure is made with malice or willful intent to injure any person.

The General Assembly also enacted several changes affecting life insurance and annuity contracts. The standard valuation and nonforfeiture provisions, which concern minimum standards for these contracts, were amended substantially. Several of the valuation tables were changed and, with regard to certain policies and contracts, a choice of tables was allowed.

In addition, Article 22B of Chapter 58 was enacted to allow for periodic adjustment of interest rates on loans against life insurance policies. The ceiling on the chargeable interest rates is the higher of the prevailing yield on corporate bonds or the rate used for determining the policy's cash surrender value.

---

323. Id. § 58-390.
324. Id. Notice to the applicant or policyholder of insurance information practices is required pursuant to G.S. 58-385.
325. Id. G.S. 58-394 sets the disclosure limitations and conditions. Subsection (1) requires the written authorization of the individual; subsection (4) sets forth the limitations on disclosure to medical professionals; and subsection (9) sets forth the limitations on disclosure for actuarial or research studies, including the destruction of the materials as soon as they no longer are needed.
326. Id. § 58-393(1).
327. Id. §§ 58-395, -396.
328. Id. §§ 58-398, -399. The Commissioner may issue a cease and desist order or apply to a court of competent jurisdiction for an order directing payment of a monetary penalty. The court may impose a penalty of up to $500 for each violation, not to exceed $10,000 in the aggregate for multiple violations. If the cease and desist order is violated, the court may impose fines of up to $10,000 for each violation or up to $50,000 if the violations are found to constitute a general business practice or suspend or revoke the insurance institution's or agent's license. Id. § 58-399.
329. Id. § 58-401. The monetary award may not exceed the actual damages sustained as a result of a violation of G.S. 58-394.
330. Id. § 58-402.
333. This rate is the monthly average of the composite yield on seasoned corporate bonds for
value plus one percent per annum. This provision was designed to protect insurance companies from policyholders borrowing at interest rates disproportionately lower than prevailing market interest rates. There also is a prohibition against the termination of a policy solely because of a change in the interest rate during that year.

2. Policy Coverage

The 1981 General Assembly enacted two statutes requiring certain insurance policy provisions. The first statute requires continuation and conversion privileges in group health insurance plans. If a group member is terminated or no longer employed, he may continue coverage in the group plan, at his option, for up to three months. After three months, the terminated member retains a conversion privilege that requires the same issuer to issue him an individual health policy with provisions meeting the minimum statutory standards. The second statute requires policies that insure property against direct loss by fire, lightning or other perils to include available coverage for direct loss resulting in physical damage caused by the weight of ice, snow or sleet.

The General Assembly also enacted a statute allowing interest to accrue from the date of the institution of actions for compensatory damage claims covered by liability insurance. In actions not covered by liability insurance, interest accrues from the date of the verdict. This could be an important incentive for insurers to settle, especially in actions posing potentially large damage amounts.


For more than a decade, the North Carolina courts have been embroiled in a series of disputes between the insurance industry and the Commissioner of Insurance. In State ex rel. Hunt v. North Carolina Reinsurance Facility the calendar month ending two months before the date on which the rate is to be determined, as published by Moody's Investors Service, Inc. N.C. Gen. Stat. §§ 58-213.19, -213.20(b) (Cum. Supp. 1981).

334. Id. § 58-213.20(b).
335. Id. § 58-213.20(f). Subsection (e) requires reasonable notice of changes made in the applicable interest rates for both cash and premium loans.

† The section on Recoupment Surcharges was written by Debra Whited.
339. See, e.g., State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980) (appeal from Commissioner's finding that ten percent rate differential for insureds ceded to Facility was unfairly discriminatory); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980) (appeal from Commissioner's order disapproving a filing involving proposed automobile insurance premium rates); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980) (appeal from Commissioner's order disapproving a filing involving revised premium rates for homeowners' in-
the North Carolina Supreme Court again resolved such a controversy—a conflict over whether recoupment surcharges imposed by the automobile insurance industry on certain policyholders constituted "rates" that the industry had to file with the Commissioner pursuant to statutory requirement.\(^{341}\) Basing the decision on strict statutory construction, the court held that the term "rates" did not include the challenged surcharges.\(^{342}\) The court then refused to entertain a different result based upon the State's public policy argument indicating that the proper forum for a policy dispute is the General Assembly.\(^{343}\) Thus, the case announced the State judiciary's intention to withdraw from the center of the controversy between the insurance commissioner and the insurance industry.

In July, 1979 the North Carolina Reinsurance Facility Board of Governors (Facility) voted, pursuant to statutory authority,\(^{344}\) to recoup 1978's heavy losses\(^{345}\) through an 18.6% surcharge imposed on all motor vehicle insurance policies transferred to the Facility between December 1979 and November 1980.\(^{346}\) At the same time, the Board of Governors voted to implement a separate 1.1% surcharge\(^{347}\) on all private passenger policies, whether in the Facility or in the voluntary market, to collect the losses that resulted because "clean risks"\(^{348}\) insured by the Facility could not receive rates higher than those charged "clean risks" in the voluntary market.\(^{349}\) Following this action by the Board of Governors, plaintiffs—the Governor, the Commissioner of Insurance, and the Attorney General—filed a complaint seeking declaratory relief and a preliminary injunction against the Facility, the North Carolina Rate Bureau, and about 300 of the Bureau's member companies. Plaintiffs challenged the recoupment surcharges as "rates" that had not been


\(^{342}\) 302 N.C. at 290, 275 S.E.2d at 406.

\(^{343}\) Id. at 297, 275 S.E.2d at 410.


\(^{345}\) During the first few years of its operation, the Facility suffered tremendous financial losses—a net cumulative operating loss of over $62,000,000 between 1973 and 1976. Losses for fiscal years 1977 and 1978 were $15,600,000 and $31,400,000, respectively. 302 N.C. at 286, 275 S.E.2d at 404.

\(^{346}\) Id. at 286-87, 275 S.E.2d at 404.

\(^{347}\) This surcharge was imposed pursuant to a separate statutory requirement, N.C. Gen. Stat. § 58-248.33(l) (Cum. Supp. 1979).

\(^{348}\) The statutory definition of a "clean risk" is as follows:

- any owner of a motor vehicle classified as a private passenger non-fleet motor vehicle . . . if the owner and the principal operator and each licensed operator in the owner's household have two years' driving experience and if neither the owner nor any member of his household nor the principal operator have had any chargeable accident or any conviction for a moving traffic violation . . . during the three-year period immediately preceding the date of application for motor vehicle insurance or the date of preparation for a renewal motor vehicle insurance policy.


\(^{349}\) 302 N.C. at 287, 275 S.E.2d at 404.
filed with the Commissioner for his prior approval.\textsuperscript{350}

After the trial court denied the motion for a preliminary injunction, plaintiffs appealed. In a relatively short opinion, the court of appeals held that defendant should have filed the surcharges as rates. Relying primarily on public policy, the court reasoned that, absent review by the Commissioner, policy holders who paid the surcharges would suffer irreparable loss if they were unable to recover excessive charges paid by them.\textsuperscript{351}

On appeal, the supreme court reversed and held that the surcharges did not constitute rates within the meaning of the insurance laws. The court based its decision largely on principles of statutory construction and concluded, after a careful analysis of the applicable statutes, that the legislature did not intend to subject these recoupment surcharges to review by the Commissioner.\textsuperscript{352}

The North Carolina Motor Vehicle Reinsurance Facility Act\textsuperscript{353} was passed in 1973 as a replacement for the unworkable Assigned Risk Plan.\textsuperscript{354} The Facility derived from a similar plan instituted in Canada in 1967\textsuperscript{355} that also has served as the prototype for reinsurance facilities in other states.\textsuperscript{356} Organized as a nonprofit, unincorporated entity, the Facility consists of all insurers licensed to write motor vehicle insurance\textsuperscript{357} in the State, and insures those "eligible risks" whom the individual companies determine they do not want to insure.\textsuperscript{358} After issuing coverage, an individual company has the dis-

\textsuperscript{350} Id. at 280, 275 S.E.2d at 400-01.


\textsuperscript{352} 302 N.C. at 289, 275 S.E.2d at 406.


\textsuperscript{354} The basic theory behind the Assigned Risk Plan is "to assign specific risks or exposures to individual carriers. With this procedure each insurer would assume only the risks which they were assigned." D. Reinmuth & G. Stone, A Study of Assigned Risk Plans 2 (1970) (Report of the Division of Industry Analysis Bureau of Economics, Federal Trade Commission to the Department of Transportation). For a general discussion of the Assigned Risk Plan as it was in North Carolina, see Governor's Study Commission on Automobile Liability Insurance and Rates, Report to the Governor of North Carolina 53-69 (1971).

\textsuperscript{355} See generally D. Reinmuth & G. Stone, supra note 354, at 71-78.


\textsuperscript{357} The statutory definition of "motor vehicle insurance" is "direct insurance against liability arising out of the ownership, operation, maintenance or use of a motor vehicle . . . for bodily injury including death and property damage and includes medical payments and uninsured motorist coverages." N.C. Gen. Stat. § 58-248.26(7) (1975 & Cum. Supp. 1981). Reinsurance by the Facility, therefore, does not include physical damage coverage.

\textsuperscript{358} Lee & Formisano, supra note 353, at 562. See N.C. Gen. Stat. § 58-248.31(a) (Cum. Supp. 1981). An "eligible risk" is defined as a person who is a resident of this state who owns a motor vehicle registered or principally garaged in this state or who has a valid driver's license in this state or who is required to file proof of financial responsibility . . . or a nonresident of this state who owns a motor vehicle registered or principally garaged in this state . . . . N.C. Gen. Stat. § 58-248.26(4) (1975).
cretion to retain the policy as part of its voluntary business or to cede the policy to the Facility. In turn, the Facility provides for the equitable distribution of the results of these cessions—profits or losses—among all participating insurers. The Facility operates on a zero profit basis, and the rates for ceded drivers must reflect this fact.

The 1977 General Assembly enacted several amendments to the original 1973 legislation including a procedure to make the Facility self-sustaining. Under the amendment, the Facility could recoup its losses pursuant to specific guidelines: "[L]osses may be recouped . . . through surcharging persons reinsured by the Facility . . . ." A final provision of the recoupment procedure stated, "[T]he amount of recoupment shall not be considered or treated as premium for any purpose."

In 1979 the legislature amended Article 25A, requiring equal treatment of policies acquired through ceded and voluntary business. Included within these amendments was a statutory definition for "clean risks," to account for a group of good drivers whose policies had been ceded to the Facility and who had been classified separately within the Facility since 1977. The same amended subsection provided that rates for "clean risks" in the Facility should not exceed those for voluntarily insured "clean risks." Finally, the 1979 changes stated that the Facility could recoup any resulting loss caused by this rate scheme in a manner similar to general Facility losses—through a network of surcharges and assessments.

In *State v. Reinsurance Facility* the North Carolina Supreme Court exercised its first opportunity to interpret the surcharge provisions of the recent amendments to the Facility Act. The court rendered a very narrow opinion that emphasized sound principles of statutory construction. By confining the issue to whether recoupment surcharges constituted "rates" and by using a conservative approach, the court developed a convincing decision.

The court's primary task involved construing the intent of the legislature. The court found it "patently clear" that the General Assembly had no

---

361. In addition to the changes mentioned in the text, the legislature provided for a "clean risk" subclassification in the Facility. See note 349 and accompanying text supra.
363. Id. § 58-248.34(3)(f).
364. One of the 1979 amendments stipulated that each insurance company would provide the same type of service to its ceded customers that it provided to its voluntary customers. Id. § 58-248.31(b). When a policy is ceded to the Facility and the premium for the policy is higher than normally would be charged, the insurer must inform the policyholder (1) that his policy has been ceded, (2) that the coverage is written at the Facility rate, (3) the reason(s) for the cession, (4) that the specific reason(s) for cession will be provided upon written request of the policyholder to the insurer, and (5) that the policyholder may seek insurance through other companies who may choose not to cede his policy. Id.
365. Id. § 58-248(f). See note 348 supra for the statutory definition of "clean risk."
intention of representing surcharges as rates. In reaching this conclusion, the court focused on the explicit language in G.S. 58-248.34(f) that refused to treat recoupment as a premium for any purpose. By examining the statutory language of the 1977 and 1979 amendments to the original legislation, the court also discovered that the statute employs the terms "rate" and "premium" interchangeably, and that nowhere does the statute use the terms "surcharge" and "recoupment" concomitantly with rate provisions. After making these initial observations, the court again emphasized its faithfulness to the intent of the Facility Act and remained firmly persuaded that such intent apprehended recoupment surcharges as clearly separate from rates under the State's insurance laws, including the provisions for filing and review by the Commissioner.

Relying on the long-established maxim that courts may determine the meaning of words in a statute by reference to dictionaries, the court found that the court of appeals had misconstrued the common definitions of "rates," "premiums" and "surcharges." After noting several similar definitions of "rate" and "premium," the court focused on the proposition that ratemaking connotes a prospective process, whereas recoupment implies a retroactive process designed to recover mathematically verifiable losses. While the 18.6% surcharge in question did involve reclaiming heavy losses already incurred by the Facility, the 1.1% surcharge involved recovery of a loss not yet

---

368. 302 N.C. at 290, 275 S.E.2d at 406.
369. The court found this comment on the 1977 insurance law amendments especially significant:

Under the old law the participating companies could not transfer more than 50% of their risks to the Facility, had to share Facility losses, and could not charge higher rates for automobile liability policies ceded to the Facility. House Bill 658 changed all of that by eliminating the 50% limitation on cessions, by permitting higher rates or surcharges to recover losses of the Facility, and by providing for distribution of Facility gains to policyholders reinsured by the Facility. The apparent intent behind the new provisions is to make the Facility self-sustaining, whereas under the old system the insurance industry subsidized the Facility by absorbing its losses.

370. 302 N.C. at 294, 275 S.E.2d at 409.
372. 302 N.C. at 291, 275 S.E.2d at 407.
373. The court relied on this passage:

The rate is the price per unit of exposure that is charged a particular insured for a particular contract of insurance. The unit of exposure is a unit of insurance measure similar to the foot . . . or the pound . . . . For the great majority of insureds, the product of the rate times the number of units of exposure equals the premium—the total price paid for the insurance.

incurred.\textsuperscript{375} Although the court recognized this consideration and attempted to explain it on the ground that simple arithmetic could determine the smaller surcharge as well,\textsuperscript{376} this explanation begs the question: the court's correlation between "mathematical" and "retroactive" is misleading, because even prospective rates derive from a mathematical formula. Nevertheless, the court's basic premise concerning the common definitions of "rates" and "recoupment" remains sound.

By utilizing another principle of statutory construction, the court further buttressed its conclusion. Statutes \textit{in pari materia} command harmonious construction;\textsuperscript{377} however, when the court hypothetically enlarged the definition of "rates" to include surcharges and then applied that expanded definition to other rate provisions, the term "rates" clearly did not encompass surcharges.\textsuperscript{378} For example, the court looked at the statute placing a six percent cap on annual insurance rate increases.\textsuperscript{379} Given that the Facility operates on a no profit-no loss basis and that the Facility might recoup its losses to that end, the court could not assume that "rates" included surcharges, because placing a six percent cap on surcharges would thwart the goal of no-profit/no-loss status.\textsuperscript{380}

Having decided this case on statutory grounds, the North Carolina Supreme Court relegated the policy considerations that were so persuasive to the court of appeals to dicta, discussing them only briefly in the opinion. By choosing this tack, the court may have taken a myopic view of the problem. The justices, however, did not totally ignore the State's policy arguments. The court, for example, summarily responded to the lower court's reasoning that failure to file surcharges with the Commissioner would deny to the public the protection of the laws. Finding no support for this conclusion, the supreme court asserted that the statutory scheme within which the Facility had to operate provided ample public protection against excessive surcharges.\textsuperscript{381}

The State raised two other policy arguments that the court refused to recognize in its opinion. The State first characterized the 18.6\% surcharge on Facility policyholders as an unfairly discriminatory\textsuperscript{382} violation of G.S. 58-248.33(l), which states that "[r]ates shall be neither excessive, inadequate nor

\textsuperscript{375} Computing this surcharge involved subtracting the income that would have been generated had "clean risks" been charged the actuarially sound rate. See N.C. Gen. Stat. § 58-248.33(l) (Cum. Supp. 1979).

\textsuperscript{376} 302 N.C. at 292, 275 S.E.2d at 407.


\textsuperscript{378} 302 N.C. at 292-93, 275 S.E.2d at 408.


\textsuperscript{380} 302 N.C. at 293, 275 S.E.2d at 408.

\textsuperscript{381} The court noted that the Facility must operate on a no-profit-no-loss basis so that any excess surcharges over losses in one collection period would be offset by a reduction in surcharges during the next period. The court also mentioned the availability of independent audits of the Facility's annual statements as an indication of protection against excessive surcharges. 302 N.C. at 294-95, 275 S.E.2d at 409.

\textsuperscript{382} Brief for Appellee at 29.
unfairly discriminatory. Because the statute revealed no prescribed standards defining which insureds the industry should or should not cede to the Facility, the State argued that there is the potential for unjust discrimination when a ceded insurance customer must pay not only high rates but also a surcharge that an unceded insurance customer would not pay for the same insurance policy. Plaintiffs also asserted that the imposition of surcharges without adequate procedural safeguards resulted in an unconstitutional delegation of legislative power to the Facility in violation of the State constitutional provision vesting such power in the General Assembly. The State pointed to several important public policy choices left to the discretion of the Facility without adequate guiding standards to assure that the Facility would not make arbitrary or unreasonable decisions. The Facility may not lawfully exercise an otherwise legislative power, the state contended, in the absence of such safeguards. By dismissing these issues so quickly, the court again remained faithful to the legislative intent of the statute and refused to speculate about any far-reaching effects of the Facility Act.

The court justified its conservatism by openly criticizing the North Carolina General Assembly for careless drafting of the insurance laws. Taking notice of the numerous judicial insurance disputes in the past few years, the court attributed this problem to the ambiguous statutes confronting the industry. Without more legislative guidance, the court felt inadequate to address these recurring policy issues for fear of misconstruing the drafters' intent in these areas. Consequently, the court resorted to strict construction of the existing statute. The court suggested that the General Assembly would be the appropriate forum for solution of these issues, admonishing that body "to rewrite the insurance laws in question in clear and unmistakable language."

In discussing the "apparent inequities in our insurance laws," the court expressed concern that the Facility forced "clean risks" and insureds outside

---

385. N.C. Const. art. 2, § 1.
386. Brief for Appellee at 41.
387. The State viewed the Facility as making several important policy decisions:
   (1) The [Facility's] agents have been given the responsibility to determine whether to charge applicants for insurance rates at the voluntary level or at the Facility level.
   (2) The Facility has been delegated the authority to decide whether to impose recoupment surcharges only on drivers in the Facility or to assess member companies which will result in a loss recoupment from all drivers in the State.
   (3) The Facility has been delegated the authority to determine whether to recoup losses by adding a flat dollar amount to each driver's policy, in which case all drivers would share losses equally, or to use a percentage of premium, in which case, the recoupment drivers will pay will vary with the driver's insurance classification and the amount of coverage purchased.

Brief for Appellee at 42.
389. 302 N.C. at 297-98, 275 S.E.2d at 410.
390. Id.
391. Id., 275 S.E.2d at 411.
the Facility to subsidize, through payment of recoupment surcharges, the costs of insuring those with poor driving records within the Facility. The court, however, refused to offer a solution; instead, it stated, "Such a grievance is best remedied by bringing it to the attention of the legislative branch." The court's suggestion apparently has had an impact on the legislature. Since the date of the opinion, the 1981 General assembly has enacted several amendments to the Facility Act. Most important, the legislature amended the surcharge provision of the statute to provide that "recoupment of losses sustained by the Facility . . . may be recouped only by surcharging policies . . . to which one or more points have been assigned . . . ." This change has eliminated the application of recoupment surcharges to "clean risk" drivers' policies.

In *State v. Reinsurance Facility* the North Carolina Supreme Court produced an internally consistent although narrowly drawn opinion deciding that recoupment surcharges are not "rates" subject to review by the Insurance Commissioner. With the undercurrent of pressing policy concerns in this case, however, the result may leave many persons unsatisfied. Because of the uncertainty surrounding the policies furthered by the statute, the court rightly concluded that these political problems must be submitted for solution by the elected lawmakers of the state. Given this conclusion, the court's strict holding deserves no more criticism than does the legislature's poor drafting.

**G. Employment**

1. Unemployment Compensation

The court of appeals decided two cases under G.S. 96-14(2), defining what type of "misconduct" justifies denial of unemployment compensation benefits for discharged employees. Consistent with the previously adopted definition of "misconduct" as "wilful or wanton disregard of an employer's interest," the court in *Yelverton v. Kemp Furniture Industries* affirmed the Employment Securities Commission's denial of benefits. Claimant's harassing of a fellow employee, threatening him with a wooden post, and subsequently striking him with the post were sufficient to disqualify claimant from any unemployment compensation benefits.  

---

392. Id.
396. 51 N.C. App. at 218-19, 275 S.E.2d at 557 (quoting *In re Collingsworth*, 17 N.C. App. 340, 343-44, 194 S.E.2d 210, 212-13 (1973)).
398. Id. at 556. The claimant was denied benefits not only for the deliberate
In a later case, *Intercraft Industries v. Morrison*, the court of appeals expanded the definition of "misconduct." The court held that ten unexcused absences for scheduled overtime work within a twelve-month period did not constitute "misconduct." Claimant's absences caused by her inability to obtain child care for those days were found to constitute "good cause" and thus were justifiable and reasonable under the circumstances.

Two legislative enactments also affected the area of unemployment compensation benefits. G.S. 96-14(3) was amended to expand the disqualification of claimants who refuse suitable work without good cause. In addition, G.S. 96-14 was amended to permit a party before the Employment Securities Commission to be represented either by an attorney or by any person supervised by an attorney.

2. Dismissal and Demotion of Public Employees

Chapter 115 of the North Carolina General Statutes governing elementary and secondary education was repealed and replaced by the comprehensive statutory enactment of Chapter 115C.

G.S. 115C-325(e)(1) now sets forth the grounds for dismissal or demotion of a career teacher. G.S. 115C-325(e)(1)(d) is identical to the former provision, G.S. 115-142(e)(1)(d), under which the supreme court defined "neglect of duty" as a "failure to perform some duty imposed by contract or law." A 1981 case illustrates the application of that definition. In *Overton v. Goldsboro City Board of Education* a tenured teacher was dismissed for failing to report for work. Plaintiff teacher had requested the school principal to hire a substitute teacher as soon as he had learned that he had been indicted on felony drug charges. Subsequently, plaintiff met twice with the school superintendent of the reasonable rules of his employer of which he had knowledge, but also for the intentional disregard of the interests of his employer in the safety of his fellow employees.

400. Id. at 227-28, 282 S.E.2d at 557-58.
402. Law of June 17, 1981, supra note 401. The time period for measuring the disqualification of benefits once a claimant has refused suitable work now begins on the first day of the first week in which the disqualifying act occurs. Prior to the amendment, the period was measured from the first day of the first week after which the disqualifying act occurred.
403. Law of July 1, 1981, supra note 401. N.C. Gen. Stat. § 96-17(b) now reads: "(b) Representation—Any claimant or employer who is a party to any proceeding before the Commission may be represented by (1) an attorney; or (2) any person who is supervised by an attorney, however, the attorney need not be present at any proceeding before the Commission." N.C. Gen. Stat. §§ 84-4 (1981) was also amended by Law of July 1, 1981, to reflect the change in G.S. 96-17(b).
405. *Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 318, 283 S.E.2d 495, 499 (1981). Neglect of duty was not defined in the previous statute or in the newly-enacted statute. Id.
dent, informed him of the charges, and professed his innocence. Plaintiff was not given any indication that he was expected to report to work. Instead, he understood that the superintendent felt it would be in the best interests of the students if he did not return to work until the matter was settled. Plaintiff even requested he be granted a leave of absence without pay. The school board responded with a dismissal based on plaintiff's unexcused absences from work.\footnote{406}

The supreme court concluded after a review of the entire record that the decision of the Board of Education to dismiss plaintiff for "neglect of duty" was not supported by the evidence.\footnote{407} The court noted that plaintiff did have a basic duty to appear for work but held that "dismissal under the statute on this ground alone cannot be sustained unless it is proven that a reasonable man under these same circumstances would have recognized the duty and would have considered himself obligated to conform."\footnote{408}

\section*{H. Professional Standards and Administration of Justice}

There have been only eight 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"\footnote{409} since the Judicial Standards Commission was created in 1973.\footnote{410} In the latest case, \textit{In re Martin},\footnote{411} the supreme court, upon independent review

\footnotesize{406. Id. at 313-14, 283 S.E.2d at 496-97.}

\footnotesize{407. The supreme court in \textit{Overton} examined the case under the "whole record" test instead of \textit{de novo} or the "any competent evidence" standard of review. G.S. 150A-2(1) of the Administrative Procedures Act (APA) expressly excludes city school boards from the coverage of the Act. The supreme court, however, adopted the same review standard, the "whole record" test, for school boards as found in the APA and applied it in Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 233 S.E.2d 538 (1977), to promote uniformity.}

\footnotesize{The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court justifiably may have reached a different result had the matter been before it \textit{de novo} . . . . On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.}

\footnotesize{304 N.C. at 317-18, 283 S.E.2d at 498-99 (quoting Thompson v. Wake County Bd. of Educ., 292 N.C. at 410, 233 S.E.2d at 541).}

\footnotesize{408. Id. at 319, 283 S.E.2d at 499-500.}


\footnotesize{411. 302 N.C. 299, 275 S.E.2d 412 (1981).}
of the findings of the Judicial Standards Commission, concluded that sexual advances made by the judge toward female defendants warranted his removal from office. In addition, censure was warranted by the judge's failure to excuse himself from hearing a case in which he was the defendant.

In his defense, Judge Martin argued that the conduct complained of was a matter of his private, as opposed to his public, life. Dismissing this contention, the court held that "wilful misconduct in office" was not "limited to the hours of the day when a judge is actually presiding over court." The judge's claim that his post-transgression reelection indicated forgiveness by the electorate and required immunity from judicial process also was rejected.

In analyzing the conduct of attorneys, the court of appeals held that a lawyer must have the express authority of his client before acting in any way that affects the client's substantive rights. An attorney's oral agreement to additional terms of insurance and an escalator clause in a child support agreement did not bind his unknowing client. Another case dealing with attorney misconduct resulted in the suspension of a lawyer from the practice of law for six months for procuring false testimony of a witness at a deposition.

As of October 1, 1981, Chapter 8B, a rewriting of Chapter 8A of the General Statutes, requires that a qualified interpreter be provided for deaf persons appearing as a party or a witness in any civil or criminal proceeding. The guarantee applies to juvenile proceedings and appearances before magistrates, legislative committees, agency or board hearings. Upon arrest for an alleged violation of the criminal law, a deaf person is entitled to an interpreter at an interrogation or any preliminary proceeding. To ensure the appointment of an interpreter, any statement or admission obtained without the presence of a qualified interpreter or a waiver of the right to have an interpreter present, is

412. Id. at 310-11, 275 S.E.2d at 418. The court exercised independent judgment in determining if there was "proof by clear and convincing evidence" to remove or censure the judge. Id. at 310, 275 S.E.2d at 418.
413. Id. at 310-11, 275 S.E.2d at 418.
414. Id. at 315-16, 275 S.E.2d at 421.
415. Id. at 318-20, 275 S.E.2d at 422-23. The court struck down two lines of authority presented to support the argument that the electorate through reelection had pardoned the judge. The first argument, supported by State ex rel. Turner v. Earle, 295 So. 2d 609 (Fla. 1974), was based on a reelection wiping his record clean. The second, supported by In Matter of Carrillo, 542 S.W.2d 105 (Texas 1976), was not applicable to these facts. In Carrillo the court held that a reelection pardoned an official of misconduct known to the public at the time of the reelection. In Martin the acts of the defendant were not "public knowledge" at the time of the reelection. Id. at 318-20, 275 S.E.2d at 422-23.
417. Id. at 539, 274 S.E.2d at 283.
excluded from use for any purpose at trial.\textsuperscript{421}

\textbf{I. Election Law}

A major issue confronted by the North Carolina General Assembly during its 1981 session was legislative redistricting. An attempt was made to formulate a redistricting plan. The plan, however, met with substantial opposition.\textsuperscript{422} Consequently, the General Assembly delayed final action on redistricting until 1982.

Other legislation enacted in 1981 dealing with elections relaxed regulations on campaign contributions and the reporting thereof.\textsuperscript{423}

\textbf{J. Alcoholic Beverage Control}

Recent changes in the state alcoholic beverage control laws and a perceived need for reorganization of alcoholic beverage regulation prompted the replacement of General Statutes Chapter 18A, governing the mechanism for alcohol regulation, with the new Chapter 18B.\textsuperscript{424} In addition to several organizational changes,\textsuperscript{425} Chapter 18B contains a new section providing penalties for violations of alcohol laws.\textsuperscript{426} Under this section, the Alcoholic Beverage Control Commission may, in lieu of suspending or revoking a permit, accept at the permit holder's option "an offer in compromise" made by the permit holder to pay a penalty of up to $5000.\textsuperscript{427} The Commission may either revoke a permit or accept a "compromise," but not both.\textsuperscript{428} In the absence of adequate guidelines for determining when the Commission should accept a com-

\textsuperscript{421} Id. §§ 8B-2(d), -3. Waiver of a qualified interpreter must be made in writing either by the deaf person's attorney or by the appointing authority.

\textsuperscript{422} The legislative districts drawn by the 1981 General Assembly were challenged by the NAACP Legal Defense and Education Fund because the plan allegedly violated the "one man, one vote" principle set forth in Gray v. Sanders, 372 U.S. 368 (1963), and the 1965 Voting Rights Act. After North Carolina Justice Department lawyers reported that the plan could not withstand a court challenge, the plan was withdrawn and the problem of redistricting was left for the 1982 session. The News and Observer (Raleigh, N.C.), Oct. 9, 1981, at 1, col. 1; The News and Observers (Raleigh, N.C.), Oct. 18, 1981, at 1, col. 1.


\textsuperscript{425} Many of the technical words used in the statute were redefined, id. (codified at N.C. Gen. Stat. § 18B-101 (Cum. Supp. 1981)), and the name of the state agency for alcohol control was changed. Id. (codified at N.C. Gen. Stat. § 18B-200 (Cum. Supp. 1981)). Also, rules governing elections on city and county alcohol sales were revised and consolidated. Id. (codified at N.C. Gen. Stat. §§ 18B-600 to -605 (Cum. Supp. 1981)).

\textsuperscript{426} Id. (codified at N.C. Gen. Stat. § 18B-104 (Cum. Supp. 1981)).

\textsuperscript{427} Id. (codified at N.C. Gen. Stat. § 18B-104(b) (Cum. Supp. 1981)).

\textsuperscript{428} Id.
promise in a case in which a permit could be revoked, the dangers of an arbitrary application of this provision seem evident.

JONATHAN A. BERKELHAMMER
REGINALD B. GILLESPIE, JR.
SALLY TOTTEN GILMORE
HENRY HAMILTON RALSTON
KATHLEEN PEPI SOUTHERN
DEBBIE WESTON
DEBRA LEIGH WHITED
II. CIVIL PROCEDURE

A. Jurisdiction

1. Personal Jurisdiction

In Speizman Knitting Machine Co. v. Terrot Strickmaschinen the United States District Court for the Western District of North Carolina held a foreign corporation subject to personal jurisdiction in North Carolina on two separate grounds. Plaintiff, a division of a North Carolina corporation, alleged that it had agreed to act as defendant's "exclusive agent in the United States." Plaintiff sold and serviced defendant's machines in North Carolina and throughout the United States. Thus, defendant was potentially subject to North Carolina's long-arm jurisdiction under G.S. 1-75.4(5)(a) and (b).

Judge McMillan held that jurisdiction existed because defendant had sufficient "minimum contacts" with North Carolina as a result of the agency relationship between plaintiff and defendant. Since the cause of action arose directly out of the agency contact in North Carolina, it was fair and reasonable for defendant to have to defend in North Carolina.

The court found a second basis for jurisdiction in defendant's contacts with its wholly owned subsidiary, Terrot Knitting Company, Inc. Judge McMillan's ruling touches on an unsettled and interesting question of law:

---

2. Id. at 202.
3. N.C. Gen. Stat. § 1-75.4(5) (a)-(b) (Cum. Supp. 1981) provides that a North Carolina court has jurisdiction over a person in any action which:
   (a) Arises out of a promise, made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the plaintiff; or
   (b) Arises out of . . . services actually performed for the defendant by the plaintiff within this State if such performance within this state was authorized or ratified by the defendant . . .

Plaintiff's verified complaint alleged that its agreement with defendant was partially negotiated in North Carolina and was entered into in North Carolina, and that plaintiff substantially performed the agreement in North Carolina, a result which must have been contemplated by defendant. 505 F. Supp. at 201. See generally The Grasp of Long Arm Jurisdiction Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk, 58 N.C.L. Rev. 407 (1980).

4. [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
6. "If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction." 2 J. Moore, Moore's Federal Practice § 4.25(5), at 4-266 (2d ed. 1981). See also Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1067, at 239 (1969).
7. Indeed, defendant thought Judge McMillan's ruling involved such a controversial question of law as to merit an immediate appeal under 28 U.S.C. § 1292(b) (1976) (allowing interlocutory appeals when an "order involves a controlling question of law as to which there is a substantial ground for difference of opinion").
whether a parent corporation has sufficient minimum contacts with the State of North Carolina for jurisdictional purposes when its only contact with North Carolina is that it has a wholly-owned subsidiary which is doing business in this state." As an alternative basis for the assertion of jurisdiction by the state, Judge McMillan held that the subsidiary provided sufficient contacts.9

Mabry v. Fuller-Shuwayer Co.10 concerned a somewhat related jurisdictional issue. A foreign corporation, Fuller-Shuwayer Co., Ltd., organized under the laws of Saudi Arabia, was seventy percent owned by a California corporation, George A. Fuller Company. The North Carolina Court of Appeals held Fuller-Shuwayer subject to in personam jurisdiction of the North Carolina courts by virtue of the acts of its agent, George A. Fuller Company, in recruiting an employee in North Carolina for employment with the Fuller-Shuwayer Company in Saudi Arabia.11 In 1978 defendant advertised in the Charlotte Observer for prospective employees for construction work in Saudi Arabia, listing the George A. Fuller Company's New York telephone number as the number to call for information. Upon calling the listed number, plaintiff was informed that a representative would visit Charlotte to conduct interviews. Plaintiff interviewed with an employee of the George A. Fuller Company in a Charlotte hotel room and was later flown to New York for a physical examination at defendant's expense.12 While in New York, plaintiff signed the employment contract that was the subject of his action. Except for a similar 1975 recruiting trip to North Carolina, this was the only contact that

8. 505 F. Supp. at 201 (emphasis in original).
9. Id. at 202. One rationale that might justify such a ruling is agency. See PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F. Supp. 375 (S.D.N.Y. 1975) (holding a foreign corporation subject to personal jurisdiction in New York because of its agency relationship with a local corporation).

Another rationale might be developed from Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925). In Cannon the Supreme Court upheld a dismissal for want of personal jurisdiction over a Maine corporation, the sole stockholder of an Alabama corporation doing business in the forum state, North Carolina. Defendant created the subsidiary to market its products in North Carolina. "The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed." Id. at 335. The Court refused to look beyond the corporate veil and hold the foreign corporation subject to the jurisdiction of North Carolina. See also J. Moore, supra note 6, § 4.25(6), at 4-269; C. Wright & A. Miller, supra note 6, § 1069, at 250. The Speisman court could arguably have pointed to factors existing in the parent-subsidiary relationship between defendant and Terrot Knitting Co., Inc. to support a finding under the Cannon rationale that no bona fide separate corporate relationship existed between defendant and Terrot Knitting.

Instead, Judge McMillan relied on neither an agency nor a Cannon (piercing the corporate veil) theory. He relied instead on the reasoning in Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977), which questions whether the Cannon rationale is mandated by due process. Id. at 429. The court in Mohasco said that mere stock ownership in a local corporation is not necessarily sufficient to subject the foreign parent to local jurisdiction, and that the foreign corporation must still be found to have the requisite "minimum contacts" in the forum state. The court found that a manufacturer-distributor relationship existed between the foreign parent and local subsidiary in Mohasco. As a result the parent's dealings with the subsidiary furnished the "minimum contacts" necessary for the forum's assertion of jurisdiction. Id. at 430-31. Judge McMillan found that the same relationship existed in Speisman and that the foreign parent's dealings with the local subsidiary met the "minimum contacts" test. 505 F. Supp. at 202.

11. Id. at 250-51, 273 S.E.2d at 512-13.
12. Defendant paid for the flight, and the George A. Fuller Company paid for the physical. Id. at 247, 273 S.E.2d at 510.
the George A. Fuller Company had with the State.\footnote{Between fifteen and twenty-two applicants were interviewed in Charlotte in 1978. How many were flown to New York or signed employment contracts, however, is not clear. Id.}

Finding that the George A. Fuller Company had "'broad executive responsibility on a continuing basis' for the hiring of employees to work for defendant,"\footnote{Id. at 246, 273 S.E.2d at 510.} the court held that the contacts of the George A. Fuller Company with North Carolina were sufficient to satisfy the "minimum contacts" test\footnote{Id. at 250, 273 S.E.2d at 512.} and that those contacts could be attributed to defendant under agency principles in order to bring defendant under the jurisdiction of the North Carolina courts.\footnote{Id. See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (jurisdiction existed even though defendant's only contact with the state was in issuing plaintiff's insurance policy and receiving payments from plaintiff). Since the court in \textit{Mabry} found that an agency relationship existed between the George A. Fuller Company and the Fuller Schuwayer Co. regarding recruitment of employees, little difficulty arises in attributing the acts of the agent to defendant. Had the court not found an agency relationship in \textit{Mabry}, bringing defendant Fuller-Schuwayer Co. under the jurisdiction of the North Carolina courts would have been more difficult. If the \textit{Cannon} rationale were applied to these facts, see note 9 supra, defendant would be immune from service of process, because defendant and the George A. Fuller Company maintained separate corporate existences. Under the more liberal \textit{Mohasco} rationale, see note 9 supra, plaintiff would still have to show that defendant had the necessary "minimum contacts" with North Carolina. One possibility, absent a finding of agency, would be a showing that defendant and the George A. Fuller Company worked so closely together on recruitment of employees for defendant as to justify attributing the contacts of the George A. Fuller Company to defendant on a joint venture or subsequent adoption theory. Regardless, \textit{Speitzman} and \textit{Mabry} illustrate that, while there is more than one way to attribute the acts of one corporation to another for jurisdictional purposes, the least problematical approach, if the facts allow, is through agency.}

This case demonstrates that when the defendant's contacts with the forum state are very limited, but the cause of action arises out of those contacts, courts may hold that it is not a violation of due process to require the defendant to defend in the forum state.\footnote{Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976) ("A simple transaction is a sufficient contact to satisfy this standard [minimum contacts] if it gives rise to the liability asserted in the suit.").} If a contract is the basis of the action, it is enough if the contract has a "substantial connection" with the forum state either through negotiation\footnote{Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1379 (S.D.N.Y. 1975); Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965) (holding a foreign corporation subject to in personam jurisdiction in North Carolina on an action for payment for goods delivered, because the last act necessary to the making of the contract was performed in North Carolina and because the goods delivered were manufactured in North Carolina pursuant to the contract. See also Johnston v. Gilley, 50 N.C. App. 274, 273 S.E.2d 513 (1981), discussed at notes 21-24 and accompanying text infra.)} or performance.\footnote{Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 229, 176 S.E.2d 784, 788 (1970) (holding that "the contract in question clearly met the requirement of 'substantial connection' with North Carolina," because it was made and performed in this State). See also N.C. Gen. Stat. § 1-75.4(5)(a)-(b)(Cum. Supp. 1981); id. § 55-145(a)(1) (1975) (every foreign corporation shall be subject to suit in North Carolina on any cause of action arising out of any contract made or to be performed in the state). In General Time Corp. v. Eye Encounter, Inc., 50 N.C. App. 467, 274 S.E.2d 391 (1981), the court of appeals held a California corporation subject to in personam jurisdiction in North Carolina on an action for payment for goods delivered, because the last act necessary to the making of the contract was performed in North Carolina and because the goods delivered were manufactured in North Carolina pursuant to the contract. See also Johnston v. Gilley, 50 N.C. App. 274, 273 S.E.2d 513 (1981), discussed at notes 21-24 and accompanying text infra.)} The exercise of jurisdiction is
further supported when the state has a special interest in entertaining the action, as when the action involves a resident whose claim may not be large enough to justify the expense of traveling to a distant state (or country) to prosecute it.\footnote{20} This would seem to be the case in Fuller-Shuwayer. It might well have proved to be a prohibitive burden on plaintiff to have to bring an action in New York, California or Saudi Arabia.

In a third 1981 case, Johnston v. Gilley,\footnote{21} the question arose whether defendant, a nonresident of North Carolina at the commencement of the action, could be brought under the jurisdiction of the North Carolina courts on a claim arising from his activities as a former resident of North Carolina and as an officer, director and principal shareholder of The Washington Group, Inc., a North Carolina corporation. In 1973 the corporation's subsidiary, Washington Mills-Retail, Inc., also a North Carolina corporation, acquired substantially all of the assets of the Johnston Mills Company and entered into an employment contract with plaintiff Johnston lasting eighteen years. The contract also included an agreement with Johnston to maintain ties between local banks and Johnston Mills Company. Defendant personally guaranteed the employment contract on which Johnston sued.

The court of appeals found that under G.S. 1-75.4(5)(a) the trial court had jurisdiction over defendant because the claim arose out of a promise, made anywhere to the plaintiff by the defendant to pay for services to be performed in this state by the plaintiff.\footnote{22} Further, the court found that the assertion of jurisdiction was consistent with due process.\footnote{23} Given that at the time this transaction took place defendant was a North Carolina resident; that he was an officer, director and principal shareholder of the parent of the corporation that incurred this obligation; that both corporations were organized under the laws of North Carolina; that defendant personally guaranteed the obligation; and that the claim arose directly out of the obligation, the decision in Johnston undoubtedly is sound.\footnote{24}

\footnote{20} See Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648-49 (1950) (holding that Virginia had personal jurisdiction over a foreign insurance company operating a mail-order health insurance business because "[h]ealth benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit.").


\footnote{22} Id. at 277-79, 273 S.E.2d at 515-16. The court rejected defendant's argument that he made not "a promise . . . to pay for services to be performed in this state," but rather a promise "to pay the debt of another," and that therefore his activities did not fall within the scope of the "long-arm" statute. Id. at 279, 273 S.E.2d at 516.

\footnote{23} Id. at 278-79, 273 S.E.2d at 516.

\footnote{24} As indicated earlier, in personam jurisdiction is more likely to be upheld when the claim arises directly out of defendant's contacts with the forum state. See note 17 and accompanying text supra. Facts similar to those in Johnston were considered in United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979). In that case, defendant, a Virginia resident, gave a note securing his indebtedness to plaintiff for goods delivered from plaintiff in North Carolina to defendant in Virginia. Defendant had also attended a number of trade shows in North Carolina and had made numerous contacts with plaintiff in connection with buying merchandise for his
The court of appeals resolved a factual dispute concerning a defendant's contacts with North Carolina in favor of plaintiff on a motion to dismiss for lack of jurisdiction. In *Fungaroli v. Fungaroli* plaintiff alleged that her son had been removed from the state by the child's father and paternal grandparents in violation of a 1978 custody decree. The child's grandfather, a Virginia resident, moved to dismiss. He supported his motion with an affidavit saying he had absolutely nothing to do with the child's removal from North Carolina and was therefore not subject to the jurisdiction of the North Carolina courts. Relying on plaintiff's affidavit saying that the child's grandfather had told her over the telephone, "We brought the child back to Virginia," the trial court denied the motion. The court of appeals affirmed, saying simply, "[W]e must assume that the trial court after reviewing the pleadings and affidavits of both parties decided to take as true plaintiff's contentions."

*Thomas v. Poole* illustrates that a foreign corporation may waive its defense of lack of in personam jurisdiction. The attorney for defendant signed a "proposed final pre-trial order" that was filed with the clerk of court and contained a stipulation "that all parties are properly before the Court and that the Court has jurisdiction of the parties." Even though the judge never adopted the proposed order, the court of appeals held that "the stipulations were nevertheless judicial admissions and binding on the parties."

Retail shoe outlets in Virginia. The North Carolina Supreme Court held that defendant's contacts in North Carolina were sufficient to subject him to jurisdiction. It is interesting to note that in *United Buying Group* the supreme court held that defendant's brother, a codefendant and resident of New York, who also gave plaintiff a note to secure the indebtedness merely as a favor to his brother, was not subject to the jurisdiction of the North Carolina courts. The court characterized his contacts with North Carolina as "isolated [and] fortuitous." Id. at 517, 251 S.E.2d at 615. For further comment on *United Buying Group*, see Survey of Developments in North Carolina Law 1979—Civil Procedure, 58 N.C.L. Rev. 1261, 1277-82 (1980).

---

27. Jurisdiction was alleged under N.C. Gen. Stat. § 1-75.4(3) (Cum. Supp. 1981): "A court of this State . . . has jurisdiction over a person . . . (3) [i]n any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant." Since plaintiff alleged no injury to herself and certainly no wrongful death, one might conclude from this case that plaintiff considered her son's removal an interference with her "property." However, the court of appeals has held that the term "injury to person or property" . . . should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages . . . . We hold that an action for alimony on the grounds of abandonment is a claim of "injury to person or property . . . ."

*Sherwood v. Sherwood*, 29 N.C. App. 112, 115-16, 223 S.E.2d 509, 512 (1976). The result is that, while courts still go through the motion of locating a subsection of the State's "long-arm" statute for legislative support, the words of the statute will not preclude the assertion of personal jurisdiction so long as due process is not offended. See *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).
28. 51 N.C. App. at 366, 276 S.E.2d at 523 (emphasis original).
29. Id. at 367, 276 S.E.2d at 524.
31. Id. at 240, 282 S.E.2d at 516.
32. Id. at 241, 282 S.E.2d at 517.
33. Id. at 242, 282 S.E.2d at 517. J. Strong, North Carolina Index, Trial § 6, at 354 (3d ed.
court of appeals affirmed the trial court’s refusal to allow defendant to withdraw the stipulation because there was no allegation of the attorney’s lack of authority, mistake or “any other just cause for withdrawal.”

The court also held that defendant’s attempt to withdraw the stipulation was ineffective, reasoning that the proper procedure is by motion; defendant merely filed a paper captioned “Withdrawal of Stipulation” that purported to nullify the prior admission.

2. Subject Matter Jurisdiction

In *Ingle v. Allen*, the court of appeals ruled that in an action alleging improprieties in the management of an estate, plaintiff’s claims of breach of fiduciary duties, negligence and fraud are “justiciable matters of a civil nature” and thus are within the jurisdiction of the superior court. The court also ruled that it was proper for the clerk of superior court to entertain claims for an accounting and distribution from a coexecutrix and for her removal; for an accounting from cotrustees and their removal; for appointment of a new trustee; for return of compensation received by defendants; for reimbursement by defendants for any benefit received that rightfully belonged to the estate; and for an award of attorney’s fees to plaintiff’s counsel from the estate and from defendants. The court held that all of these were matters concerning “the administration, settlement, and distribution of estates.”

In *Journeys International v. Corbett*, the court of appeals considered whether a superior court judge had original jurisdiction to hear a special proceeding under G.S. 45-21.34 when no issue of fact had been raised. Judgment creditors of Atlantic Manufacturing, Ltd., sought to require Corbett, who allegedly had foreclosed on real estate owned by Atlantic Manufacturing as trustee under a deed of trust, to pay the surplus of the sale beyond the amount of indebtedness to the clerk for determination of ownership. Corbett moved

---

1982], states very succinctly the judicial attitude towards stipulations in North Carolina: “Where the stipulations of plaintiff and defendant are entered of record, and there is no contention that the attorney for either party was not authorized to make the stipulations and admissions, the parties are bound thereby.”

34. 54 N.C. App. at 242, 282 S.E.2d at 517.
36. 54 N.C. App. at 242, 282 S.E.2d at 517. The court did not reach the question of whether defendant’s four-year, seven-month delay in attempting to withdraw the stipulation constituted a waiver of the lack of jurisdiction defense. Id. at 242, 282 S.E.2d at 518. See Napoli v. Philbrick, 8 N.C. App. at 12, 173 S.E.2d at 576 (holding that failure “seasonably” to apply to set aside a stipulation may defeat the right to have the stipulation stricken).
39. Superior Court was the proper division because the amount in controversy was greater than $5,000. 53 N.C. App. at 629 n.2, 281 S.E.2d at 407 n.2; N.C. Gen. Stat. § 7A-243 (1981).
42. A special proceeding to determine the ownership of any surplus resulting from the sale of real property is properly heard by the clerk unless an “answer is filed raising issues of fact as to the ownership of the money,” in which case the matter “shall be transferred to the civil issue docket of the superior court for trial.” N.C. Gen. Stat. § 45-21.32(c) (1976).
43. According to plaintiff’s allegations, the deed of trust secured a $250,000 note given to
to dismiss for want of subject matter jurisdiction. The matter was then calendared for hearing before a judge of the superior court over the objection of the plaintiff, who contended that the matter was properly to be heard before the clerk. The court of appeals ruled that it was improper for the superior court judge to hear the matter because no issue of fact had been raised.

B. Voluntary Dismissal—Effective Date in Diversity Actions

In Shuford v. Kawamura Cycle Co., a diversity of citizenship action, plaintiff moved for and was granted a voluntary dismissal without prejudice. Under North Carolina law, the plaintiff may reinstitute his action within one year after the dismissal, and the reinstated action will relate back to the filing date of the original action. In Shuford, after the statute of limitations had run and more than a year after the judge orally granted plaintiff's motion for voluntary dismissal, but less than a year after the judge issued his written order dismissing the action, plaintiff sought to reinstate his action. Plaintiff argued that under federal law a party can take a voluntary dismissal after defendant has answered only by order of the court; since defendant had answered, the effective date of the dismissal should be when the judge issued his written order. In Danielson v. Cummings, however, the Supreme Court of North Carolina held that under the North Carolina Rules of Civil Procedure the one-year period begins to run when the plaintiff announces his intention to take a voluntary dismissal in open court. Thus, the Fourth Circuit Court of Appeals in Shuford was confronted with an Erie question.

Superior Machine Shop, Inc. Superior bought the real estate at the foreclosure sale, paying $325,505.49. 53 N.C. App. at 124, 280 S.E.2d at 6.

44. N.C.R. Civ. P. 12(b)(2).
45. 53 N.C. App. at 125-26, 280 S.E.2d at 6-7. The court distinguished Redevelopment Comm'n of Washington v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971), which held that "when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him." Id. at 638, 178 S.E.2d at 347. Grimes involved a premature appeal from the clerk who had not yet approved or disapproved a report of an appraisal commission. Appeal was only appropriate after such action by the clerk. Nevertheless, the court held that the superior court judge had jurisdiction to decide the matter. In Corbett the defendant did not purport to appeal from the clerk since there was no ruling, tentative or otherwise, to appeal from. The court followed Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967). The Becker court held that a superior court had no jurisdiction to set aside an order of the clerk when there was no appeal by "a party aggrieved." See N.C. Gen. Stat. § 1-272 (Cum. Supp. 1981). The rule seems to emerge that whether or not there is a final order of the clerk, a party is properly before the superior court judge if he gets there by means of a formal appeal.

46. 649 F.2d 261 (4th Cir. 1981).
47. N.C.R. Civ. P. 41(a)(1).
48. Fed. R. Civ. P. 41(a) provides, in pertinent part, as follows:

(2) By order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.
49. 300 N.C. 175, 265 S.E.2d 161 (1980).
50. Id. at 180, 265 S.E.2d at 164.
Applying the reasoning of *Walker v. Armco Steel Co.*, the court of appeals held that state law governs the effective date of a voluntary dismissal because Federal Rule of Civil Procedure 41 does not purport to cover that question. Because the effective date of the voluntary dismissal is an "'integral' part of the statute of limitations," and because there is no "'direct collision' between the Federal Rule and the state law," state law must govern.

C. Service of Process

*Long v. Cabarrus County Board of Education* demonstrates vividly how the unwary may be trapped by the tangle of technical rules for service of process contained in the North Carolina Rules of Civil Procedure. Rule 4 provides for service of process on county boards of education "by personally delivering a copy of the summons and of the complaint to an officer or director thereof." Process was directed to Stuart Black, Chairman of the Cabarrus County Board of Education. The return of service indicated, however, that the deputy "left copies with Mrs. Stuart Black who is a person of suitable age and discretion and who resides in the defendant's house or usual place of abode." While service on most individual defendants is sufficient under these circumstances, the provision for service on a county board of education does not allow similar service on an officer or director of the board. Because process servers may not always be aware of such distinctions, attorneys should scrutinize the form of process and return of service to determine whether statutory guidelines, which are strictly construed, have been met.

52. 446 U.S. 740 (1980). *Walker* concerned whether an action, filed within the statute of limitations, is commenced within the statute of limitations when state law requires service of process to commence the action and the defendant was not served within the statute of limitations. The Court held that Fed. R. Civ. P. 3 does not purport to control the time of commencement for purposes of the state statute of limitations and that, since the service requirement is an "integral" part of the statute of limitations, the action is not commenced (for statute of limitations purposes) until the defendant is served. Only when there is a direct conflict between a federal rule and state law will the federal rule prevail. Since Fed. R. Civ. P. 41 does not purport to dictate when a voluntary dismissal is effective, state law prevails.


54. 446 U.S. at 752. The court in *Danielson* concluded that to interpret N.C.R. Civ. P. 41 to allow one year from the date of filing the notice of dismissal to reinstitute a voluntarily dismissed action would defeat the intention of the legislature in enacting rule 41. 300 N.C. at 180, 265 S.E.2d at 164.

55. 446 U.S. at 749.


58. Id. 4(j)(5)(c)(i).

59. 52 N.C. App. at 625-26, 279 S.E.2d at 96.


61. It generally should be unnecessary to serve the chairman of the board of education at home; he presumably could be located easily at the board's offices. The rule also authorizes service on the North Carolina Attorney General if an officer, director or agent cannot be located or served by registered mail.

62. "Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and unless the specific require-
In *Southern Athletic Bike v. House of Sports, Inc.*, plaintiff obtained a judgment against House of Sports, Inc., the entity primarily liable for the debt upon which plaintiff sued. Plaintiff then attempted to obtain a judgment against A.C. Burgess, Jr., guarantor of the debt. Plaintiff's attorney persuaded Judge Kirby to enter an order requiring Burgess "to appear and show cause why judgment . . . should not be entered against him individually." The order was served on Burgess, but he did not appear at the hearing, and judgment was entered against him as guarantor of the debt. Burgess had never been served with a summons and complaint on the original action. The court of appeals held that the trial court did not have personal jurisdiction over him, and that the "show cause" order was not a substitute for service of process. Therefore, "[t]he judgment entered against him [was] a nullity."

D. Appeal and Error

A party generally has a right to appeal a judgment only if that judgment is final; a final judgment is one that disposes of all claims against all parties in the action, so that no issues remain for judicial determination. There are, however, three exceptions to this requirement of finality. First, in multiple-claim or -party cases, a judge has authority to enter final judgment against one or more, but fewer than all, of the claims or parties if he expressly states in the record that there is "no just reason for delay." The two other exceptions arise when the court's order affects a substantial right of a party and would work an injury to that party if not corrected before an appeal from a judgment.
One circumstance in which substantial rights may be affected occurs when a judge issues an order that, if improperly issued, could force the parties to litigate twice. In *Roberts v. Hefner,* for example, plaintiffs and defendants had entered into a written agreement in which defendants agreed to construct a house on property owned by defendants and subsequently to convey both the land and the completed building to plaintiffs. Various disagreements arose between the parties before the house was completed, and plaintiffs filed a complaint seeking specific performance of the contract or, in the alternative, money damages and a temporary restraining order granting them exclusive possession of the premises. The court issued a temporary restraining order, and the parties then reached a partial settlement providing that defendants would convey title to the property to plaintiffs in return for the contract price of $80,000. Plaintiffs then filed an amended complaint seeking $20,000 in actual damages and $50,000 in punitive damages. Defendants counterclaimed, alleging breach of contract and requesting the various overages incurred in the construction of the house. Plaintiffs then pleaded the settlement as a defense to the counterclaim.

The trial court held a hearing on plaintiffs' plea and entered a judgment in plaintiffs' favor that defendants were not entitled to any overages per se, but that defendants would be allowed to assert their counterclaim as a set-off to the principal claim. Defendants appealed, and the court of appeals held that an appeal did rightfully lie from the trial court's order, because this order substantially affected the rights of defendants and could inure to their detriment if wrongly issued. The court designated as a "sub-

applied. While the attorney can discern some general trends by examining the cases, it is usually necessary to consider the specific facts of each case, particularly the procedural context of the trial court's order. See W. Shuford, North Carolina Civil Practice and Procedure § 54-5, at 419 (2d ed. 1981); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).


In another 1981 case, Shaver v. North Carolina Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981), the court of appeals held that defendants were not entitled to appeal from an order of the trial court denying their motion to dismiss three of plaintiff's causes of action on the grounds of lack of subject matter jurisdiction. The court deemed inapplicable N.C. Gen. Stat. § 1-277(b) (1969), which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." In so ruling, the court distinguished between jurisdiction over the "person or property of the defendant" and general subject matter jurisdiction.

Plaintiffs asserted that defendants were "unlicensed contractors" who, pursuant to N.C. Gen. Stat. § 87-1, could not enforce the contract or recover for services and materials under the theory of quantum meruit. 51 N.C. App. at 646, 277 S.E.2d at 446.

72. 51 N.C. App. 646, 277 S.E.2d 446 (1981).

73. Id. at 651, 277 S.E.2d at 449.
stantial right" the right of defendants to avoid two trials.\textsuperscript{75} The absence of a right of immediate appeal would have forced defendants to undergo a full trial on the merits of plaintiffs' claim and if they prevailed on the counterclaim, they would be limited to a set-off against the amount of plaintiffs' recovery. Moreover, if the jury determined that plaintiffs were not entitled to the relief prayed for, it would not consider defendants' set-off claim at all. In either case, if defendants were correct in their legal position and prevailed on appeal, they would then be forced to undergo another full trial to recover the full value of their counterclaims. The court stated that "the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice makes it clear that the judgment in question works an injury to defendants if not corrected before an appeal from a final judgment."\textsuperscript{76}

The court of appeals again labeled the right to avoid multiple litigation a substantial right in \textit{Briggs v. Mid-State Oil Co.},\textsuperscript{77} in which two former employees sued their employer for severance pay, basing their claims on breach of contract and fraud. The superior court rendered summary judgment on behalf of defendants on the fraud claim, and plaintiffs appealed. The court of appeals allowed the appeal, observing that if summary judgment had been improperly granted, plaintiffs had a substantial right to have their fraud claim tried before the same court that tried their breach of contract claim, given that the two claims arose out of the same core of operative facts.\textsuperscript{78}

The court of appeals reached a different and arguably inconsistent conclusion in \textit{Green v. Duke Power Co.}\textsuperscript{79} Plaintiff brought suit against Duke Power Company to recover for injuries received when she came in contact with an electrical transformer. Duke Power, pursuant to rule 14,\textsuperscript{80} impleaded two other defendants seeking contribution from each as joint tortfeasors. The third-party defendant then moved for summary judgment, which the superior court granted. Duke appealed the order, and the third-party defendants moved to dismiss the appeal as interlocutory.\textsuperscript{81} The court of appeals dismissed the appeal, stating that the avoidance of a separate trial by Duke Power Company against the joint tortfeasors did not constitute a substantial

\textsuperscript{75} Id. For a discussion of the one trial/two trial distinction see Survey of Developments in North Carolina Law, 1978—Civil Procedure, 57 N.C.L. Rev. 891, 907 (1979).
\textsuperscript{76} 51 N.C. App. at 651, 277 S.E.2d at 449.
\textsuperscript{78} Id. at 206-07, 280 S.E.2d at 503.
\textsuperscript{79} 50 N.C. App. 646, 274 S.E.2d 889 (1981).
\textsuperscript{80} N.C.R. Civ. P. 14 provides, in pertinent part:

At any time after commencement of the action a defendant, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.


\textsuperscript{81} For discussion of the related topic of the propriety of granting an appeal from an order dismissing a third party defendant, see Survey of Developments in North Carolina Law, 1978—Civil Procedure, 57 N.C.L. Rev. 891, 909 (1979).
right. The court distinguished *Oestreicher v. American National Stores, Inc.*, in which the North Carolina Supreme Court held that the plaintiff had a substantial right to have a claim for punitive damages tried together with a claim for actual damages based on a breach of the same contract. The *Green* court interpreted the holding in *Oestreicher* as involving but one legal right, with several elements of damages requested; the case before it, on the other hand, involved multiple parties. The court of appeals may have read *Oestreicher* too narrowly, however, because the supreme court's opinion had stressed the desirability of adjudicating all interrelated claims in one forum.

Another 1981 decision by the court of appeals also is arguably inconsistent with *Roberts* and *Briggs* and could result in wasteful litigation, an evil the exception to the rule against interlocutory appeals was designed to prevent. In *Bacon v. Leatherwood* plaintiff sought a declaratory judgment to determine whether a deed from her ex-husband conveyed good title. The husband's present wife had refused to sign the deed. In a second claim, plaintiff alleged that her husband had failed to convey a warranty deed to her without exception upon her tender to him of the agreed-upon price, thereby violating the terms of their divorce decree. Plaintiff also named the ex-husband's wife as a defendant, alleging that she contrived with the husband in an attempt to harass plaintiff and cause her additional expense by not joining in the deed. The superior court granted the ex-husband's motion to dismiss the complaint as it pertained to him, and plaintiff appealed. The court of appeals deemed the order from which plaintiff appealed "interlocutory," ruling that the order did not affect a substantial right of the plaintiff. She had adequately preserved the question of the propriety of the order by taking exception, so that the issue could be raised on appeal following a full trial on the merits of her claim against her ex-husband's current wife.

Another situation in which the substantial rights test typically is satisfied occurs when the trial court orders one of the parties either to act or to refrain

82. 50 N.C. App. at 649, 274 S.E.2d at 891.
83. 290 N.C. 118, 225 S.E.2d 797 (1976).
84. The court in *Oestreicher* stated that:

> The causes of action that the plaintiff allege are related to each other. He seeks punitive damages in the second cause because of the alleged misconduct of defendant in the first cause of action. [The trial judge] required plaintiff to try his first cause of action, relating the alleged fraudulent failure of the defendant to pay proper rental. To require him possibly later to try the second cause of action for punitive damages would involve an indiscriminate use of judicial manpower and be destructive of the rights of both plaintiff and defendant. Common sense tells us that the same judge and jury that hears the claim on the alleged fraudulent breach of contract should hear the punitive damage claim based thereon. The third cause of action alleged an anticipatory breach of contract. This arose from the same lease contract that gave birth to the first and second causes. By the same token, the same judge and jury should hear the third cause along with the first and second ones, assuming the plaintiff's cause is not subject to summary judgment.

290 N.C. at 130, 225 S.E.2d at 805.
85. See note 67 supra.
87. Id. at 591-92, 279 S.E.2d at 89. See also Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981).
from acting. In Atkins v. Beasley plaintiffs sued to obtain specific performance of an agreement. The trial court entered partial summary judgment, ordering defendants to replace existing concrete pipe in the subdivision in which plaintiffs resided, and to perform all acts necessary to provide the subdivision with proper drainage. The court of appeals allowed defendant's appeal from the order, relying in part on Wachovia Realty Investments v. Housing, Inc., in which the North Carolina Supreme Court held that a grant of partial summary judgment for a monetary sum against the defendant affected a substantial right of the defendant, and in part on English v. Holden Beach Realty Co., in which the trial court issued an injunction, pursuant to a grant of partial summary judgment, ordering the defendant to remove a roadway. The court of appeals in English held that the order affected a substantial right of the defendant and thus, an interlocutory appeal was appropriate.

E. Pleading

The North Carolina Supreme Court clarified the pleading requirements of the North Carolina Rules of Civil Procedure in two 1981 cases, citing with approval the rationale of Sutton v. Duke.

In Terry v. Terry the supreme court enumerated the requirements for pleading constructive, as compared to actual, fraud, both of which, under rule 9(b), must be "stated with particularity." In that case plaintiff sued his uncle, alleging that he had fraudulently obtained plaintiff's signature and the signature of plaintiff's fatally ill father on a document conveying his father's business to his uncle for a grossly inadequate sum. More specifically, the nephew averred that there had been a close business relationship between the father and defendant; that prior to the father's death defendant took increasing control of the business; that plaintiff and his father signed the agreement when the father was bedridden, virtually blind and deaf, unable to talk and suffering great pain; and that the sales price was grossly inadequate. The superior court dismissed the complaint upon defendant's 12(b)(6) motion, and

92. Id. at 12, 254 S.E.2d at 231.
the court of appeals affirmed. The North Carolina Supreme Court reversed and remanded, holding that the plaintiff's averments of constructive fraud were sufficient.

The court noted that rule 9(b)'s requirement of particularity must be reconciled with rule 8, which requires only a short and concise statement of claims. The court also looked to the rationale behind the particularity requirement of rule 9(b), which protects a defendant from unjustified injury to his reputation. As the court noted, the requirements for pleading constructive fraud are less stringent than those for pleading actual fraud, because constructive fraud is grounded in abuse of a confidential relationship rather than in specific misrepresentations. Therefore, a claim of actual fraud requires averments detailing time, place, content of the fraudulent representation, identity of the person making the representation and what the defendant obtained as the result of the alleged representations; an individual pleading constructive fraud need only allege the circumstances under which the confidential relationship was created, together with the facts that led up to and surrounded a breach of that confidence.

In the second 1981 case, Shugar v. Guill, the court reiterated the notice rationale behind the North Carolina Rules of Civil Procedure pleading requirements. In that case, a restaurant customer brought an action against the owner to recover compensatory and punitive damages for assault and battery. At the trial defendant moved to dismiss plaintiff's claim for punitive damages on the ground that plaintiff had failed to plead properly or to prove the claim. The trial court denied the motion and submitted to the jury the issues of liability and compensatory and punitive damages. The jury awarded punitive and compensatory damages, but the court of appeals reversed, agreeing with defendant's contention that plaintiff failed to plead properly, and va-

97. 46 N.C. App. 583, 265 S.E.2d 463 (1980).
98. 302 N.C. at 85-87, 273 S.E.2d at 678-79.
99. Id. at 84-85, 273 S.E.2d at 678.
103. Rhodes v. Jones, 232 N.C. 547, 61 S.E.2d 725 (1950). In finding plaintiff's allegations sufficiently particular in Terry, the court distinguished its decision in Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972), in which allegations of a mere family relationship, coupled with consultations among family members, were held insufficient to meet the pleading requirement of a confidential relationship. Id. at 96, 187 S.E.2d at 700. According to the court, plaintiff in Terry pleaded the necessary element of a confidential relationship when he alleged a trusted business relationship. 302 N.C. at 87, 273 S.E.2d at 679. Cf. Link, in which a husband and wife relationship was held sufficient to meet the requirement of a confidential relationship. 278 N.C. at 193, 179 S.E.2d at 704.
106. In North Carolina, a claim for punitive damages will lie only upon a showing of either actual or express malice or sufficient aggravated circumstances, including a reckless disregard of the plaintiff's rights. Van Leuven v. Akers Motor Lines, Inc., 261 N.C. 539, 135 S.E.2d 640 (1964); Allred v. Graves, 261 N.C. 31, 134 S.E.2d 640 (1964).
cated the punitive damage award. The supreme court reversed, holding that the allegations contained in plaintiff's complaint were sufficient to give defendant notice of the events or transactions that produced the claim sufficient to enable the adverse party to file a responsive pleading.

F. Default

Two 1981 North Carolina cases interpreted the technical requirements for the entry of default and established that a rule 60(b) motion for setting aside a default judgment is not tantamount to an appeal, in which substitution of judgment may be proper. In addition, the cases balanced the need for technical compliance with the Rules of Civil Procedure, notably rule 55(d), against the general goal of promoting justice.

In Peeples v. Moore plaintiff filed an action to recover for personal injuries. Defendant answered thirty-seven days after being served with the complaint, seven days after expiration of the thirty-day limit for filing a responsive pleading. More than a month after the answer was filed, the clerk, upon plaintiff's request, made an entry of default. Defendant then moved to have the entry set aside, alleging good cause. The trial court denied the motion and granted plaintiff a default judgment on the issue of liability. The court of appeals reversed the trial judge, holding that while the clerk had properly made the initial entry of default despite the presence of a belated answer, the superior court judge had abused his discretion in failing to set aside the entry of default. On appeal, the North Carolina Supreme Court in review held that a clerk is not permitted to make an entry of default when an answer is on file, however untimely the filing may have been. The court construed literally the requirement of rule 55 that a clerk is empowered to enter default when "a party has failed to plead," interpreting "failure to plead" to mean an absolute failure to answer at any time prior to the entry of default. The court of appeals had differed with this reading of the statute, engrafting upon it the requirement of a timely answer.

108. 304 N.C. at 337, 283 S.E.2d at 510. Plaintiff's allegations provided, in pertinent part, as follows: "[O]n or about the 19th day of October, 1978, the defendant, without cause, did intentionally, willfully and maliciously assault and batter the plaintiff, inflicting on him serious and permanent personal injuries . . . ." 304 N.C. at 335-36, 283 S.E.2d at 509. Under decisions prior to 1970, the plaintiff would have been required to state with particularity the facts illustrating such aggravating circumstances as would justify an award of punitive damages. Clemmons v. Life Ins. Co. of Ga., 274 N.C. 416, 163 S.E.2d 761 (1968); Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966).
111. N.C.R. Civ. P. 12(a)(1). A party can file for enlargement of the time in which an answer must be filed under N.C.R. Civ. P. 6(b).
114. Id.
According to what the court of appeals deemed the better reasoned view, the burden would be placed on the defendant either to adhere to the time limit for answering, upon penalty of an entry of default, or to move the court for a time extension in which to file a responsive pleading. Of course, the entry of default could always be set aside upon a showing of a good cause. The supreme court's view, on the other hand, prevents the entry of default ab initio if the defendant had filed an answer, thus placing, in practical effect, a burden on the plaintiff "to race to the courthouse" to request an entry of default before the defendant files his untimely answer. The clear lesson is that plaintiff's attorney should exercise greater vigilance in watching the passage of time following service of the complaint on a defendant.

In *Whitfield v. Wakefield* plaintiff sought damages arising out of his purchase of books from defendant. Plaintiff filed a complaint, serving a copy on defendant, a New Hampshire resident. Plaintiff received a letter from defendant acknowledging receipt of the complaint and informing plaintiff that he believed that the averments constituted nothing but "rhetoric" and that his lawyer thought the complaint "highly laughable [and] a disgrace." Plaintiff, after the time for filing a responsive pleading had expired, requested that the clerk make an entry of default, and the clerk complied. Plaintiff then moved for default judgment, which the district court judge granted, expressly ruling that defendant had not filed a responsive pleading or otherwise appeared. Defendant moved to set the default judgment aside, arguing that he had "appeared" through the letter sent to plaintiff and therefore should have been given three days' notice of the hearing on plaintiff's application for judgment by default.

A different district court set the judgment aside, finding that, contrary to the prior judge's findings of fact, defendant had "appeared" and therefore should have been given notice of the hearing. Plaintiff appealed, and the court of appeals vacated and remanded, holding that the second judge had no power to substitute his finding for that of the first judge, even if the first judge had been wrong; a motion to set aside the default judgment could not be used as a substitute for appellate review. Moreover, even assuming that the letter did constitute an appearance, the default judgment should not have been

---

55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972). In *Bell* the court noted that if the defendant does not answer within 30 days, without requesting an extension, the plaintiff may move for entry of default. 299 N.C. at 720, 264 S.E.2d at 105. In *Bell*, however, no answer had been filed.

116. 48 N.C. App. at 501, 269 S.E.2d at 697.
119. Id. at 125, 275 S.E.2d at 264.
120. Id. An "appearance" contemplates some sort of submission to the court but does not require that a defendant have actually answered the complaint. See, e.g., *Webb v. James*, 46 N.C. App. 551, 265 S.E.2d 642 (1980) (defendant appeared when he negotiated a continuance of the action).
121. Under N.C.R. Civ. P. 55(b)(2), a defendant who has "appeared" is entitled to three days' notice of the hearing on the plaintiff's application for a judgment by default.
122. 51 N.C. App. at 126, 275 S.E.2d at 265.
123. Id.
set aside despite a technical violation of rule 55(b)(2). In light of defendant's referral to the summons served upon him as "laughable," and his failure to answer, justice would not have been served by designating the failure to give defendant notice an extraordinary circumstance of the type that is required by rule 60(b)(6).

G. Rule 60(b): Relief from Judgment

Rule 60(b)(1) of the North Carolina Rules of Civil Procedure provides that relief may be obtained from a judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect." Normally, motions made pursuant to this rule must be made not more than one year after entry of judgment. In Love v. Moore, however, the court of appeals found an exception to the one-year limit.

The saga of this simple personal injury action spans more than a decade and has yet to come to a conclusion. On October 30, 1970, plaintiff was injured by one Frank Willard Moore in an automobile accident. After the accident, plaintiff's attorney entered into settlement negotiations with Nationwide Mutual Insurance Company under North Carolina's assigned risk plan. These negotiations proved unsuccessful, prompting plaintiff's attorney to file a complaint on October 29, 1973, naming Moore as defendant. The action came for trial on April 30, 1975, and defendant Moore failed to appear. Waiving trial by jury, plaintiff presented her evidence and obtained judgment.

Apparently unable to locate Moore, plaintiff on May 31, 1977, filed a complaint against Nationwide to collect on her judgment against Moore. In that action, the trial court ruled that plaintiff's 1975 judgment was void for lack of personal jurisdiction over Moore, and for failure to comply with rule

---

124. Id. at 127, 275 S.E.2d at 266.
125. Id.
126. N.C.R. Civ. P. 60(b)(1).
127. Motions for relief "shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken." N.C.R. Civ. P. 60(b)(6).
129. N.C. Gen. Stat. § 20-279.34(2) (1978) provides that the Commissioner of Insurance shall devise a plan for the "equitable apportionment among... insurance carriers of those applicants for motor vehicle liability insurance on motor vehicles registered or principally garaged in this State who are unable to secure such insurance through ordinary means." Participation in the plan is mandatory for all motor vehicle liability insurance carriers.
130. 54 N.C. App. at 407, 283 S.E.2d at 802. The insurer, which was not unaware of the insured's identity, or of its potential liability, made no attempt during settlement negotiations to correct plaintiff's misunderstanding. The court thus rejected the insurer's attack on the plaintiff's service of process on Moore by publication, reasoning that the risk that Moore would be misled by name difference was reduced by the notice reference to details of the accident. Id. at 407, 410, 283 S.E.2d at 802, 804.
131. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 445, 263 S.E.2d 327, 338, disc. rev. denied, 300 N.C. 198, 269 S.E.2d 617 (1980). Nationwide impleaded Moore in that action alleging that Moore violated the terms of the policy by failing to notify Nationwide of plaintiff's earlier action and that Moore was therefore liable to Nationwide for any amount Nationwide was found to be liable to plaintiff. On this third-party complaint, Nationwide obtained a default judgment against Moore for failure to plead or defend.
on entry of default before seeking judgment. The court of appeals in *Love v. Nationwide Mutual Insurance Co.* reversed the trial court's ruling but nevertheless affirmed the dismissal of the action. In a case of first impression, the court determined that plaintiff's 1975 judgment was in effect a default judgment against Moore, Nationwide's assigned risk. The court then held that the judgment was unenforceable against Nationwide because of plaintiff's failure to fulfill the notice requirements of G.S. 20-279.21(f)(1).  

On June 10, 1980, nearly eight years after filing the original complaint, plaintiff successfully moved in the trial court to vacate the "unenforceable judgment" and was allowed to serve Nationwide with the required notice. From a denial of its motion to strike the order to vacate, Nationwide appealed.  

In a remarkable about-face, the court of appeals affirmed the trial court's rulings. Noting that rule 60(b) allows a movant to set aside its own judgments, the court upheld the trial court's determination that plaintiff followed the law when she obtained a judgment against Moore without giving notice to Nationwide. The court reasoned that because plaintiff did not know that the judgment obtained would be held to be a default judgment, and because Nationwide did not inform her that its insured was an assigned risk, she "acted in compliance with the facts and law as she reasonably understood them in giving notice only to Moore."  

---

132. 45 N.C. App. 444, 263 S.E.2d 337 (1980)  
133. Id. at 448, 263 S.E.2d at 340.  
As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action.  
135. 54 N.C. App. at 408, 283 S.E.2d at 803. Plaintiff's motion to vacate did not specify the rule number under which she was proceeding, as required by N.C. Gen. R. Practice for Superior & Dist. Cts. 6. Id. at 412, 283 S.E.2d at 805 (Vaughn, J., dissenting).  
136. The former statute governing relief from judgments, N.C. Gen. Stat. § 1-220 (1969), provided for relief to "a party from a judgment, order, verdict or other proceeding taken against him." N.C.R. Civ. P. 60(b), however, imposes no such restriction and it is now clear that any party may seek relief under the rule. See Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979); W. Shuford, supra note 70, § 60-4, at 478-79.  
137. 54 N.C. App. at 409, 283 S.E.2d at 803. This reasoning does not square easily with the court's earlier statement in *Love v. Nationwide Mut. Ins. Co.*:

The burden which our holding places on plaintiff's counsel, to inquire into the insurance status of the defendant and in appropriate cases notify the insurer, is slight compared to the damage which could result to the insurer if it is effectively foreclosed from defending against the action. The giving of such notice is a condition precedent to maintaining a subsequent action against the insurer on the judgment, and the plaintiff's failure to provide notice here operates as a bar to her action against Nationwide.  
45 N.C. App. at 448-49, 263 S.E.2d at 340 (emphasis added). Under this reasoning, it is irrelevant that plaintiff obtained a default judgment; giving notice to the insurer was the plaintiff's burden and a condition precedent to any enforceable judgment against the insurer.  

Similarly, it is incomprehensible why failure to give the insurer proper notice barred relief in an independent action, while such failure did not bar relief on a motion in the cause. Rule 60(b)(6) states that "[t]he procedure for obtaining any relief from a judgment, order, or proceeding
The court rejected Nationwide's contention that the trial court erred in vacating the judgment against Moore and authorizing notice to Nationwide more than seven years after the original complaint. In reasoning that contradicts its earlier statements in *Love v. Nationwide Mutual Insurance Co.*, the court observed that "if [G.S. 20-279.21(f)(1)] is construed as placing the burden on the claimant to ascertain whether an insured is an assigned risk in order that the claimant may comply with the notice requirements thereby imposed, failure to do so is, in all likelihood, a matter of attorney neglect." The court held that failure to inquire into the status of Nationwide's insured was excusable neglect under the circumstances and therefore upheld plaintiff's motion for relief.

Aside from completely disregarding its earlier holding in *Love v. Nationwide Mutual Insurance Co.*, the court applied a rule that clearly was not available. As noted earlier, a motion for relief from judgment on the grounds of excusable neglect must be made within one year from entry of judgment. In holding that failure to inquire into the status of Nationwide's insured was excusable neglect—and thereby upholding plaintiff's motion—the court in effect granted relief under rule 60(b)(1) more than four years after the time for filing such motion had expired.

Not all rule 60(b) motions, however, are construed so liberally. This is especially true of motions for relief from consent judgments. The recent...
case of *Wachovia Bank & Trust Co. v. Bounous* illustrates the stringent burden facing movants requesting relief from consent judgments.

In that case, Wachovia claimed title to property under a will devising a life estate to defendant's sister, remainder in trust to Wachovia. Shortly after the death of defendant's sister, Wachovia sought removal of defendant and his personal property from the land. Upon defendant's failure to move, Wachovia filed suit. Sometime thereafter a consent judgment was entered which recited that defendant was to relinquish any claim to the property by executing a quit-claim deed to Wachovia. Nine days later, however, defendant moved for relief pursuant to rule 60(b)(6), asserting that he did not understand the nature and effect of the consent judgment and that the trial court erred by failing to make an independent determination of the factual and legal basis for the entry of such judgment.

At the hearing on the motion, defendant's evidence showed that he was almost eighty years of age and had a severe hearing defect, a first-grade education and an incapacity to read or understand some words. Defendant testified that he did not talk to his lawyers because he was unable to hear them; defendant's attorney, however, testified that he communicated with defendant at all times and that the documents were explained to defendant in a loud voice.

Even assuming that defendant's attorney did attempt to explain the nature and effect of the consent judgment, it is safe to conclude that defendant did not comprehend the explanation. From a denial of his rule 60(b)(6) motion, defendant appealed.

In response to defendant's contention that relief should be granted because the trial court failed to conduct an independent hearing on the existence of actual consent of all parties, the court of appeals held that a judge may properly rely on the signatures of the parties as evidence of consent to a judgment. The court recited "the general rule that one who signs a contract is presumed to know its contents," and added that there was no evidence before the trial judge alerting him to the alleged lack of consent. The court distinguished *Owens v. Voncannon*, *Lee v. Rhodes* and *Lalanne v.*...
by noting that in "all those cases the lack of assent of one of the parties to the judgment was manifested to the trial court before the judgment was signed or one of the parties failed to sign the judgment." Holding that the record contained competent evidence supporting the trial judge's findings of fact, the court upheld the denial of defendant's motion.

Although this decision is procedurally correct, it is difficult to envision a case more deserving of equitable relief. This case thus illustrates that relief will not be dispensed lightly from rule 60(b)(6)'s reservoir of equity.

H. Rule 50 Motion for Directed Verdict and JNOV

1. JNOV

A motion for JNOV under rule 50 of the North Carolina Rules of Civil Procedure may be granted only "if it appears that the motion for directed verdict could properly have been granted." Under the plain meaning of the rule, a motion for directed verdict at the close of all the evidence is an absolute prerequisite to the right to move for JNOV. The existence of this deceptively simple requirement, however, has not yet been fully realized by some courts and litigants.

In Graves v. Walston, for example, the Supreme Court of North Carolina reversed the court of appeals on two grounds. Without having moved earlier for a directed verdict, plaintiffs' counsel made three motions following an unfavorable jury verdict, one of which was a motion for JNOV. The trial court granted the motion and the court of appeals affirmed. In reversing the JNOV, the supreme court stated that the rationale underlying the pre

---

154. 227 N.C. 240, 41 S.E.2d 747 (1947) (plaintiff allowed to repudiate previous open-court consent to judgment prior to the signing and entry of the judgment).
155. 43 N.C. App. 528, 259 S.E.2d 402 (1979) (defendant allowed to repudiate previous open-court consent to judgment prior to the signing and entry of the judgment).
156. 53 N.C. App. at 706, 281 S.E.2d at 715 (emphasis in original).
157. "While Rule 60(b)(6) has been described as a 'grand reservoir of equitable power to do justice in a particular case,' . . . it should not be a 'catch-all' rule." Norton v. Sawyer, 30 N.C. App. 420, 426, 227 S.E.2d 148, 153, disc. rev. denied, 291 N.C. 176, 229 S.E.2d 689 (1976) (quoting 7 J. Moore, Moore's Federal Practice § 60.27, at 375 (2d ed. 1975)). The setting aside of a judgment pursuant to Rule 60(b)(6) "should only take place where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist." Baylor v. Brown, 46 N.C. App. 664, 670, 266 S.E.2d 9, 13 (1980). For the four factors used in determining whether this two-prong test has been met, see Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501-02 (1978).
159. Id.
161. Id. at 336, 275 S.E.2d at 488. Plaintiff's counsel also moved to set aside the jury's answers to two issues of fact, and for a new trial. The former was expressly denied by the court of appeals; the latter was never ruled on. Id. at 337, 275 S.E.2d at 488.
requisite of a motion for directed verdict is to afford the non-movant the opportunity to cure defects in proof that might otherwise prevent submission of the case to the jury.\textsuperscript{163} A motion for JNOV without previous notice of possible deficiencies of proof would foreclose the possibility of cure except by instituting a new trial.\textsuperscript{164}

The second ground for the court's reversal was the failure of the trial court to rule on plaintiffs' postverdict motion for a new trial.\textsuperscript{165} Rule 50(c)(1) provides that, whenever a motion for JNOV is joined with a motion for a new trial, and the motion for JNOV is subsequently granted, the trial court must also rule on the new trial motion.\textsuperscript{166} This ruling is necessary to enable the appellate court to act properly on the trial court's decision if that decision is vacated or reversed. In \textit{Graves}, however, the supreme court chose not to remand to the trial court for a conditional ruling on the motion for new trial because "[i]t would be inappropriate for another superior court judge who did not try the case to now pass upon plaintiffs' alternative motion for a new trial."\textsuperscript{167} The court therefore remanded the case for a new trial.\textsuperscript{168}

\textit{Graves} thus illustrates two simple, but often overlooked, points. First, to preserve the availability of a motion for JNOV, the movant must first move for a directed verdict at the close of all the evidence. Second, when a motion for JNOV is joined with a motion for a new trial, the trial judge must rule on both motions, and failure to do so may be grounds for a new trial.\textsuperscript{169}

2. Directed Verdict

Until relatively recently, a directed verdict in favor of the party with the burden of proof was rarely allowed.\textsuperscript{170} In \textit{Paccar Financial Corp. v. Harnett}

\begin{footnotes}
\item[163] 302 N.C. at 338, 275 S.E.2d at 489 (citing 5A J. Moore, Moore's Federal Practice § 50.08 (2d ed. 1980); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537 (1971)).
\item[164] 302 N.C. at 338, 275 S.E.2d at 489.
\item[165] Id. at 339, 275 S.E.2d at 489. See note 163 supra.
\item[166] N.C.R. Civ. P. 50(c)(1) provides, in pertinent part, as follows:
If the motion for judgment notwithstanding the verdict . . . is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.
\item[167] 302 N.C. at 340, 275 S.E.2d at 490. The court noted that the special superior court judge who tried the case was no longer on the bench. Id.
\item[168] Id. at 342, 275 S.E.2d at 491.
\item[169] See notes 165-68 and accompanying text supra. See also Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973) (trial court failed to rule on defendants' motion for new trial that was joined with motion for JNOV; on reversal of JNOV and remand for entry of judgment for plaintiffs, defendants were allowed to appeal therefrom and to assert errors that entitled them to new trial).
\item[170] Beginning with dictum in \textit{Cutts v. Casey}, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971), the principle began to emerge in North Carolina that a party with the burden of proof may be entitled to a directed verdict when the credibility of that party's witnesses is established as a matter of law. This principle was later recognized in \textit{Murray v. Murray}, 296 N.C. 405, 250 S.E.2d 276 (1979). It was not until \textit{North Carolina Nat'l Bank v. Burnette}, 297 N.C. 524, 537-38, 256 S.E.2d 388, 396 (1979), however, that the supreme court expressly outlined the circumstances in which the credibility of a movant's witnesses can be established as a matter of law for purposes of directing a verdict in the movant's favor. See Survey of Developments in North Carolina Law, 1979—Civil Procedure, 58 N.C.L. Rev. 1261, 1270-73 (1980).
\end{footnotes}
the court of appeals followed the emerging trend and upheld the trial court's granting of a directed verdict in favor of the party with the burden of proof when that party's evidence did not depend on the credibility of its witnesses.

In *Paccar* plaintiff brought suit seeking to foreclose on its perfected security interest in a truck and moved for a directed verdict at the close of all the evidence. The trial court submitted three issues to the jury but peremptorily instructed them to answer the first issue in the affirmative, which was whether plaintiff was entitled to possession of the truck. With the jury hung on the two remaining issues and a mistrial subsequently declared, plaintiff successfully moved pursuant to rule 50(b) for judgment in accordance with the directed verdict of plaintiff's right to immediate possession of the truck.

In its affirmance, the court of appeals noted that while a verdict may not be directed in favor of a party having the burden of proof when his right to recover depends on the credibility of his witnesses, a verdict may be directed when his right to recover does not so depend, and when the pleadings, evidence and stipulations show that there is no issue of genuine fact for jury consideration. Applying the above principle, the court found that the pleadings and evidence established uncontroverted facts that entitled plaintiff to possession of the truck as a matter of law and therefore upheld the directed verdict.

This case exemplifies a principle that is now established law in North Carolina. Optimal utilization of this principle will likely be realized when the party with the burden of proof moves initially for summary judgment and the non-movant narrowly escapes this motion. When the action proceeds to trial the movant may then be in position to call his adversary's bluff with a motion for directed verdict even though the movant bears the burden of proof.

### I. Statutory Developments

Rule 4(b) of the North Carolina Rules of Civil Procedure was amended by the General Assembly in 1981 to require that a summons state that a request for admission is being served with the summons if a request is to be


173. 51 N.C. App. at 5, 275 S.E.2d at 245. Although the court of appeals labeled plaintiff's motion a motion for directed verdict, id. at 6, 275 S.E.2d at 247, it was technically a motion for JNOV. See N.C.R. Civ. P. 50(b)(1).

174. 51 N.C. App. at 5, 275 S.E.2d at 245.

175. Id., 275 S.E.2d at 246 (citing Cutts v. Casey, 278 N.C. 390, 417, 180 S.E.2d 297, 311 (1971)).

176. Id.

177. Id. at 9-10, 285 S.E.2d at 248-49. In somewhat similar vein, the court of appeals in Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 278 S.E.2d 893, disc. rev. denied, 304 N.C. 193, 285 S.E.2d 96 (1981), held that the depositions of two doctors concerning the cause of plaintiff's injuries were not sufficient as a matter of law to refute plaintiff's contention of a different cause, and thus summary judgment was not granted.
served. Former subdivision 4(j)(9)(c) has been redesignated 4(j1), and the first sentence has been simplified to read, "A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication." A new subdivision 4(j2) has been added regarding proof of service. Former subdivision 4(j)(9)(d) has been redesignated 4(j3) and the last sentence has been rewritten. A new subdivision to rule 4 has been added, (j4), providing that parties cannot attack judgments by default on the ground that personal service rather than service by registered mail could have been made, or on the ground that due diligence to serve personally or by registered mail was not exercised when service was effected by publication if the party had actual notice of the pending action. Former rule 4(j1) has been redesignated (j5). Finally, former rule 4(j)(9), except for subdivisions (c) and (d), has been repealed.

The "amount in controversy" maximum for small claims actions in district court has been raised to $1000 from $800.

DEBRA LEE FOSTER
WILLIAM CLYDE MORRIS, III
JEFFREY NEIL ROBINSON
III. COMMERCIAL LAW

A. Contracts

1. Interpretation of Insurance Contracts

The North Carolina Supreme Court construed provisions of insurance

1. Additional Developments: In United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981), a diversity action for breach of contract, plaintiff maintained that North Carolina law imposes a good faith limitation upon a party's exercise of an unconditional right of contract termination. Stating that the facts did not call for a resolution of the question, the court decided the case on other grounds. However, Judge Haynsworth indicated that good faith may be required in certain situations: "When termination is oppressive, when it would frustrate expectations reasonably held, though unsecured by express contractual agreements and when it will impose substantial losses upon the other party, application of the principle may well be called for . . . ." Id. at 989. The court also rejected the contention that good faith requires a party to notify the other party promptly of his intent to exercise an unconditional right of termination; they specifically referred to a tenant's right not to inform his landlord of his intent to end the lease until notice is required.

In Burke County Pub. Schools Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504, cert. dismissed as improvidently granted, 304 N.C. 187, 279 S.E.2d 350 (1981), plaintiff sued for contractor's failure to properly install a school roof. Defendant general contractor was able to prove that damage to the roof resulted solely from deficiencies in the design and specifications furnished by plaintiff. The court adopted the general rule that a contractor is not liable for the consequences of defects in plans and specifications when the contractor is required to do and does comply with the plans and specifications prepared by the owner and his architect. See also H. L. Coble Constr. Co. v. Housing Auth., 244 N.C. 261, 93 S.E.2d 98 (1956) (allegation that plaintiff had to correct the settling of floor slabs constructed in accordance with plans and specifications provided by the defendant's architect stated a good cause of action).

In Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981), cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981), the court of appeals applied the judicially mandated rule that allows payment of interest from the date of breach when the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence. Id. at 627, 274 S.E.2d at 902; see General Metals v. Truitt Mfg. Co., 259 N.C. 709, 712, 131 S.E.2d 360, 363 (1963). The judicial rule expands the statutory language of G.S. 24-5, which requires the payment of interest on the principal amount recovered in contract suits "from the time of rendering judgment thereon until it is paid and satisfied." N.C. Gen. Stat. § 24-5 (Cum. Supp. 1981). Despite a 1981 amendment to G.S. 24-5, which allows interest on money judgments for compensatory damages from the time the action is instituted when the claim is covered by insurance, the legislature has not incorporated the judicial rule into the statute. See Law of May 5, 1981, ch. 327, §1, 1981 N.C. Sess. Laws, 1st Sess. 369.

contracts in three cases in 1981. In *Lovell v. Rowan Mutual Fire Insurance Co.* the supreme court decided that an innocent wife could recover under an insurance policy issued to her husband that insured property owned by them as tenants by the entirety, even though the loss resulted from the husband's intentional burning of the property. After her husband intentionally destroyed their house by fire, plaintiff brought suit to recover the value of her interest in the realty from defendant insurance company. The insurance policy named only the husband as insured and beneficiary, and provided that the entire policy would be void in case of fraud by the insured.4

The court first decided that even though only the husband was named as insured, the wife also was entitled to recover under the policy. The court found that both case precedent and statutory language gave defendant sufficient notice that "by insuring the interest of the husband it also insured the interest of plaintiff wife."5

Jurisdictions differ regarding recovery by an innocent spouse of a share of the insurance proceeds in this situation.6 "Generally speaking, the question whether an innocent coinsured may recover on property insurance after another coinsured has committed some act of fraud . . . ordinarily depends upon whether the interests of the coinsureds are joint or severable."7 The supreme court found that the interests in the cash proceeds of the insurance policy are governed by the law of contracts, rather than the law of tenancies by the entirety, and held that the interest of the coinsureds are severable when contract principles are applied.8 Interests in the proceeds of an insurance contract are held by the coinsureds in the same way as other personal property.9 The court approved10 the reasoning in *Howell v. Ohio Casualty Insurance Co.*, which the contract rights were treated as severable personal property that could be possessed by either spouse.

Once the court established that the interests in the proceeds were severable, it was left with the simple construction of a contract between the wife and
the insurance company. A party cannot be made to forfeit his separate contractual rights merely because of another’s wrongful acts. It would therefore be unjust, in the context of a spouse’s separate contractual arrangements, to hold the wife responsible for the wrongful acts of her husband.

The decision in Lovell demonstrates that North Carolina will apply rules of contract law, rather than notions derived from the nature of tenancies, when issues arise concerning insurance proceeds from real property. Lovell also indicates a desire not to treat the holders of personal property as tenants by the entirety. Although other jurisdictions have split on the issue decided in this case, North Carolina seems to have opted for the more modern view of the marital relationship by rejecting the common-law doctrine of marital unity when spouses enter into insurance contracts that cover jointly held property. It also seems fairer to allow the innocent spouse to be compensated for the real loss he has suffered, rather than automatically to hold him accountable for the acts of the other spouse.

In Maddox v. Colonial Life & Accident Insurance Co. the supreme court also interpreted specific provisions of an insurance policy. The decedent was insured “against loss resulting directly and exclusively of all other causes from . . . accidental means.” The policy did not cover suicide, and paid only one-fifth face value for death resulting from “shooting self-inflicted.” Both plaintiff-wife and defendant-insurance company agreed that the insured died as a result of an accidental shooting. All that could be established was that the gun was fired while in its holster, that the gun was found a few feet from the insured’s body, and that the gun could fire if it struck the ground. Plaintiff sought to collect the full amount, but defendant claimed only one-fifth was payable because the shooting was “self-inflicted” within the meaning of the policy.

The critical issue was the construction of the term “shooting self-inflicted.” The court held that the reduction clause applied only if “the insured intended the act of shooting, which shooting ultimately resulted in his death, but did not intend to kill himself.” Thus, for a shooting to be self-inflicted,

12. 302 N.C. at 153-54, 274 S.E.2d at 172.
13. Id. at 154, 274 S.E.2d at 172-73 (citing Steigler v. Insurance Co. of N. Am., 384 A.2d 398 (Del. 1978)).
14. Id.
15. See Forsyth County v. Plemmons, 2 N.C. App. 373, 163 S.E.2d 97 (1968) (insurance proceeds resulting from fire are not held in tenancy by the entirety). For further discussion of the legal status of proceeds from property held in entirety, see this Survey, Property Section, at 1421.
16. The Lovell court recognized and rejected the view reflected in Rockingham Mut. Ins. Co. v. Hummel, 219 Va. 803, 250 S.E.2d 774, 776 (1979) that interests in insurance on jointly held property are also jointly held. 302 N.C. at 154-55, 274 S.E.2d at 173; see also In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981) (surplus funds generated by a foreclosure sale are held as tenants in common); see this Survey, Property Section, at 1422, for a discussion of the implications of these decisions for North Carolina property law.
18. Id. at 655, 280 S.E.2d at 911.
19. Id. at 650, 280 S.E.2d at 908.
20. Id. at 652, 280 S.E.2d at 910.
the insured had to shoot himself with the intent of employing a firearm.\footnote{21} Because the insurance company could not prove that the decedent had intended to pull the trigger, the company had failed to establish any intentional employment of the firearm by him.

One questionable portion of the opinion is the majority's construction that an insured would be covered if he intended the act of shooting, but did not intend to kill himself. This interpretation raises the issue whether the death was brought about by "accidental means"; if not, the insured would not be covered at all. As the dissent pointed out, prior cases held that the insured could not have been shot by accidental means unless "the causal factor of pulling the trigger" was "unusual, unforeseen and unexpected."\footnote{22} The court in Maddox appears to have strayed from placing the emphasis on the character of the causation in deciding whether death occurred by accidental means, and instead has focused on the foreseeability of result. If it is possible to intend to pull the trigger and still recover under this policy, one can also argue that any death not reasonably foreseeable as following from a voluntary act is the result of accidental means. This implication would represent a broad expansion of the scope of an insurer's liability under policies compensating for death resulting from accidental means.\footnote{23}

In a third insurance case decided by the supreme court, Great American Insurance Co. v. C.G. Tate Construction Co.,\footnote{24} the court held that an insurer may not deny coverage based on the insured's noncompliance with a notice provision unless the insurer can prove that it has been prejudiced by the delay in receiving notice.\footnote{25} The Tate decision explicitly overruled earlier precedent that had adopted a strict constructionist view of insurance contract notice provisions.\footnote{26}

In Douglas v. Nationwide Mutual Insurance Co.,\footnote{27} insurance coverage was provided under an omnibus clause protecting anyone injured by the car if the driver were acting with the owner's permission. The owner gave his permission to the driver but was mistaken as to his identity. As the policy did not define "permission," the court of appeals applied general principles of contract and tort law and concluded that a unilateral mistake does not negate permission in the absence of fraud, undue influence, oppression or knowing exploita-

\footnote{21. See National Sec. Ins. Co. v. Ingalls, 56 Ala. App. 498, 501, 323 So.2d 384, 386 (Ala. Civ. App. 1975) ("In ordinary parlance, to shoot oneself connotes that the injury results from direct, immediate, and conscious employment of a firearm by the victim.").}
\footnote{22. 303 N.C. at 656, 280 S.E.2d at 912 (quoting Fletcher v. Security Life & Trust Co., 220 N.C. 148, 150, 16 S.E.2d 687, 688 (1941)).}
\footnote{23. See Fletcher v. Security Life & Trust Co., 220 N.C. 148, 16 S.E.2d 687 (1941).}
\footnote{24. 303 N.C. 387, 279 S.E.2d 769 (1981).}
\footnote{25. Id. at 396, 279 S.E.2d at 711.}
\footnote{27. 54 N.C. App 334, 283 S.E.2d 166 (1981).}
tion of the mistake. Since there was no indication of such abuse, the insured's mistake did not relieve the insurer of its obligations under the policy.

2. Formation

The North Carolina Court of Appeals considered the ramifications of a three-party contract in Dealer Specialties, Inc. v. Neighborhood Housing Services, Inc. 
28 Defendant Neighborhood Housing Services assisted homeowners in making home improvements by financing and supervising renovations. To encourage plaintiff to sell building materials on credit to a building contractor assigned to one of defendant's projects, defendant told plaintiff that the final draw on the project would be a check payable jointly to plaintiff and the contractor.
29 The contractor left the project prior to completion and, consequently, prior to the final draw without paying plaintiff for the materials purchased. Plaintiff brought suit against Neighborhood Housing Services on its obligation to make the last check payable jointly to plaintiff and the contractor.

The majority of the court upheld the lower court's finding for plaintiff that the oral contract was a direct unconditional promise between plaintiff and defendant.
30 Furthermore, the majority indicated that the statute of frauds was not applicable because the goods were received and accepted by the contractor.
31 Judge Becton's dissent agreed with the majority's finding that the oral communication between plaintiff and defendant "constituted an original, not a collateral, obligation . . . ."
32 He argued, however, that Neighborhood Housing Services' promise to make joint payment was conditioned on the occurrence of several events. One such event was the payment to the contractor of the final draw on the project.
33 By delivering goods to the contractor on credit, plaintiff took the risk that the final draw would be made to someone other than the original contractor. Since the final draw was not paid to the contractor with whom plaintiff dealt, the dissent argued that Neighborhood Housing Services' performance should have been excused.

In Southern Spindle & Flyer Co. v. Milliken & Co.,
35 the court of appeals

---

29. Plaintiff's testimony indicated that the decision to sell goods to the contractor on credit was based on defendant's promise that the final draw on the project would be a check issued jointly to plaintiff and the contractor. Plaintiff took this as assurance that the contractor would not make his final draw until payment was made. Id. at 51, 283 S.E.2d at 158-59.
30. Id. at 53, 283 S.E.2d at 160. If the contract had not been a direct or original promise, the contract would fall within G.S. 22-1, which precludes actions on promises to answer for the debt of another that are not in writing. N.C. Gen. Stat. § 22-1 (1965); see 54 N.C. App. at 52, 283 S.E.2d at 159.
31. 54 N.C. App. at 54, 283 S.E.2d 160. G.S. 25-2-201(3)(e) provides that contracts for the sale of goods at a price of $500 or more do not require a writing if the goods have been received and accepted. N.C. Gen. Stat. § 25-2-201(3)(e) (1965).
32. 54 N.C. App. at 55, 283 S.E.2d at 161 (1981) (J.Becton, dissenting); see text accompanying note 30 supra.
33. Id. at 55-56, 283 S.E.2d at 161.
34. Id. at 56-57, 283 S.E.2d at 161-62.
COMMERCIAL LAW

held that an arbitration term in a commercial form contract forwarded to plaintiff after oral agreement between the parties did not become part of their contract.\textsuperscript{36} The parties had entered into an oral contract for plaintiff to perform services for defendant. After plaintiff had begun performance, defendant sent plaintiff an unsolicited form titled “Purchase Order,” on which defendant had typed a description of the services that plaintiff was to perform. The “Purchase Order” form included a provision, among other printed items, requiring submission of all disputes to arbitration.\textsuperscript{37} Since the parties had already formed a valid oral contract, and since plaintiff did not sign or otherwise assent to the form containing the arbitration agreement, the court held that plaintiff had never accepted defendant’s offer to alter the contract.\textsuperscript{38} Hence, the printed terms contained in the “Purchase Order” form, including the arbitration agreement, did not become a part of the contract.\textsuperscript{39}

3. Consideration

\textit{In Holt v. Holt}\textsuperscript{40} the North Carolina Supreme Court held that plaintiff’s promise to relinquish his right to litigate the validity of a codicil to a will did not constitute sufficient consideration to support enforcement of defendants’ promises to plaintiff not to probate the codicil where there was no bona fide dispute as to the will’s validity. Plaintiff and defendants were brothers. Their mother’s will divided her property equally among her three sons; a subsequent codicil, however, disinherited plaintiff. Defendants alleged that upon the reading of the codicil, plaintiff became enraged and threatened to commence a lawsuit unless defendants conveyed a share of the estate to him.\textsuperscript{41} Plaintiff alleged that defendants had agreed that, in return for plaintiff’s promise not to file a caveat to the codicil, the codicil would not be probated and the decedent’s property would descend as provided in the will.\textsuperscript{42} Due to a dispute over the distribution agreed to by the parties, defendants offered the codicil for probate. Plaintiff then brought suit to enforce the family settlement agreement.

Although family settlement agreements are favored by the law, they can be enforced only if supported by consideration.\textsuperscript{43} The court noted that language in some cases\textsuperscript{44} seems to suggest that the mere quieting of a family

\begin{itemize}
\item \textsuperscript{36} Id. at 786, 281 S.E.2d at 735.
\item \textsuperscript{37} Parties “may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract . . . .” N.C. Gen. Stat. § 1-567.2(a) (Cum. Supp. 1981).
\item \textsuperscript{38} 53 N.C. App. at 788, 281 S.E.2d at 736.
\item \textsuperscript{39} Id. In order for modification of a contract to be valid, the new agreement must possess all the elements necessary for the formation of a new contract. 17 Am. Jur. 2d Contracts § 465 (1964). If this had been a contract for the sale of goods, rather than a contract to provide services, then the arbitration agreement would have become a part of the contract. N.C. Gen. Stat. § 25-2-207 (1965).
\item \textsuperscript{40} 304 N.C. 137, 282 S.E.2d 784 (1981).
\item \textsuperscript{41} Id. at 148, 282 S.E.2d at 791.
\item \textsuperscript{42} Id. at 141, 282 S.E.2d at 787.
\item \textsuperscript{43} Id. at 142, 282 S.E.2d at 787.
\item \textsuperscript{44} “The agreement was confessedly entered into for the purpose of quieting disputes be-
dispute over a will is sufficient consideration for agreements modifying that will. In those cases, however, there was either other sufficient consideration or a bona fide dispute over the will. Relying on O'Neil v. O'Neil, the court held that "in order for a promise not to contest a will to constitute consideration to support a family settlement agreement modifying the will, there must be a bona fide dispute as to the validity of the will in question."

The major significance of Holt may lie in the guidance the court gave in evaluating whether a bona fide dispute exists. The court expressly rejected any notion that a party who subjectively believes he has a good claim, but is unable to show a reasonable basis for it, can argue that a bona fide dispute exists. In order to find that the outcome of a contest is in doubt, "the bona fides of the dispute must be reasonably apparent from all the facts and circumstances surrounding the dispute itself." If it is clear that the contestant would have been unable at trial "to show any facts or circumstances from which it could be reasonably determined" that a real controversy existed, and there is only "plaintiff's bare allegation that if the codicil were probated he would contest it," the family settlement agreement cannot be enforced.

The Holt decision carefully balances the policies supporting family settlement agreements. If a contestant's evidence does not genuinely put a will's validity at issue, a court should not allow the threat of vexatious litigation to upset the decedent's testamentary plan. If, however, there are reasonable doubts about validity, concerns about "blackmail" and frivolous lawsuits fade and the family settlement agreement serves to prevent "substantial expense to the estate, protracted delay in its settlement, and complete disruption of family harmony."

Among the children . . . Such arrangements are upheld by considerations affecting the interests of all the parties, often far more weighty than any considerations simply pecuniary." Bailey v. Wilson, 21 N.C. (1 Dev. & Bat. Eq.) 182, 189 (1835).

45. 304 N.C. at 144, 282 S.E.2d at 788.
46. Id. at 143, 144 n.3, 282 S.E.2d at 788, 789 n.3.
47. The mere fact that a caveat has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will. The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict.

48. 304 N.C. at 146-47, 282 S.E.2d at 790.
49. Id. at 146 n.4, 282 S.E.2d at 790 n.4.
50. Id. at 147, 282 S.E.2d at 790.
51. Id. at 148-49, 282 S.E.2d at 791.
52. Id. at 149, 282 S.E.2d at 791.
4. Assignment of Indemnity Judgments

In *Walker Manufacturing Co. v. Dickerson, Inc.* the Federal District Court for the Western District of North Carolina examined the enforceability of an assigned judgment of indemnity. Walker Manufacturing brought a diversity action against defendant Dickerson, Inc. and won a judgment for $194,000. Dickerson asserted cross-claims against Edwards Roofing & Sheet Metal, Piedmont Engineering & Architects, and The Celotex Corporation. In the trial of the third-party claims, the jury found Dickerson entitled to full indemnity of $194,000 from Edwards, but none from Piedmont and Celotex. Edwards, however, was found entitled to indemnity in the amount of $97,000 from Celotex and $48,500 from Piedmont. Edwards had not conducted any business since 1976 and had no assets other than its indemnity claims; its corporate charter had been suspended as well. Celotex filed a motion for an order modifying the judgment to indicate that the judgment against Celotex was conditional, and that no execution to collect indemnity would be allowed until Edwards had made actual payment of the judgment to Dickerson. Edwards assigned its entire interest in its indemnity judgment against Celotex to Dickerson, in partial satisfaction of Dickerson's indemnity judgment against Edwards.

North Carolina follows the general rule regarding collection of indemnity: a determination of the indemnitor's liability alone is not sufficient; the indemnitee must have made payment or otherwise suffered actual loss or damage. No previous North Carolina case, however, had decided whether assignment of an indemnity judgment under the circumstances in this case entitled the assignee to collect.

The court held that the assignment by Edwards of its indemnity judgment to Dickerson, in partial satisfaction of the indemnity judgment Dickerson had against Edwards, constituted a loss to Edwards for the purposes of indemnity collection by Edwards. The court noted cases in other jurisdictions that treat a note given in satisfaction of a judgment against an indemnitee as a loss actu-

---

55. Huff v. Trent Academy of Basic Educ. Inc., 53 N.C. App. 113, 280 S.E.2d 17 (1981) also concerned both assignment and indemnity principles. Defendant academy had received funds embezzled by a bank officer who was also the academy's treasurer. The bank officer pleaded guilty to embezzlement, and his mother and brother, plaintiffs in this case, repaid the embezzled funds to the bank and received an assignment of the bank's claims against the academy. The court rejected the academy's contention that plaintiffs could not maintain the action because they were under no duty to pay the bank. The court noted that the plaintiffs' rights as assignees were not affected by the fact that they had volunteered to pay, and allowed them to maintain their action.

57. Id. at 330.
59. 510 F. Supp. at 331.
60. Id. at 332.
ally sustained by the indemnitee. The court in *Walker Manufacturing* concluded that the assignment of an indemnity judgment should be an actual loss to Edwards which amounted merely to an alternate method of paying and satisfying the adverse judgment. Since the problems caused by the maker's possible insolvency or failure to make a cash payment had also been raised in cases in which a note had been assigned, the court reasoned that these same objections should be no more persuasive when there is an assignment of an indemnity judgment.

While the result in *Walker Manufacturing* is sound, the court stretched the analogy between notes and assignments too far. The holder of the note can collect from the maker when the note becomes due by relying solely on the note. In the case of an indemnity judgment, however, the right to collection is conditional upon an actual loss. Unlike the holder of a note, Edwards could levy upon Celotex's property without affirmatively showing that it had incurred some real loss arising out of its secondary liability. In order to find actual loss or damage to Edwards, the district court engaged in bootstrapping. An indemnitee who no longer conducts any business and has no assets cannot satisfy a judgment against it, so the conditional indemnity judgment it holds can never be collected. Thus, by assigning its indemnity judgment Edwards would give up something of value and suffer actual loss only if the court allowed the assignee to collect from Celotex. But whether the assignee could collect, and whether Edwards had suffered actual loss of indemnity rights as against Celotex, are questions that can only be resolved by answering the question whether the indemnity judgment could be assigned to Dickerson in the first place. Use of such circular reasoning does not provide a satisfactory rationale for the result in *Walker Manufacturing*.

An alternative approach to the issues that are raised by assignment of indemnity judgments is to look at the problem in a broad context. The rule requiring actual loss before an indemnitee can collect is not an end in itself, but a tool that usually leads to a just result. Although the indemnitee may be liable to the plaintiff solely by imputation of law, or because of a secondary duty owed by him, he is a tortfeasor nonetheless, and plaintiff, if he so wishes, is entitled to seek compensation from him. The purpose of the actual loss rule then becomes clear; the indemnitee is a wrongdoer, and cannot demand pay-

61. Id.; see, e.g., Seattle & S.F. Ry. & Navig. Co. v. Maryland Casualty Co., 50 Wash. 44, 96 P. 509 (1908); Kennedy v. Fidelity & Casualty Co., 100 Minn. 1, 110 N.W. 97 (1907).
63. See 50 Wash. at 47, 96 P. at 510.
64. See Heath v. Board of Comm'rs, 292 N.C. 369, 377, 233 S.E.2d 889, 893 (1977) ("[T]he [indemnitee] could not have sued [indemnitor] independently of [plaintiff's] suit unless it had first paid his claim. Nor could [indemnitee] collect from [indemnitor] in this consolidated suit until both had been found liable and the [indemnitee] had paid the judgment.").
ment from another wrongdoer before he has been forced to pay. Otherwise, by collecting early, the indemnitee could benefit from his own wrong.

This analysis shows why an assignee of an indemnity judgment should be allowed to collect on the assignment given to satisfy the judgment against the indemnitee. There is no need to look for an "actual loss" in this situation, because the indemnitee has not gained as a result of his wrong. The assignment in satisfaction of the judgment against him has merely set off his right to collect against his duty to pay. If the court allows enforcement of an assigned indemnity judgment, the judgment creditor of a financially unsound indemnitee avoids the risk of loss in collecting from that indemnitee. Instead, he can collect directly from a party with greater fault, the indemnitor, the same result as that reached in cases in which all parties in the chain of liability are solvent. A literal requirement of actual loss would render the assigned judgment unenforceable and would unfairly allow the primary wrongdoer to escape liability; it would also prevent an indemnitee further up the chain (or a completely innocent plaintiff) from collecting on his judgment. The use of an assignment to collect directly from the indemnitor, as opposed to forcing the parties to enforce liability through a successive series of actions, also saves time and expense.

The actual loss rule should not be mechanically applied in actions to collect indemnity. By noting the purpose the rule serves, courts can be flexible in determining actual loss while achieving just and consistent results in a particular case. When a major consideration is prevention of gain by the indemnitee as a result of his wrong, an assigned indemnity claim obtained from an indemnitee in financial difficulty should be enforceable. When the indemnitor's substantive rights would be affected because some policy prevents the assignee from succeeding in a direct action against the indemnitor, courts should be more cautious in allowing a party to shift the burden of the indemnitee's insolvency to an indemnitor by use of an assignment.

5. Agency

In a case of first impression, the supreme court held in *Forbis v.*

66. It is doubtful that the actual loss rule is designed to ensure the indemnitee suffers some punishment because of his wrong. Technically, the indemnitee can demand to be completely compensated a fraction of a second after he pays, which seems more consistent with a policy of preventing unwarranted gain, rather than one which seeks a guarantee of punishment.

67. For example, a different standard for finding actual loss may be appropriate when statute of limitations problems are involved. When a defendant brings a separate suit for indemnity, his right of action accrues at the time of his payment. See Heath v. Board of Comm'rs, 292 N.C. 369, 375, 233 S.E.2d 889, 893 (1977) (citing Pittman v. Snedeker, 264 N.C. 55, 57, 140 S.E.2d 740, 742-43 (1965); American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 687, 133 S.E.2d 669, 674 (1963)). Thus, the indemnitee can bring suit even though the statute of limitations would prevent the plaintiff from proceeding against the indemnitor, since the plaintiff's cause accrues at the time of the wrong. If the plaintiff failed to sue the indemnitor within the allowed time, however, he should bear any loss occurring due to the indemnitee's insolvency. If the plaintiff were allowed to evade the limitations statute by having the defendant- indemnitee assign his indemnity judgment, the indemnitor would be denied his substantive right to be found liable to the plaintiff only if the plaintiff brings the action within the prescribed time.
Honeycutt that an exclusive listing agreement does not authorize the real estate agent to enter into a contract binding the owner to convey. Plaintiffs executed a written offer and tendered $600 earnest money to the real estate agent. Although defendant owners had an exclusive listing contract with the real estate agent, they refused to convey their property. Plaintiffs sought specific performance based on the exclusive listing contract.

The supreme court determined that the trial court properly dismissed the action because the language in the listing agreement was insufficient to vest the authority to convey in the real estate agent. In effect, the agreement only authorized the agent to find a purchaser "with whom the principal is to conduct the final negotiations." The court's decision was based on the belief that real estate transactions involve complex decisions which would not readily be entrusted to an agent. The court recognized that a real estate agent may be authorized to bind the owner to a contract of sale; but "such authority must be expressly conferred upon the agent or necessarily implied from the terms of the particular contract."

B. Uniform Commercial Code

In Preston v. Thompson the North Carolina Court of Appeals held that a dentist was not liable under the G.S. 25-2-315 implied warranty of fitness for a particular purpose. In Preston defendant-dentist had fitted plaintiff with dentures. When the dentures caused plaintiff pain, she brought suit, alleging

69. Id. at 704-05, 273 S.E.2d at 243.
70. Id. (quoting Restatement (Second) of Agency § 53 comment b, at 158 (1958)). The court noted that an agent's authority to buy or sell land did not normally imply the "[a]uthority to accept or to make a conveyance of land for the principal."
71. 301 N.C. at 705, 273 S.E.2d at 243.
72. Id. at 703, 273 S.E.2d at 242. In a related case, Cooper v. Henderson, 55 N.C. App. 234, 284 S.E.2d 756 (1981), the court of appeals interpreted an exclusive listing contract clause providing for payment of broker's commissions on a sale (within 90 days of the listing contract's termination) to a buyer with whom the broker had previously "negotiated." The court held that the plaintiff-broker had not negotiated with the buyer under the terms of the contract. The buyer for whom the plaintiff claimed commission was the mother of a potential buyer plaintiff had procured. The broker was aware that the potential buyer whose own offer was rejected by the defendant might seek financial assistance from the mother, but the broker never had any contact with the mother whose offer was accepted. Id. at 236, 284 S.E.2d at 757.
73. Additional Developments: In Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981), the North Carolina Court of Appeals held that in order to recover the portion of the price paid for nonconforming goods pursuant to G.S. 25-2-711(1)(a), the court did no more than make a straightforward application of the section. That statute provides that "in addition to recovering so much of the price as has been paid," the purchaser of nonconforming goods may "cover" and have damages under G.S. 25-2-712. N.C. Gen. Stat. § 25-2-711 (1965).
75. An alternative ground for the court's holding that the dentist was not liable was G.S. 90-21.13(d). That statute provides that in order to sue any "health care provider upon any guarantee . . . as to the result of any . . . treatment," the guarantee must be in writing and signed by the health care provider. N.C. Gen. Stat. § 90-21.13(d) (1981).
that the transaction constituted a sale of "goods" by a "merchant" and was therefore covered by an implied warranty under G.S. 25-2-315. The court rejected this argument, reasoning that fitting a patient with a set of dentures is in essence a service and not a sale of goods as defined by the U.C.C.

In Rheinberg-Kellerei GMBH v. Vineyard Wine Co. the court of appeals ruled that where seller did not notify buyer of shipment until after the goods had been lost at sea, prompt notification of shipment had not been given for purposes of G.S. 25-2-504(c). Since the prompt notification requirement of G.S. 25-2-504 had not been met, the goods had not been "duly delivered" to the carrier pursuant to G.S. 25-2-509(1)(a) and the risk of loss remained with the seller.

The parties had entered a shipment contract for the sale of wine. In such a contract, risk of loss ordinarily shifts to the buyer upon the seller's delivery of the goods to the carrier. Since seller did not notify buyer of shipment until after the loss had occurred, buyer was denied the opportunity to insure the goods—an event which should occur prior to the risk of loss shifting to him. Hence, the risk of loss remained with the seller.

In Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc. the United States District Court for the Eastern District of North Carolina held that a contractual arbitration agreement that provided for arbitration in a forum foreign to buyer was not rendered ineffective by G.S. 24-2-719(2) or (3). Rockwool was a diversity action involving a North Carolina corporation as

---

76. Id. § 25-2-105 (1965).
77. Id. § 25-2-104(1).
78. 56 N.C. App. at 295, 280 S.E.2d at 784. Plaintiff sued under G.S. 25-2-315 because she alleged that defendant had made oral assurances to her that the dentures would fit. See id. at 290-91, 280 S.E.2d at 781.
81. Id. at 565-66, 281 S.E.2d at 428.
82. Id.
83. A shipment contract authorizes the seller to send the goods to the buyer, but does not require him to deliver them at a particular destination. N.C. Gen. Stat. § 25-2-504 (1965). By contrast, a destination contract requires the seller to deliver the goods at a particular destination. W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 1.210401, at 103 (1964).
85. 53 N.C. App. at 565-66, 281 S.E.2d at 428-29.
86. See W. Hawkland, supra note 157, § 1.210402, at 106. But see J. White & R. Summers, Uniform Commercial Code § 5-2, at 181 n.15 (2d ed. 1980). White and Summers argue that the risk of loss should be on the buyer, since even if he had been given notice, he would have been unable to prevent the loss. This argument misses the point of the statute; although the buyer could not have prevented the loss of the goods, if he had been given prompt notice of shipment he could have insured the goods against such a risk.
88. Although in contracts involving commerce, federal law is to be applied in determining the validity of an arbitration agreement, the court found reference to the Uniform Commercial Code appropriate in the absence of well-developed contract law. 504 F. Supp. at 1388.
plaintiff-buyer, and a California corporation as defendant seller. Embodied in their contract for the sale of goods was a clause providing for arbitration in the event of dispute, to be held in California. When buyer cancelled its plans and did not purchase or pay for the goods, seller-defendant initiated arbitration in California.

Plaintiff sought to enjoin the arbitration on the ground that the arbitration clause, which was an exclusive remedy under the contract, failed of its essential purpose because the great expense plaintiff would incur by arbitrating in California would, in effect, preclude plaintiff from pursuing any remedy; thus, the arbitration clause was ineffective under G.S. 25-2-719(2). The court rejected this argument based on the language of G.S. 25-2-719(2), which states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose" the exclusive remedy will be ineffective and full UCC remedies will be available. The court rejected this argument, noting that the arbitration agreement had not failed of its essential purpose, which was to provide defendant-seller with a convenient forum. Whether the limited or exclusive remedy effects the purpose of the Code or of equity is irrelevant for purposes of G.S. 25-2-719(2).

Plaintiff-buyer next alleged that the arbitration clause was unconscionable under G.S. 25-2-719(3), which provides that "consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." The court held this statute inapplicable because plaintiff did not contend that the arbitration clause excluded consequential damages, but rather that it excluded all remedies. The court further noted that when the buyer is a merchant, courts should seldom find remedy-limiting clauses unconscionable.

In Paccar Financial Corp. v. Harnett Transfer, Inc. the North Carolina Court of Appeals examined the interaction between a perfected Article 9 security interest and a statutory mechanics lien. The assignee of a note and security agreement sued defendant, Hard Times Transfer, Inc., for possession of the secured property, a truck. Hard Times had purchased the truck, subject to the security interest, from the original debtor. After making several pay-
ments on the note, Hard Times defaulted. Hard Times then had Harnett Transfer, Inc., a related corporation,\textsuperscript{102} make needed repairs on the truck. Harnett Transfer performed the repairs and charged Hard Times $12,638.56, which Hard Times failed to pay. Harnett Transfer then sold the truck in a judicial sale to satisfy the mechanic's lien. Hard Times purchased the truck for $12,758.56, only $120 more than the debt for repairs.

At trial, Hard Times alleged a claim of superior right to possession by virtue of its purchase of the truck at the foreclosure sale.\textsuperscript{103} Hard Times based its claim to possession on the statutory mechanic's lien, G.S. 44A-2(d),\textsuperscript{104} and on a provision concerning a bona fide purchaser at a properly conducted sale, G.S. 44A-6(d).\textsuperscript{105} Thus, Hard Times asserted that Harnett Transfer, having repaired the truck, was entitled to a mechanic's lien that had priority over the security interest by virtue of G.S. 44A-2(d).\textsuperscript{106} Further, Hard Times argued that since it was a "purchaser for value" at the foreclosure sale, it acquired title "free of any interests over which the lienor (Hartnett Transfer) was entitled to priority."\textsuperscript{107} Since Harnett Transfer had priority over plaintiff's security interest, and Hard Times was a "purchaser for value," Hard Times asserted that it took the property free of any security interest, pursuant to G.S. 44A-6.\textsuperscript{108}

The court rejected this argument and awarded possession to plaintiff.\textsuperscript{109} The court noted that Hard Times had purchased the truck at the foreclosure sale for only $120 more than the account for repairs, which almost certainly represented the costs of the sale. Thus, the substance of the transaction was that Hard Times merely satisfied its account for repairs. The court reasoned that to allow Hard Times to free itself of plaintiff's security interest by means of this ruse would be to exalt form over substance.\textsuperscript{110} The court found that plaintiff had a "valid, enforceable, perfected security interest in the truck," and therefore Hard Times took the truck subject to plaintiff's security interest.\textsuperscript{111} The court further found that defendant had defaulted on the secured indebtedness. Therefore, plaintiff had a right to take possession of the truck.\textsuperscript{112}

\textsuperscript{102} The same man was president of both corporations. 51 N.C. App. at 6, 275 S.E.2d at 247.
\textsuperscript{103} Id. at 8, 275 S.E.2d at 247.
\textsuperscript{104} Any person who repairs . . . motor vehicles in the ordinary course of his business pursuant to . . . [a] contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs . . . . This lien shall have priority over perfected and unperfected security interests.
\textsuperscript{105} A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale who is not the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled.
Id. § 44A-6(d) (1976) (emphasis added).
\textsuperscript{106} 51 N.C. App. at 8, 275 S.E.2d at 248.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 8-10, 275 S.E.2d at 248.
\textsuperscript{110} Id.
Also in 1981, the North Carolina General Assembly amended G.S. 25-4-406, the statute dealing with a bank customer's duty to examine items returned by the bank and to report any alterations or forgeries therein, by adding to the end of subsection (1) the following sentence: "A customer will be considered to have acted with reasonable care and promptness if he notifies the bank within 60 days of receipt of the statements of account accompanied by such item." It is unclear precisely what effect this amendment will have on the operation of the statute.

One question raised by the amendment concerns the meaning of "considered to have acted with reasonable care." The legislature probably intended "considered" to mean "conclusively presumed," since this would better effectuate the policy of judicial economy that was probably behind the amendment. The bank already had the burden of showing lack of reasonable care on the part of the customer before the statute was amended. Thus, if "considered" means "rebuttably presumed," rather than "conclusively presumed," the amendment has altered the effect of the statute very little.

Another question raised is the effect of the amendment when the customer does not notify the bank within sixty days, but does "exercise reasonable care and promptness" in examining the statement and items. Literally, the amendment would not preclude such a customer from asserting his claim against the bank. Nevertheless, the desire for a bright line test might lead courts to hold that if the customer does not notify the bank within sixty days he is precluded from asserting the item against the bank. A better, and more likely, interpretation would be that after sixty days the customer is presumed not to have acted with reasonable care. Finally, the courts could follow the literal language of the statute, which would place the burden of proof of lack of due care on the bank after the sixty day period.

If "considered" is construed to mean "conclusively presumed," one virtually certain effect of the amendment is that it renders the fourteen day period of subsection 2(b) ineffective. Since the customer will be considered to have notified the bank within sixty days, the bank will be presumed to have acted with reasonable care and the customer will not be precluded from asserting his claim against the bank.

115. The amendment provides that a customer "will be" considered to have acted reasonably if he notifies the bank within 60 days. It does not provide that a customer will be considered not to have acted with reasonable care if he does not notify the bank within 60 days. N.C. Gen. Stat. § 25-4-406 (Cum. Supp. 1981).
116. "If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1)" then the customer is precluded from asserting certain alterations or forgeries on the item against the bank. Id. § 25-4-406(2) (Cum. Supp. 1981) (emphasis added).
117. Subsections (1), (2), and (2)(b) of G.S. 25-4-406 provide:
   (1) When a bank . . . makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof. A customer will be considered to have acted with reasonable care and promptness if he notifies the bank within 60 days of receipt of the statement of account accompanied by such items.
   (2) If the bank establishes that the customer failed with respect to an item to comply
acted reasonably if he notifies the bank within sixty days, the bank will never be able to establish that a customer failed to comply with subsection (1) prior to the completion of the sixty day period. Under this view, subsection 2(b) can be invoked by the bank only after completion of the sixty day period. The amendment reduces the fourteen day period of subsection 2(b) to no more than statutory surplusage.\textsuperscript{118}

In *Maybank v. S. S. Kresge Co.*\textsuperscript{119} the North Carolina Supreme Court strained to find that reasonable notice had been given in a case concerning a breach of an implied warranty of merchantability.\textsuperscript{120} The court held that a three-year delay in notifying a seller of a breach of warranty was not unreasonable as a matter of law when the buyer was a lay consumer and the delay did not result in destruction of vital evidence; whether the notice was given within a "reasonable" period was a question for the jury.\textsuperscript{121}

What constitutes a "reasonable" length of time has depended largely upon the circumstances in a particular case.\textsuperscript{122} Courts are often more liberal in applying the notice requirement to an individual purchaser than to a commercial buyer.\textsuperscript{123} Nevertheless, there are time limits generally recognized as "unreasonable" by courts, even in consumer-buyer cases.\textsuperscript{124} In many cases courts have been willing to let the question go to the jury only when the delay in reporting the injury or defect was less than a year from the time of the accident.\textsuperscript{125} The *Maybank* decision went far in recognizing the differences between a breach of warranty causing personal injury to a consumer-buyer

---

with the duties imposed on the customer by subsection (1) the customer is precluded . . . from asserting against the bank.

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.


118. The bank must establish that the customer failed to comply with the duties of subsection (1) in order to preclude him from asserting the item against the bank. Id. §§ 25-4-406(2); Burnette v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980).


120. This cause of action is governed by North Carolina's Sales Act, the state's version of the Uniform Commercial Code. N.C. Gen. Stat. § 25-2-607 (1965). G.S. 25-2-607(3) deals specifically with the notice requirement in breach of warranty cases.

121. 302 N.C. at 135, 273 S.E.2d at 685.


123. Id. at 5-160.


125. Indicating that the question is for the jury, appellate courts often reverse lower courts that hold that a delay of less than one year is unreasonable as a matter of law. See, e.g., Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (ten months not unreasonable per se when plaintiff was in hospital and no harm was done to evidence); Bonker v. Ingersoll Prods. Corp., 132 F. Supp. 5 (D. Mass. 1955) (four months not unreasonable where plaintiff was in hospital and no harm was done to essential evidence).
and a breach of warranty causing economic injury to a businessman buying
and selling commercial items.

C. Unfair Trade Practices

Commercially valuable ideas traditionally have been protected by patent
and trade secret laws. Patent law is governed by a uniform federal statutory
scheme, but trade secret law usually is embodied in common law\textsuperscript{126} and its
development has thus been more inconsistent among jurisdictions. In order to
harmonize and clarify the law of trade secrets, the Commissioners on Uniform
State Laws adopted the Uniform Trade Secrets Act at their 1979 Annual Con-
ference and recommended its enactment in all the states.\textsuperscript{127} Although there
have been many reported decisions concerning trade secrets in states that are
commercial centers, this is not the case in the "less populous and more agricul-
tural"\textsuperscript{128} states such as North Carolina,\textsuperscript{129} where trade secrets have been pri-
marily protected as ancillary restraints of trade.\textsuperscript{130} The 1981 North Carolina
General Assembly, in an effort to provide a definitive body of law for the
protection of valuable ideas, adopted the Uniform Act with a few minor varia-
tions as the "Trade Secrets Protection Act."\textsuperscript{131}

A "trade secret," as defined in G.S. 66-152, must (1) be business or technical
information, (2) have independent actual or potential commercial value
stemming from its secrecy, and (3) have been the object of reasonable efforts
designed to maintain its secrecy.\textsuperscript{132} In a departure from the common law the
North Carolina Act extends protection to information not "continuously used
in a trade or business."\textsuperscript{133} by expanding the definition of "trade secret" to in-

\begin{itemize}
\item \textsuperscript{126} Klitzke, The Uniform Trade Secrets Act, 64 Marq. L. Rev. 277, 277 (1980).
\item \textsuperscript{127} Uniform Trade Secrets Act, 14 U.L.A. commissioners' prefatory note, at 539-40 (1980).
The Uniform Act derives a substantial amount of its policies and text from the First Restatement
of Torts, which attempted to codify the general principles of trade secrets law. Restatement (First)
of Torts §§ 757-59 (1939). The second edition, however, deleted all provisions concerning trade
secrets. The American Law Institute was of the opinion that trade regulation law (which includes
trade secrets law) had developed into an independent body of law no longer based primarily on
tort principles. Restatement (Second) of Torts 1 (1979).
\item \textsuperscript{128} Uniform Trade Secrets Act, 14 U.L.A. commissioners' prefatory note, at 537 (1980).
\item \textsuperscript{129} See Comment, Unfair Competition—Law of Unfair Competition in North Carolina, 46
N.C.L. Rev. 856, 881 (1968). The primary types of trade secrets cases that have arisen in North
Carolina involve phonographs or recordings. See id. Accord United Artists Records, Inc. v. Eastern
\item \textsuperscript{130} See, e.g., Harwell Enters. v. Heim, 276 N.C. 475, 173 S.E.2d 316 (1970) (restrictive cove-
nant in employment contract upheld to protect employer).
\item \textsuperscript{131} Law of July 9, 1981, ch. 890, § 1, N.C. Sess. Laws, 1st Sess. 1326, 1326-28 (codified at
\item \textsuperscript{132} N.C. Gen. Stat. § 66-152(3) provides:
\begin{quote}
Trade secret means business or technical information, including but not limited to a
formula, pattern, program, device, compilation of information, method, technique, or
process that: a. Derives independent actual or potential commercial value from not be-
ing generally known or readily ascertainable through independent development or re-
verse engineering by persons who can obtain economic value from its disclosure or use;
and b. Is the subject of efforts that are reasonable under the circumstances to maintain
its secrecy.
\end{quote}
\item \textsuperscript{133} The First Restatement of Torts required that a trade secret be "continuously used in one's

clude information having potential, as well as actual, commercial value. The North Carolina Act differs from the Uniform Act by protecting information having “commercial value,” whereas the Uniform Act protects information having “economic value.” The significance of this difference is unclear. It is interesting to note that the North Carolina Act uses “economic value” in its requirement that to qualify as a trade secret, information must derive its commercial value from not being generally known or readily ascertainable by persons who can obtain economic value from its use or disclosure.

Information developed by “proper means” is “outside of trade secret protection, as between the parties with such knowledge.” The North Carolina Act lists two examples of “proper means” of discovery in its definition of “trade secret”: discovery through “independent development or reverse engineering.” The North Carolina and Uniform Acts further require that the information be the “subject of efforts that are reasonable under the circumstances to maintain its secrecy.” The comments to the Uniform Act state that “extreme and unduly expensive procedures” need not be taken to protect trade secrets against “flagrant industrial espionage.”

business.” Restatement (First) of Torts § 759 comment b, at 24 (1939). This view is also evident in Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 417, 216 S.E.2d 379, 381 (1975), in which the court said that a “trade secret” is “a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value.” (quoting Annot., 17 A.L.R.2d 383, 385 (1951) (citing In re Bolster, 59 Wash. 655, 110 P. 547 (1910)) (emphasis added).


136. It has been argued that “economic value” is a much broader term than “commercial value” because a secret could have economic value without having commercial value. Klitzke, supra note 126, at 289. Professor Klitzke contends that “[i]nformation regarding a future manufacturing process may have no present commercial value and yet have economic value, as where time and effort have been expended in its development.” Id. Professor Klitzke goes on to argue that “the term ‘economic value’ is elastic enough to include ‘negative information,’ that is, information that a certain process or formula will not work.” He adds that “[i]t is unclear whether such information could be said to have commercial value.” Id.


138. Id. at 289.

139. N.C. Gen. Stat. § 66-152(3)(a) (Cum. Supp. 1981). The Uniform Trade Secrets Act itself does not provide examples given in the North Carolina Act but also (1) “[d]iscovery under a license from the owner of the trade secret;” (2) “[o]bservation of the item in public use or on public display;” and (3) “[o]btaining the trade secret from published literature.” Uniform Trade Secrets Act § 1, 14 U.L.A. commissioners’ comment, at 542 (1980). “Reverse engineering” is defined as “starting with the known product and working backward to find the method by which it was developed.” Id.


In order to secure a remedy there must be a “misappropriation.” The North Carolina Act defines “misappropriation” as the “acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” The Uniform Act's definition of misappropriation differs from the North Carolina Act by providing that trade secrets must be acquired through “improper means” and then supplementing that provision with a definition of “improper means.” The North Carolina Act presumes that acquisition or disclosure “without express or implied authority or consent” would be an improper means of discovery or use of the trade secret. In addition, the North Carolina statute relies on examples of proper means of discovery listed in its definition of trade secret.

The North Carolina Act substantially simplifies the common law trade secret action through its definition of “misappropriation.” “At common law, misappropriation of a trade secret sounded in either tort or contract, depending on whether the ‘improper means’ [of discovery] was an intentional tort, such as theft, bribery, misrepresentation or espionage, or was a breach of a contractually-created duty to maintain secrecy.” This distinction has been eliminated by the North Carolina Act. While a misappropriation may stem from the breach of a contractual relationship or from tortious or criminal misconduct, the cause of action for misappropriation is independent of the conduct out of which it arose. This change eliminates many statute of limitations and damages questions. The North Carolina Act now provides for a three-year statute of limitations during which an action must be commenced “after the misappropriation complained of is or reasonably should have been discovered.” The Uniform Act explains further that a “continuing misappropriation constitutes a single claim.”

When a trade secret has been misappropriated the North Carolina Act grants both injunctive relief and damages. The Act permits the enjoining of

---

143. Id. § 66-152(1).
145. Id. § 1(1).
146. See text accompanying notes 138-39 supra.
147. Klitzke, supra note 126, at 296.
148. Id. The Uniform Act provides: “This Act displaces conflicting tort, restitutionary, and other law of this State pertaining to civil liability for misappropriation of a trade secret.” Uniform Trade Secrets Act § 7(a), 14 U.L.A. 549 (1980). The North Carolina Act does not contain the specific language set forth in § 7 of the Uniform Act; it accomplishes the same result, however, through implication by way of its unified statute of limitations and damages treatment.
150. Id. at 296.
present as well as threatened misappropriation both permanently and tempo-
rarily during the pendency of the action.\textsuperscript{154} An injunction that issues after
trial shall last for the "period that the trade secret exists plus an additional
period as the court may deem necessary under the circumstances to eliminate
any inequitable or unjust advantage . . . ."\textsuperscript{155} When it is unreasonable to
enjoin use of a trade secret, use may be allowed upon payment of a reasonable
royalty.\textsuperscript{156} The North Carolina Act further provides that "[i]n appropriate
circumstances, affirmative acts to protect the trade secret may be compelled by
order of the court."\textsuperscript{157} This could include return of the "fruits of misappropri-
ation" to the aggrieved party.\textsuperscript{158}

The North Carolina statute provides that in addition to injunctive relief,
"actual damages may be recovered, measured by the economic loss or the un-
just enrichment caused by misappropriation of a trade secret, whichever is
greater."\textsuperscript{159} The North Carolina Act, unlike the Uniform Act, explicitly pro-
tects a person who in good faith derives knowledge of a trade secret through
inadvertent misappropriation or mistake. Such a person is not required to pay
damages for the period prior to the time the person knows or has reason to
know that he has misappropriated a trade secret; nevertheless, he can be en-
joined from disclosing the trade secret or can be required to pay a reasonable
royalty.\textsuperscript{160}

If willful and malicious misappropriation exists, the North Carolina Act
permits the trier of fact to "award punitive damages in its discretion."\textsuperscript{161}

\textsuperscript{154} U.L.A. 546 (1980). The Restatement rule did not specify the type of remedy available—only that
liability attached. Restatement of Torts (First) § 757 (1939). The comments to § 757 did state that
four remedies should be available under appropriate circumstances: (1) damages for past harm,
(2) injunction against future harm, (3) accounting of the wrongdoers' profits, and (4) surrender of
the physical things embodying the trade secret. Id. comment e, at 10.


\textsuperscript{158} Uniform Trade Secrets Act § 2, 14 U.L.A. commissioners' comment, at 546 (1980).

to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by
misappropriation. A complainant may also recover for the unjust enrichment caused by misap-
propriation that is not taken into account in computing damages for actual loss." Uniform Trade


\textsuperscript{161} Id. § 66-154(c). The Uniform Act provides that the court may award "exemplary dam-
ages in an amount not exceeding twice any award" of damages allowed for actual loss or unjust
claim of misappropriation is made in bad faith or if willful misappropriation exists” the North Carolina Act allows for an award of reasonable attorneys’ fees to the prevailing party.\textsuperscript{162}

In another statutory development, the North Carolina General Assembly responded forcefully to the recent discovery of bid rigging on state contracts.\textsuperscript{163} G.S. 133-24 provides that any conspiracy, combination or act in restraint of trade declared to be unlawful by the provisions of G.S. 75-1 and 75-2 is a felony if the act involves contracts or subcontracts for a governmental agency.\textsuperscript{164} A person convicted of violating G.S. 133-24 will be punished as a Class H felon, and may also be subject to a fine of up to one hundred thousand dollars for any convicted individual and up to one million dollars for any convicted corporation.\textsuperscript{165} The convicted entity will not be allowed to enter a contract with any governmental agency for a period of up to three years, to be determined in the discretion of the court.\textsuperscript{166} The court shall have authority to direct the contractor’s licensing board to suspend the individual’s license for up to three years\textsuperscript{167} and the court may provide that the individual shall not be employed by a corporation that engages in public construction or repair contracts with a governmental agency for up to three years.\textsuperscript{168}

The “governmental agency entering into a contract which is or has been the subject of a conspiracy prohibited by G.S. 75-1 or 75-2 shall have a right of action against the participants in the conspiracy to recover damages . . . .”\textsuperscript{169} At the governmental agency’s election, the measure of damages shall be treble either the actual damages or ten percent of the contract price.\textsuperscript{170}

\begin{footnotesize}


164. G.S. 133-24 provides:

Government contracts; violation of G.S. 75-1 and 75-2—Every person who shall engage in any conspiracy, combination, or any other act in restraint of trade or commerce declared to be unlawful by the provisions of G.S. 75-1 and 75-2 shall be guilty of a felony under this section where the combination, conspiracy, or other unlawful act in restraint of trade involves:

(1) A contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a governmental agency;

(2) A subcontract for the purchase of equipment, goods, services or materials or for construction or repair with a prime contractor or proposed prime contractor for a governmental agency.


For developments leading up to the enactment of G.S. 113-24, see Aycock, supra note 237, at 224-29.


166. Id. § 133-25(b).

167. Id. § 133-25(d). The individual shall not be eligible to serve as a member of any contractor’s licensing board. Id. § 133-26.

168. Id. § 133-25(c).

169. Id. § 133-28(a) (“There shall be no right to contribution among participants not named defendants by the governmental agency.”)

170. Id. §133-28(b).
\end{footnotesize}
action shall accrue from the time the conspiracy is discovered and must be brought within three years.\textsuperscript{171}

In its efforts to ferret out violations of G.S. 75-1 or 75-2, a governmental agency is authorized to pay up to twenty-five percent of any civil damages it collects from the violator to any person with knowledge of such violations who reports them to the agency.\textsuperscript{172} In order to prevent violations, the agency may require all prime bidders to submit noncollusion affidavits, with failure to do so being grounds for disqualification of a bid.\textsuperscript{173} A further attempt by the legislature to prevent impropriety is set forth in G.S. 133-32, which makes it a misdemeanor for any contractor, subcontractor or supplier who has, or within the past year has had, a contract with a governmental agency, to make gifts or give favors to any officer or employee of a governmental agency that prepares awards or administers contracts, or inspects or supervises construction.\textsuperscript{174}

In \textit{Hester v. Martindale-Hubbell, Inc.}\textsuperscript{175} the Fourth Circuit Court of Appeals considered the definition of "concerted activity" under section 1 of the Sherman Act and G.S. 75-1.\textsuperscript{176} At the time the alleged concerted activity in \textit{Hester} took place, the North Carolina Code of Professional Responsibility provided that an attorney could present brief biographical and other specified information in a reputable legal directory. A directory was conclusively established to be reputable if it was certified by the American Bar Association.\textsuperscript{177} Martindale-Hubbell was the only directory listed in the ABA's category of "general legal directory." Martindale-Hubbell contains a biographical section in which lawyers may pay to have their advertisements published. In order to advertise, however, an attorney must have received a certain rating under Martindale-Hubbell's system or be associated with a firm that has obtained that rating. Plaintiff Hester's requests for information on advertising in the directory were denied because he had not yet received a rating. Hester complained to the North Carolina State Bar, which referred him to the ABA. The ABA stated that Martindale-Hubbell had in no way violated its rules.\textsuperscript{178} Hester then brought an antitrust action alleging that the ABA conspired with Martindale-Hubbell to restrain trade in violation of sections 1 and 2 of the

\begin{itemize}
  \item \textsuperscript{171} Id. §133-28(c).
  \item \textsuperscript{172} Id. § 133-29.
  \item \textsuperscript{173} Id. § 133-30.
  \item \textsuperscript{174} Id. § 133-32(a), (b).
  \item \textsuperscript{176} For a discussion of \textit{United Roasters}, see note 1 supra; Aycock, supra note 163, at 215.
  \item \textsuperscript{177} N.C. Code of Professional Responsibility DR 2-102(A)(6), 1 N.C. State Bar, The Green Book 19 (1979). The Code, however, was amended in 1978 to delete the reference to certification by the ABA. 659 F.2d at 434.
  \item \textsuperscript{178} 659 F.2d at 434-35.
\end{itemize}
Sherman Act\textsuperscript{179} and G.S. 75-1 and 75-1.1\textsuperscript{180} Although there clearly existed a restraint of trade in the form of restricted access to advertising, the dispositive issue was whether that restraint was the result of the concerted activity of the ABA, the State Bar and Martindale-Hubbell, or merely unilateral action of Martindale-Hubbell.\textsuperscript{181} Hester established only that the ABA and State Bar had attempted to set standards regulating advertisements by attorneys; there was no showing that the ABA required that Martindale-Hubbell condition the right to advertise in its publication on the attainment of a certain rating. Such evidence, the court held, "does not show a concerted refusal to deal within contemplation of the laws invoked."\textsuperscript{182}

Judge Winter, dissenting, believed this definition of "concerted activity" was narrower than that approved by the Supreme Court in\textit{Albrecht v. The Herald Co.}\textsuperscript{183} \textit{Albrecht} held that it was "irrelevant that one party unilaterally formulated a policy restraining trade, if he sought and received the assistance of another party which acted with knowledge of the restraint."\textsuperscript{184}

\textbf{D. Securities}

The North Carolina Supreme Court was provided with its first opportunity to define and explain the North Carolina Tender Offer Disclosure Act\textsuperscript{185} in\textit{Sheffield v. Consolidated Foods Corp.}\textsuperscript{186} The court held that the stock acquisitions at issue in\textit{Sheffield} were open market purchases, which are generally not considered tender offers, and therefore were not regulated under the Act. The court noted, however, that some purchases on the open market may fall

\begin{itemize}
\item \textsuperscript{179} 15 U.S.C. §§ 1, 2 (1976).
\item Hester further alleged that defendant North Carolina State Bar cooperated in and condoned the discrimination against him, and through the adoption and enforcement of DR 2-102 denied him due process and equal protection of law. 659 F.2d at 435. The constitutional issue, however, was moot because DR 2-102 was amended to eliminate the process of which he complained. Id. See note 177 supra.
\item \textsuperscript{181} 659 F.2d at 436.
\item \textsuperscript{182} Id. It is not clear whether the court based its decision on interpretation of the North Carolina Act as well as the Sherman Act, although it did affirm the ultimate disposition by the district court, which found no evidence showing concerted activity in restraint of trade in violation of the Sherman Act and, therefore, rejected plaintiff's claims under G.S. 75-1 and 75-1.1. See id. Dissenting in\textit{Hester}, Judge Winter stated that "[b]ecause N.C. Gen. Stat. § 75-1 is the state equivalent of Sherman Act § 1, I would reverse the dismissal of Hester's claim under that section as well." Id. at 436 n.1 (Winter, J., dissenting).
\item In\textit{Rose v. Vulcan Materials Co.}, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973), the court said that G.S. 75-1 was based upon section one of the Sherman Act, which "although not binding upon this court in applying G.S. § 75-1, is nonetheless instructive in determining the full reach of that statute."
\item \textsuperscript{183} 390 U.S. 145 (1968).
\item \textsuperscript{184} 659 F.2d at 437. (Winter, C.J., dissenting).
\item \textsuperscript{185} N.C. Gen. Stat. § 78B-1 to -11 (1978).
\item \textsuperscript{186} 302 N.C. 403, 276 S.E.2d 422 (1981). Plaintiffs brought suit for alleged violations of the Act against Consolidated Foods Corporation, a Maryland corporation. Summary judgment was entered for defendant Consolidated and the case moved directly to the Supreme Court on petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 (1981).
\end{itemize}
within the Act's regulation if they involve pressures on stockholders to sell their stock without sufficient knowledge upon which to base their decision.

Sheffield concerned the merger of the Hanes Corporation into a wholly-owned subsidiary of Consolidated Foods Corporation. Over the course of three months, Consolidated bought more than twenty percent of Hanes' stock, entirely on the open market. After this time, officers of Consolidated met with Hanes and negotiated the merger. Plaintiffs, who had sold their stock during the three month period, claimed that these earlier purchases violated the Act. Plaintiffs filed suit on behalf of all shareholders who had sold during the three months before the merger without knowledge of Consolidated's plans. Plaintiffs alleged that the Tender Offer Disclosure Act should apply, and that the violation of the mandated disclosure provision caused them to sell their shares at prices lower than they would have with full knowledge.

The accepted definition of a tender offer is "a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Usually there is a premium price offered that remains open for a limited time, and which may be withdrawn if certain stipulated conditions are not met. Upon accepting the offer to tender, shareholders relinquish control over their shares to a third party depository pending fulfillment of the conditions. An unregulated tender offer allows an offeror quickly and covertly to purchase controlling shares of a target company, without the shareholders having adequate knowledge of who is taking over and what effect this will have on their investment. Congress feared the threat of "unscrupulous corporate raiders" who might force shareholders into hasty, uninformed sales of stock and enacted the Williams Act in 1968 to regulate tender offers. The Williams Act requires disclosure to the Securities and Exchange Commission at the time the tender offer is first made, including the identity and background of the offeror, how many shares he currently holds, and what major changes he contemplates if he assumes control of the target.

The North Carolina Act reaches beyond federal law by requiring thirty days notice to the Secretary of State and the target company before a tender offer can be made. This requirement responds to the failure of the Williams Act to require advance notice, thereby avoiding "surprise or blitz tender of-
fers.” The final version of the Act is a compromise between those who favored the less restrictive federal law and the supporters of even more stringent shareholder protection. While the two acts differ in various other areas, the prior disclosure provision was the key to plaintiffs’ case in Sheffield.

Plaintiffs’ primary argument for labeling defendant’s action a tender offer under the North Carolina Act was that the statutory definition of tender offers, “an offer to purchase or invitation to tender,” was an intentionally broad definition covering both conventional tender offers (“invitations to tender”) and all other offers to purchase. This broad interpretation would encompass open market acquisitions. The court, looking at the entire Act, found that plaintiffs’ contention was not harmonious with the purpose of the North Carolina Act or with the remainder of the definition of tender offer. Although the statute reads “offers to purchase or invitations to tender,” it later states that an offer is made when the “offer ... is first published or sent or given to the offerees.” Because open market purchases involve no express offer, nothing exists to be published or sent to the offerees. The court argued further that it is common practice to use “offer to purchase” and “invitation to tender” as “different legislative expressions embracing the same concept of an offeror expressing a desire to purchase shares of stock.” The statute also permits, in some instances, withdrawal of tendered shares and proration of sales of excess shares, actions that could not successfully operate on the open market.


200. Id. Two proposed bills were rejected before passage of G.S. 78B. The first, H. 307, 1977 Gen. Assembly, 1st Sess., was very burdensome to offerors, because the financial disclosure provision was more extensive than its counterpart in the final act, and the target company was permitted to request hearings before the Secretary of State. By contrast, H. 406, 1977 Gen. Assembly, 1st Sess. required much less information from the offeror than the enacted statute and did not require a filing with the Secretary of State.

201. Other major differences in these Acts include: 1) tendered shares may be withdrawn by shareholders within seven days of the offer under federal law, while the state allows withdrawal up to three days before the termination of the offer; 2) if more shares are tendered than were requested, the federal act provides for those shares tendered in the first ten days to be purchased pro rata; the state act allows proration of shares tendered at any time.

202. Whether this provision is unconstitutional because it is preempted by federal regulation of the securities area is very much in question. See Comment, The North Carolina Tender Offer Disclosure Act: Congenitally Defective?, 14 Wake Forest L. Rev. 1035, 1043 (1978). The United States Supreme Court will soon have a chance to rule on this question in Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), prob. juris. noted sub nom. Edgar v. Mite Corp., 49 U.S.L.W. 3824 (1981), where the lower court held a similar state act to be unconstitutional.


204. 302 N.C. at 421-22, 276 S.E.2d at 434.


206. 302 N.C. at 418, 276 S.E.2d at 432.

207. Id. at 419, 276 S.E.2d at 433. When a tender offer is made, usually the purchaser can either offer to purchase shares from the shareholders or invite the shareholders to tender their shares for sale. Little difference exists between the two.

208. The chaos that would result in the marketplace from the application of this requirement and the impossibility of administering such a provision in the open market context, where every transaction is final and is not subject to revision, shows with abundant clarity that our Legislature could not have intended this provision to apply to purchases in the open market.
Similarly, the thirty-day prior disclosure provision is impractical in open market trading.\(^{209}\)

Plaintiff next argued that all corporate takeovers must be conducted as conventional tender offers so that disclosure under the Act would always be necessary.\(^{210}\) Finding no express legislative intent on this issue, the court declined to construe the Act as placing such severe restrictions on the permissible means of takeovers.\(^{211}\) Finally, plaintiffs argued that an exemption from the Act for bids made by a broker\(^{212}\) suggested that all open market purchases were included in the Act’s coverage; otherwise there would be no need to exempt broker bids.\(^{213}\) The court disposed of this argument by noting that the involvement of a broker did not necessarily indicate an open market transaction.\(^{214}\)

_Sheffield_ clearly rejects the notion that open market transactions are covered by the North Carolina Tender Offer Act. The court noted, however, that some stock purchases have been found by federal courts\(^{215}\) to fall within the Williams Act even though they are not conducted as conventional tender offers.\(^{216}\) The key element in deciding whether an acquisition will be treated as a tender offer, as noted in _Sheffield_, is “pressure on shareholders to make uniformed, ill-considered decisions to sell.”\(^{217}\) This expanded definition leads to a case-by-case study by the courts to determine if the pressure is enough to require regulation.\(^{218}\) In _Sheffield_ the court found that the only pressure on plaintiffs was normal market pressure.\(^{219}\)

Construing the Williams Act to cover non-conventional tender offers carries out the main purpose of that Act—protecting shareholders.\(^{220}\) When transactions create pressures on shareholders beyond the normal pressures of

---

\(^{209}\) Id. at 420, 276 S.E.2d at 433.

\(^{210}\) Id. at 423, 276 S.E.2d at 435. Senator Williams made this clear in his discussion of the federal act. Open market and private transactions require disclosure after the purchases in order to “avoid upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoid prematurely disclosing the terms of privately negotiated transactions.” 113 Cong. Rec. 855 (1967).

\(^{211}\) Id. at 423-24, 276 S.E.2d at 435.

\(^{212}\) Id. at 424-25, 276 S.E.2d at 436. Plaintiffs relied on Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980), a Virginia case holding that all takeovers involving 10% of a corporation’s shares were covered by the state act. The Virginia act, however, expressly included open market transactions, while the North Carolina act is silent on the matter.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) Noting the state act’s similarity to the Williams Act, the court declared that construction of the state act could be influenced by federal court decisions under the Williams Act. Id. at 427, 276 S.E.2d at 437.


\(^{217}\) Id. at 428, 276 S.E.2d at 438 (emphasis in original).

\(^{218}\) Note, Cash Tender Offers: A Proposed Definition, 31 U. Fla. L. Rev. 694, 724 (1979). This approach leads to confusion and uncertainty for offerors who are not sure what will be prohibited, and for the SEC in deciding if the regulations have indeed been violated.


\(^{220}\) The Court in Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975), stated that the
the marketplace, the effect can be the same as if a conventional tender offer has been made.\textsuperscript{221} If only conventional tender offers were regulated, offerors could easily avoid the inconvenience of the Williams Act by "slight deviations from the conventional model, thus . . . frustrating . . . congressional intent."\textsuperscript{222}

Federal courts have been willing to extend the protection of the Williams Act in certain circumstances. When shareholders are pursued actively in large numbers by the offeror, most federal courts have applied the Williams Act.\textsuperscript{223} Public announcements of the proposed offer are the most blatant offenses of this type. If only a small percentage of the shareholders are pursued actively, however, the courts usually do not include the offer within the provisions of the Williams Act.\textsuperscript{224} Courts and commentators are not in agreement where the line should be drawn between truly "private" transactions and "public" transactions.\textsuperscript{225} Courts generally have refused to apply the Williams Act when the investors contacted were professional investors or sophisticated stock dealers.\textsuperscript{226} But even these knowledgeable shareholders can be pressured or con-

disclosure provisions assure that investors will have information on which to base their decisions regarding securities.

\textsuperscript{221} Einhorn & Blackburn, The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretation of the Term, 23 N.Y.L. Sch. L. Rev. 379, 382 (1978).

\textsuperscript{222} Note, supra note 191, at 1271. The note further states that "a tender offer should include any offer to purchase securities likely to pressure . . . shareholders into making uninformed, . . . ill-considered decisions to sell." Id. at 1281.

\textsuperscript{223} Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972). This was the first court to extend the Williams Act to public transactions. The offerors contacted almost all of the shareholders by mail, phone and personal visits prior to the offer. This publication created pressures as great as those of conventional tender offers. Other courts have cited Cattlemen's with approval. See S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978); Loews Corp. v. Accident & Casualty Ins. Co., Civ. No. 74C-1396 (N.D. Ill. Aug. 20, 1974).


\textsuperscript{225} The leading commentators in this field view the Cattlemen's decision and its successors as an attempt to differentiate between public purchases of stock and private actions, such as transactions on the floor of the stock exchange. Private actions assume both parties have access to necessary information and can act freely without time restraints. E. Aranow & H. Einhorn, Tender Offers for Corporate Control 70 (1973); E. Aranow, H. Einhorn, & G. Berlstein, Developments in Tender Offers for Corporate Control 44 (1977). At what point a purportedly private transaction involves so many shareholders that it becomes public remains unclear. The suggestion has been made that Congress should choose a number and create a rebuttable presumption that if more shareholders than this number are involved, the transaction becomes public and falls within the Act. E. Aranow, H. Einhorn, & G. Berlstein, supra, at 5; Moylan, Exploring the Tender Offer Provisions of the Federal Securities Law, 43 Geo. Wash. L. Rev. 551, 588-89 (1975); Note, Cash Tender Offers: A Proposed Definition, 31 U. Fla. L. Rev. 694 (1979). Until this advice is followed, courts will have very little guidance in this area.

The SEC has proposed a definition to help courts determine if seemingly private or open market transactions are really tender offers under the federal act. Offers that include direct solicitations of more than 10 shareholders in a 45 day period would be tender offers if the offeror seeks over 5% of that stock. Block offers between brokers at the usual market price may be excluded from this definition. In addition, even without meeting the above criteria, the SEC would treat as tender offers all purchases following widespread announcements offering a premium price on offers that are not negotiable. SEC Release No. 34-16,385, 44 Fed. Reg. 70,349 (Dec. 6, 1979).

fused if the offeror denies them sufficient information upon which to base a wise decision, or imposes a short time limit.227

The Sheffield opinion outlines the supreme court’s interpretation of the coverage of the North Carolina Tender Offer Disclosure Act. Without legislative amendments, the North Carolina act will not serve to regulate open market purchases of stock, regardless of how large these purchases are or for what purpose they are made, unless the purchases fall within the exceptions adopted from the federal courts. Further case law is necessary before the extent of these exceptions can be discerned.

E. Consumer Finance: Usury

The 1981 General Assembly responded to rising market rates of interest by raising interest ceilings prescribed in various chapters of the General Statutes.228 The most significant element in these provisions is the introduction into the usury statutes of a scheme that allows the maximum rate of interest to vary according to fluctuations in the rate for U.S. Treasury bills.229 This “sliding scale” approach substitutes a less artificial standard for the static maximum rates heretofore prescribed in the statutes and also reduces the danger of pressures caused by legislative delay in conforming legal interest ceilings to market rates.230

In Western Auto Supply Co. v. Vick231 the North Carolina Supreme Court had to determine whether a certain transaction was within the scope of the usury statutes. Defendant Vick, a retail merchant, financed purchases of inventory by assigning to plaintiff installment sales contracts executed by defendant’s customers. As holder of this paper, plaintiff Western Auto received

combined with the sophistication of those shareholders to find this case outside the Cattlemen’s exception. These investors should know enough about stock transactions to avoid being forced into bad deals. See also D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94, 771 (S.D.N.Y. Aug. 23, 1974); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978); Brascan Ltd. v. Edper Equities, Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979).

227. In Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979), sophisticated shareholders were given a premium price offer that expired in less than an hour. The court found that the denial of necessary information prevented these investors from applying their sophistication and held that a tender offer had been made. Id. at 819-21. Because of this danger of high pressure and lack of shareholder access to pertinent information, Aranow suggests little weight should be placed upon the sophistication of the shareholders. E. Aranow, H. Einhorn, & G. Berlstein, supra note 5, at 9.


229. See, e.g., id. § 24-1.1(3):

On the fifteenth day of each month, the Commissioner of Banks shall announce and publish the maximum rate of interest permitted by subdivision (1) of this section on that date. Such rate shall be the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus six percent (6%), rounded upward or downward, as the case may be, to the nearest one-half of one percent (1/2 of 1%), or sixteen percent (16%), whichever is greater . . . .


payments of the principal due under the contracts and applied the proceeds to Vick's indebtedness of the merchandise received. Plaintiff also retained sixty-five or seventy percent of the finance charges due under the contracts, placing the remainder in a dealer reserve account for Vick. The sales contracts were assigned with recourse, requiring Vick to make good any customer's failure to maintain installment payments.

As a counterclaim to Western Auto's subsequent action for default, Vick asserted that Western Auto's practices were usurious. Vick claimed that since he remained liable for paying off the installment sales contracts even after they were assigned to Western Auto, there was in effect a forbearance of the debts he had incurred for the purchase of merchandise. Under this theory, Western Auto's retention of a portion of the finance charge was viewed as the taking of interest at a usurious rate. In its defense, Western Auto contended the assignment of the sales contracts was a sale, and therefore not subject to the usury statutes.

A divided court found the transaction to be a forbearance. Because of Western Auto's right of recourse, the debts incurred by Vick through the purchase of inventory were not extinguished but only secured by the assignment of the paper. Thus, until payout, there was a forbearance of those debts, which implicated the usury statutes. In support of this conclusion the supreme court relied on the 1857 case of Bynum v. Rogers.

The court's decision in Vick places North Carolina in the minority of jurisdictions that hold assignments of chattel paper with recourse subject to the usury laws. Although this result should provide merchants and financiers with a clear standard for structuring their transactions, it raises some problems. First, it is clear that Vick would have been viewed more accurately as a guarantor of his customer's obligations than as a borrower. At least theoretically, Vick's debts for the merchandise received from Western Auto were extinguished by the assignment of the sales contracts, since whatever sum he had to pay on behalf of a defaulting customer was money he had a right to

---

232. The percentage deducted depended on the term of Vick's contract with the customer. Id. at 34, 277 S.E.2d at 364.

233. "Forbearance" was defined in the Vick opinion as "the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable." Id. at 39, 277 S.E.2d at 367.


235. 303 N.C. at 43, 277 S.E.2d at 369.


recover from that customer. 238 Indeed, application of the Vick analysis could lead to a windfall for retailers, because on a usurious transaction they could recover the statutory penalty of twice the interest paid from the financier, 239 and then either proceed directly against the customer or enforce a security interest to recover the balance owed on the contract. Second, by subjecting recourse assignments to the usury laws, Vick effectively limits the profit financiers can realize under such an arrangement. A plausible response by financiers seeking to maintain a higher return, therefore, may be to forego the guaranty requirement, take on the risk of nonpayment themselves and raise the discount rate of the paper accordingly. 240 The result could be in an increase in the cost of credit for both retailers and consumers. 241

F. Other Statutory Developments

1. Banks and Banking

In the 1981 legislative session the General Assembly made several statutory changes affecting the banking industry. The most comprehensive change was the enactment of Chapter 54B 242 of the General Statutes, titled “Savings and Loan Associations,” and the subsequent repeal of Chapter 54A 243 and Subchapter I of Chapter 54. 244 This legislation consolidates what had been a piecemeal statutory approach to the different forms of savings and loan associations. The legislation brings under one chapter the regulation and administration of mutual associations, stock associations, mutual guaranty associations, and savings and loan holding companies. 245 To provide greater flexibility in rulemaking and administration of savings and loan associations, the legislature expanded the powers and authority of the Administrator of the Savings and Loan Division of the Department of Commerce. 246 This flex-

238. See N.C. Gen. Stat. § 25-3-415 official comment 5 (1965): “the accommodation party who pays is subrogated to the rights of the holder paid, and should have his recourse on the instrument.”


240. This fear was expressed by Justice Meyer. 303 N.C. at 51-52, 277 S.E.2d at 374 (Meyer, J., dissenting). Obviously, the lower price a retailer would get for his contracts under this scenario would be offset to some extent by the retailer’s being freed of the obligation to guarantee payment. As Justice Meyer suggested, however, the fact that of all the financing options available, Vick chose the assignment with recourse, indicates that the arrangement offered savings that could not be matched by assigning without recourse.

241. The importance of Vick may be diminished in light of the 1981 amendments to the usury statutes. See notes 228-30 and accompanying text supra.


244. Id. §§ 54-1 to -44.13 (1975 & Cum. Supp. 1980). This subchapter dealt with the administration and regulation of building and loan associations, building associations, and savings and loan associations.

245. The legislation refers to all thrift institutions generically as savings and loan associations, and indicates whether it was organized as a stock or mutual savings and loan by identifying the association as “stock” or “mutual.” Id. § 54B-4(b)(36), (49) (Cum. Supp. 1981).

246. The Administrator’s powers were extended to include authorization of new branches, id. § 54B-22, taking supervisory control of associations conducting business in an unsafe manner, id.
ibility will allow the Administrator to respond more readily to change in economic conditions and savings and loan practices.

The major substantive changes of the legislation cover a wide variety of activities. Regarding the organization of a savings and loan, the chapter specifies time limits for completion of various steps in the application process and increases the minimum capital required for approval of a savings and loan application. Operational changes in the statute include granting savings and loan associations a setoff upon default on an unsecured loan on withdrawal accounts owned by the customers in default; describing the kinds of loans permitted, including certain insider loans, and placing the level of required reserves in the General Reserve Account at the discretion of the Savings and Loan Commission. In addition, the chapter provides for civil and criminal penalties for violation of the Administrator's orders or the provisions of the chapter. This legislation should provide greater administrative control over savings and loans, while making them more competitive in the financial markets.

Another legislative action that directly affects savings and loan associations concerns a change in the method of taxation of savings and loans. In lieu of treating savings and loan associations separately, newly amended G.S. 105-228.22 through 105-228.27 will treat savings and loans like other corporations and tax them on net income.

§ 54B-68, temporary removal of officers or directors for any violation of this chapter or unsound business practice, id. § 54B-69(b), and the authority to promulgate rules and regulations as required to discharge his duties, id. § 54B-55.

247. Id. §§ 54B-9(b), -11, -12, -14 to -18. The sections ensure that an application for formation of a savings and loan association is given adequate examination. The disposition of each application is monitored until approval or denial, and once approved a savings and loan begins operation within six months.

248. The minimum required capitalization for stock associations was increased from $700,000 to $1,500,000 in subscribed capital stock, a minimum of $500,000 of which must be set aside as a permanent capital reserve. Id. § 54B-12(b)(1), (2). Prior to approval of its application, a mutual association is required to have an operational expense fund determined by the Administrator, but not less than $75,000. This fund is to cover organizational and corporate expenses. In addition, the mutual association must have a minimum of pledges for withdrawal accounts of $350,000. Id. § 54B-12(a)(1), (2).

249. Id. §54B-131.

250. Id. § 54B-151; see also id. § 54B-153 (prohibiting the use of an association's own capital stock or its own mutual capital certificates as security for a loan).

251. Id. § 54B-154.

252. Id. § 54B-216. The commission is to base its decision on the degree of risk involved with the type of assets held by the association. Id.

253. Id. §§ 54B-64 to -66.

254. For the protection of the public, the Administrator is authorized to permit a savings and loan association to merge with any other state association if he finds that the association is "unable to operate in a safe and sound manner." Id. § 54B-44.

255. Id. § 54B-261. The Administrator is given the duty of supervising savings and loan holding companies. Id. § 54B-262.

256. N.C. Gen. Stat. §§ 105-228.22 to .27 (Cum. Supp. 1981). Previously, savings and loan associations had been taxed on their deposits and on net income. See id. §§ 105-228.22 to .27.

There were also several minor statutory changes that will affect commercial banks. The most significant legislative action requires approval of the Commissioner of Banks prior to effecting a change in bank control. Prior to this legislation, the Commissioner had to be informed of any change in bank control within twenty-four hours. The new statute gives the Commissioner an opportunity to examine the proposed change and to disallow it if he believes the change would not be in the public interest.

2. Consumer Protection

In the area of consumer protection the legislature passed a bill that regulates the activities of discount buying clubs. Discount buying clubs are defined as "any person, firm, or corporation, which in exchange for any valuable consideration offers to sell or to arrange the sale of goods or services to its customers at prices represented to be lower than are generally available." The statute requires that contracts between the discount buying club and its customers be in writing, signed by all parties, with the customer maintaining a right to cancel for three business days after signing the contract. The statute also forbids certain coercive business practices and requires that the club maintain a surety bond to provide funds for injuries caused by the club's violation of the statute or breach of contract.

3. Mobile Home Regulation

The General Assembly also enacted a statute designed "to promote the general welfare and safety of mobile home residents in North Carolina." The statute creates the North Carolina Manufactured Housing Board, which is charged with the duty of providing a comprehensive framework for regulating

---

262. N.C. Gen. Stat. § 66-131 (Cum. Supp. 1981). The statute does not include groups or associations in which no person is intended to or actually profits from the organization beyond the benefit that all members receive from discount purchases.
263. Id. § 66-132.
264. Id.
265. Id. § 66-133.
266. Id. § 66-134. This section forbids certain high-pressure selling techniques, refusal to disclose fully price lists and merchandise catalogs to potential customers, and failure to comply with a customer's request to cancel purchase orders without charge when goods have not been delivered or services are yet to be performed.
267. Id. § 66-135.
the industry of the manufacture and sale of mobile homes.\textsuperscript{269} The statute attempts to bring some order to the industry by requiring the licensing and bonding of all segments,\textsuperscript{270} delineating specific warranty requirements,\textsuperscript{271} and providing channels for an enforcement procedure for warranty claims.\textsuperscript{272} The statute eliminates the confusion surrounding the definition of a mobile home,\textsuperscript{273} sets forth standards for manufacturing and selling,\textsuperscript{274} and gives the Commissioner of Insurance authority to promulgate rules to effectuate the intent of the legislature.\textsuperscript{275}

4. State Building Code

The legislature amended the state building code to provide "Special Safety to Life Requirements Applicable to Existing High-Rise Buildings."\textsuperscript{276} The code as amended categorizes buildings according to height and identifies safety measures that are applicable to each category.\textsuperscript{277} The identified safety measures vary from corridor smoke detectors, required in all buildings over six stories tall, to special refuge areas required in buildings over twenty-four stories.\textsuperscript{278} Building owners are required to submit plans and specifications within one year to outline the work necessary to bring buildings into compliance and are given five years to complete the required modifications.\textsuperscript{279} The statute may require major modifications to bring some buildings into compliance.

5. Credit Unions: Confidentiality

Another development in the commercial area was the General Assembly's passage of an act to ensure the confidentiality of information obtained by the state credit union division or its agents.\textsuperscript{280} The primary purpose of the legislation is to provide privacy to credit unions and their customers by ensuring that data collected as a result of state or federal information requirements or examinations is not publicly disclosed. Through this statute the legislature affords

\begin{itemize}
\item \textsuperscript{269} N.C. Gen. Stat. § 143-143.10 (Cum. Supp. 1981); see also id. § 143-146.
\item \textsuperscript{270} Id. §§ 143-143.11-143.12.
\item \textsuperscript{271} Id. § 143-143.16; see also id. § 143-143.18.
\item \textsuperscript{272} Id. § 143-143.17.
\item \textsuperscript{273} See id. § 143-143.9(6).
\item \textsuperscript{274} Id. §§ 143-151.5.
\item \textsuperscript{275} Id. § 143-146.
\item \textsuperscript{277} Id. For purposes of the code, high-rise buildings are divided into three categories: class I—60 to 120 feet above ground level (6 to 12 stories); class II—120 to 250 feet above ground level (12 to 25 stories); and class III—over 250 feet above ground level (more than 25 stories).
\item \textsuperscript{278} Id. Class III buildings are required to have refuge areas on every eighth floor above the twenty-fifth floor, smoke venting, and sprinkler systems.
\item \textsuperscript{279} Id. Building officials may permit time extensions beyond the five-year period if the owner can show just cause for the extension at the time the plan is approved.
\end{itemize}
credit unions a degree of confidentiality similar to that given banking institutions.\textsuperscript{281}

6. Debtor Exemptions From Money Judgments

The North Carolina General Assembly adopted a new statute dealing with debtor exemptions from money judgments.\textsuperscript{282} This statute repeals G.S. 1-369 to -392.\textsuperscript{283} The major exemptions provided by the new statute consist of up to $7,500 in property the debtor uses as a residence, up to $1,000 in one motor vehicle, up to $2,500 in household goods, plus $500 for each dependent of the debtor up to $2000.\textsuperscript{284}

The new statute gives debtors a choice between the exemptions provided therein and the exemptions provided by Article X of the North Carolina Constitution.\textsuperscript{285} Interestingly, G.S. 1-369 to -392 provided the statutory machinery for implementing the Article X exemptions. Thus, the new statute expressly authorizes the debtor to choose the Article X exemptions, but repeals the statutory machinery to implement the Article X exemptions.

The exemptions provided in The Federal Bankruptcy Reform Act are not applicable to residents of North Carolina under the new statute.\textsuperscript{286} Instead, the exemptions provided by G.S. 1C-1601 shall apply for purposes of the Federal Bankruptcy Reform Act.\textsuperscript{287}

A. Mark Adcock
Steven Anzalone
Carolyn D. Bakeswell
Jacqueline Riley Clare
Robert L. Mendenhall
Julius A. Rousseau, III


\textsuperscript{284} Id. § 1C-1601(a) (Cum. Supp. 1981).

\textsuperscript{285} Id. § 1C-1602.

\textsuperscript{286} Id. § 1C-1601(f).

\textsuperscript{287} Id.
IV. CONSTITUTIONAL LAW

A. Freedom of Speech

In *Rich v. Luther* the federal district court for the Western District of North Carolina confirmed the constitutionality of the Department of Corrections' "publisher only rule." This rule states that "[a]n inmate in medium, close, or maximum security may receive a reasonable number of books, newspapers, magazines, and other publications directly from the publisher." The regulation prohibits an inmate's receipt of literature from any other source. Plaintiff, an inmate in a North Carolina state prison, claimed that this rule violated his first amendment rights. Because the suit was filed in 1975, resolution of the constitutional issue required the convening of a three-judge district court panel.

The United States Supreme Court held a similar rule constitutional as applied to pre-trial detainees in *Bell v. Wolfish*. Thus, the issue facing the district court in *Rich* was whether to extend the *Wolfish* decision to convicted prisoners. Emphasizing the *Wolfish* conclusion that a regulation must be evaluated in light of the need for institutional security even when the regulation affects constitutional rights, the court held that the "publisher only rule" represents "a rational and reasonable response to security problems confronting state officials charged with the responsibility of managing the North Carolina prison system." In support of its conclusion the court noted that the rule regulated the source and not the content of the materials, that admitting all books and magazines might increase the flow of drugs and weapons within the prison.

---

1. In *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981), the court considered whether the refusal of the trial court to grant a "gag order" prohibiting attorneys, assistants, investigators, the county clerk, sheriff, jailer, police and witnesses from talking to the media denied defendant a fair trial. In balancing the right to free speech and the guarantee of a fair trial, the court relied on the holding in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), which held that the person seeking a gag rule carries a heavy burden of showing justification for the prior restraint. The court found that defendant had not carried his burden, stating that adverse publicity does not have to lead to an unfair trial.


4. A woman in Durham had sent plaintiff *Great Short Works of Mark Twain* and *Don Juan: A Yaqui Way of Knowledge*. Prison officials returned the books to the sender pursuant to the "publisher only rule."

5. In 1975, challenges to the constitutionality of state statutes were heard in three-judge courts. Act of June 25, 1948, ch. 646, 62 Stat. 968 (current version at 28 U.S.C. § 2284 (1976)). Currently, three-judge panels are convened only in cases challenging the constitutionality of the apportionment of Congressional districts or any statewide legislative body, or as otherwise required by Congress. 28 U.S.C. § 2284 (1976). Judge Russell wrote the court's opinion, joined by Judge Jones, with Judge McMillan dissenting.

6. 441 U.S. 520 (1979). In *Wolfish*, pre-trial detainees brought suit to correct conditions at the Metropolitan Correctional Center in New York City. The "publisher only rule" was challenged in one of several constitutional claims.

7. 514 F. Supp. at 482.

8. 441 U.S. at 546.

the prison system, and that the inmates had access to prison libraries.\textsuperscript{10}

The Rich opinion represents a considerable expansion of the holding in Wolfish. The Supreme Court had stressed that it was dealing with a limited restriction: a prohibition against the receipt of hardback books unless mailed directly from publishers, book clubs or bookstores.\textsuperscript{11} The North Carolina rule embraces all reading material, hard- or soft-bound, and excludes bookstores and book clubs as potential sources.\textsuperscript{12} In other words, the North Carolina regulation is much more restrictive than the one upheld in Wolfish. Furthermore, the Court in Wolfish stressed that its conclusion was the result of a consideration of all the circumstances surrounding pre-trial detainees.\textsuperscript{13} The Supreme Court found three factors to be compelling: first, the purpose of the rule was to regulate the source and not the content of the inmate's reading material; second, the inmates had access to considerable additional material outside of the restricted hardcover books; and third, the restriction was limited to a maximum duration of sixty days.\textsuperscript{14}

Only the first of these factors, the purpose of the regulation, applies to the situation of convicted prisoners in North Carolina. While the prisons do provide libraries for their inmates, books obtained from outside sources are the only reading material available to inmates, whereas more numerous opportunities are available to pre-trial detainees.\textsuperscript{15} In addition, the North Carolina restriction's impact is not limited to a short span of time.\textsuperscript{16} In light of the factors found to be relevant in Wolfish, the Rich court must be seen as having embraced the Wolfish holding without adhering to its rationale.\textsuperscript{17}

Another significant 1981 decision\textsuperscript{18} involved North Carolina's moral nuisance statute.\textsuperscript{19} In 1977 the State sought to have the Chateau X Theater and Bookstore declared a nuisance under Chapter 19 of the North Carolina General Statutes.\textsuperscript{20} The trial court, finding that Chateau X was in fact a nuisance, permanently enjoined defendants from showing any obscene films in the fu-

\begin{flushright}
10. Id. (citing as support Cotton v. Lockhart, 620 F.2d 670, 672 (8th Cir. 1980)).
11. 441 U.S. at 550.
14. Id. at 551-52.
15. The New York facility had a library containing over 8,000 volumes and offered for sale to the inmates four daily newspapers and several magazines. Since the "publisher only rule" applied only to hard-bound material, the inmates could also receive paperback books and magazines from any source. Id. at 552 n.33. North Carolina facilities, as noted by the dissent in Rich, cannot offer these alternatives. 514 F. Supp. at 484 (McMillan, J., dissenting).
16. The pre-trial detainees usually were kept no more than ten days, while over 85% were released within 60 days. 441 U.S. at 524-25 n.3.
17. Justice McMillan further questioned whether the "publisher only rule" was necessary even in light of security risks. He noted that in minimum custody units, where the rule is not followed, there are no additional security problems. Moreover, reading materials represent only a portion of the fifth most frequent source of contraband, and an adequate search of a book should require no more than 30 seconds. 514 F. Supp. at 485 (McMillan, J., dissenting).
20. Id. §§ 19-1, -2.1 (1978) (making the use of a building for the purpose of illegal possession or sale of obscene or lewd matter a nuisance and providing for a civil action of abatement perpetually enjoining all persons from maintaining the nuisance).
ture. The North Carolina Supreme Court affirmed the trial court in *State ex rel. Andrews v. Chateau X, Inc.* 21 The United States Supreme Court granted certiorari but vacated the decision and remanded 22 for consideration in light of *Vance v. Universal Amusement Co.* 23

On remand 24 the North Carolina Supreme Court held that *Vance* was inapplicable and reaffirmed its earlier decision, incorporating the prior opinion into the current decision. 25 The court read *Vance* as declaring a Texas nuisance statute an invalid prior restraint because it permitted an individual to be held in contempt for violating an injunction by showing a film, even though there had been no final adjudication of obscenity and even though the film was ultimately found not obscene. Nonobscenity was not a defense under the Texas statute. 26 The court pointed out that in contrast, under the North Carolina moral nuisance statute, G.S. 19-4, nonobscenity is always a defense to a contempt proceeding. 27 The court concluded that because of this safeguard, the prior restraint of future expression permitted by the nuisance statute is no more burdensome than a criminal sanction for past acts, and thus is constitutionally permissible. 28

The supreme court’s opinion represents a very narrow interpretation of the *Vance* decision. In a strong dissent, Justice Exum chose to read *Vance* much more broadly and to view it within the context of other Supreme Court decisions. 29 This approach seems to be a better interpretation of the admittedly confusing *Vance* decision. The majority’s view, that under *Vance* a court need only find that a prior restraint is “neither more onerous nor more objectionable than a criminal sanction,” 30 does not meet the standards of either of the Supreme Court decisions in *Southeastern Promotions, Ltd. v. Conrad* 31 or

---

23. 445 U.S. 308 (1980) (per curiam). The *Vance* Court was considering a Texas nuisance statute that allowed injunctions for indefinite duration against future exhibitions of films even though they had not been adjudicated obscene. If an individual did not obey the order, he could be held in contempt regardless of whether the film was ultimately found to be obscene. The Court held that this was an invalid prior restraint on communicative activity. 445 U.S. at 316-17.
25. Id. at 323, 275 S.E.2d at 445.
26. Id. at 328, 275 S.E.2d at 448.
27. Id. at 328-29, 275 S.E.2d at 448. The court quoted its earlier decision as support: There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always depend on the ground that the material is not legally obscene. The burden is on the State to prove obscenity beyond a reasonable doubt. 296 N.C. at 264, 250 S.E.2d at 611 (as quoted in 302 N.C. at 329, 275 S.E.2d at 448).
28. 302 N.C. at 329, 275 S.E.2d at 448.
29. Id. at 330, 275 S.E.2d at 449 (Exum, J., dissenting) (citing particularly *Near v. Minnesota*, 283 U.S. 697 (1931)).
30. 302 N.C. at 329, 275 S.E.2d at 448.
31. 420 U.S. 546 (1975) (considering the prohibition of a production of the play *Hair*). The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.
Near v. Minnesota, both of which emphasize that the burden of supporting a prior restraint is much heavier than the burden of supporting a criminal sanction. Injunctions against future expressions differ from criminal sanctions because of their potentially chilling effect on first amendment rights.

Justice Exum’s dissent suggested that the State’s burden may not be met solely by a showing that nonobscenity is a defense to a contempt proceeding. He noted that contempt and criminal proceedings differ as to certain key protections: a civil contemnor is not entitled to a jury trial, and the State in a civil contempt proceeding does not have to prove scienter, as it must to obtain a criminal conviction. Justice Exum’s dissent thus viewed Vance as an example of only one way in which an injunction against future expression may be an impermissible prior restraint.

Fracaro v. Priddy, a third 1981 decision, concerned the first amendment rights of public employees. The District Court for the Middle District of North Carolina recognized that the right to free speech is not absolute for public employees. Nevertheless, the State must show significant interference with efficient operations before limiting first amendment rights. Whether there has been sufficient interference is an issue of fact to be decided by the jury.

Id. at 558-59 (emphasis in original).

32. 283 U.S. 697 (1931) (holding invalid a statute making regular publication of a malicious, scandalous and defamatory newspaper a public nuisance that may be permanently enjoined).

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.

Id. at 721.

33. The Vance court reiterated this concept: “[T]he burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.” 445 U.S. at 315-16.

34. 302 N.C. at 331, 275 S.E.2d at 449 (Exum, J., dissenting).

35. Id.

36. Id. The two other courts that have faced the problem of applying Vance to a nuisance statute did not clearly adopt the interpretation of the Chateau X court, nor did they embrace the view of Exum’s dissent. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), aff’d mem., 50 U.S.L.W. 3373 (U.S. Nov. 10, 1981) (No. 80-1604); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981).


38. Plaintiff, a Social Services Eligibility Supervisor, claimed in two television interviews that social workers mishandled child abuse cases. She was fired because of the statements and brought suit claiming that this action violated her first amendment rights.


40. Id. at 196.

41. Id. at 195-96. Defendants had moved for summary judgment on the grounds that plaintiff’s claim was dismissed pursuant to a statute prohibiting dissemination of confidential informa-
Finally, in *State v. Felmet* the supreme court held that the free speech provisions of the United States and North Carolina Constitutions do not protect an individual from prosecution for trespassing when he solicits signatures for a petition in the parking lot of a privately owned shopping mall.

B. Fifth Amendment: Self-Incrimination

In *Lowder v. All Star Mills, Inc.* the North Carolina Supreme Court considered whether the refusal by defendant in a civil contempt proceeding to comply with a court order to produce tax returns was protected by the fifth amendment's proscription against self-incrimination. After a careful study of several United States Supreme Court decisions addressing the matter, the court concluded that the contents of the documents did not provide the necessary element of compulsion when there was no evidence that the defendant was under any physical or mental coercion at the time he prepared his tax returns. The court also concluded that the compelled testimony which would result from defendant's required production of the tax returns did not merit fifth amendment protection because the documents were only of a semi-private nature.

C. Fourteenth Amendment: Equal Protection

In *Jones v. McDowell* the North Carolina Court of Appeals sustained due process and equal protection attacks on the State's statutory scheme for
changing an illegitimate child's surname upon legitimation to that of the father. After holding that the mother has a constitutionally protected interest in retaining the surname given the child at birth, the court concluded that the statutory scheme providing for notice and hearing was not sufficient to satisfy the requirements of due process because the scheme mandated a change in the surname to that of the father. Moreover, the court continued, the statute utilized a gender-based classification for which the State could not advance an "exceedingly persuasive justification." Because the requirement did not bear a close and substantial relationship to the underlying governmental objective of establishing the filial relationship between illegitimate children and their fathers, it was found to deny the mother her right to equal protection under the law.

D. Fourteenth Amendment: Due Process

1. Civil Paternity and Right to Counsel

In *Wake County ex rel. Carrington v. Townes*, a case of first impression in North Carolina, the court of appeals held that an indigent defendant has a

52. N.C. Gen. Stat. §§ 49-10, -13 (1976 & Cum. Supp. 1981) provide that upon legitimation, the child's birth certificate shall be replaced by one bearing the full name of the father, and on which the surname of the child is changed to that of the father.

53. The court relied on several cases for this proposition, including Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977), and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

54. 53 N.C. App. at 441-42, 281 S.E.2d at 194. See note 52 supra.

55. Id. at 441, 281 S.E.2d at 196.

56. In considering a similar issue, the Federal District Court for the Eastern District of North Carolina recently held that G.S. § 130-53(e), which requires that children born of married parents be given their father's surname, violated the parents' and the child's right to privacy in making decisions affecting family life. *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981). Furthermore, because the statutory scheme distinguishes between legitimate children, who must bear the father's name, and illegitimate children, who until legitimated may be given either parent's name, see N.C. Gen. Stat. § 130-50(f) (1981), it fails to provide equal protection under the law. The court rejected the State's contentions that the scheme was necessary to keep accurate and timely records of births, and to screen newborns for health problems, concluding that a compelling state interest justifying the different requirements was not shown. 523 F. Supp. at 496.

57. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. In *State v. McCoy*, 302 N.C. 363, 283 S.E.2d 788 (1981), the North Carolina Supreme Court was presented with the question whether an indigent defendant has a constitutional right under the sixth amendment to court-appointed counsel in a criminal prosecution for nonsupport of an illegitimate child under G.S. § 49-2. Defendant had been adjudged the father of the child in an earlier action for nonsupport in which he had not been offered the assistance of appointed counsel. The court refused to decide the issue, however, holding instead that the trial judge's ruling on defendant's motion for appropriate relief was not yet ripe for appellate review because the trial court had not determined whether defendant's failure to comply with the earlier child support judgment had been willful. Willful failure to comply with an earlier support judgment, the court noted, is not presumed from a mere failure to support. Id. at 370-71, 283 S.E.2d at 792. See *State v. Cook*, 207 N.C. 261, 176 S.E.2d 757 (1934).


59. Although the courts of North Carolina had not addressed this precise question, they had addressed similar ones, the most notable being that of an indigent defendant's right to court-appointed counsel in a state-instituted parental rights termination proceeding. In *re Lasiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979). See Survey of Developments in North Carolina Law, 1979—Constitutional Law, 58 N.C.L. Rev. 1326, 1345 (1980)). Although the North Carolina
right to court-appointed counsel in civil paternity suits instituted by the State. The court based the right on the due process requirements of the fourteenth amendment of the United States Constitution and of article I, section 19 of the North Carolina Constitution.

Wake County, through its Department of Social Services Child Support Agency, sought a civil adjudication that defendant was the father of an illegitimate child whose mother was a recipient of Aid to Families with Dependent Children (AFDC) funds. The county also sought an order directing defendant to make support payments on the child's behalf.

At a preliminary hearing, the trial judge denied defendant's motion seeking appointment of counsel, concluding that neither the due process clause of the United States Constitution nor article I, section 19 of the North Carolina Constitution guarantees an indigent defendant the right to court-appointed counsel in civil paternity actions. On review of defendant's appeal from the denial of the motion, the court of appeals reversed.

The court of appeals adopted the analysis set forth by the United States Supreme Court in *Lassiter v. Department of Social Services*, in which the Supreme Court affirmed a North Carolina Court of Appeals decision that an indigent defendant does not have a constitutional right to court-appointed counsel in a civil termination of parental rights hearing. The Court in *Lassiter* began its analysis with the presumption that an indigent litigant has a right to appointed counsel only when an adverse decision might result in the deprivation of the litigant's "physical liberty." A balancing of interests test was then applied, in which three distinct factors deemed necessary to ensure fundamental fairness are considered:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
3. The Government's interest, including the possibility of expense and burden to the Government and of delay in the administration of justice.

---


60. 53 N.C. App. at 650, 281 S.E.2d at 766-67.
61. U.S. Const. amend. XIV.
63. 53 N.C. App. at 649, 281 S.E.2d at 766.
64. The defendant had first sought assistance at the local legal services office, but he was turned away because the office believed that he had a right to court-appointed counsel. The office did agree to make a limited appearance, however, to ensure that defendant received appointed counsel. Id. at 649-50, 281 S.E.2d at 766.
65. Id. at 650, 281 S.E.2d at 766.
66. Id.
69. 53 N.C. App. at 651, 281 S.E.2d at 767 (quoting from *Lassiter*, 452 U.S. at 26-27).
CONSTITUTIONAL LAW

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.70 After balancing these three factors, the court must then "set their net weight . . . against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom."71

After outlining the analysis, the court of appeals applied the Lassiter test to the facts before it. Because a paternity action is a civil proceeding, the court reasoned, it offered no immediate threat to defendant's personal liberty.72 Nevertheless, a civil paternity adjudication can have criminal ramifications if, for example, the defendant is found to be the child's father and subsequently defaults on support payments that he was ordered to make in the paternity action.73 The court concluded that there is "at best, a weakened presumption that court-appointed counsel is not necessary in a paternity proceeding."74

The court then proceeded to examine the three factors involved, looking first at those interests of defendant that would be placed in jeopardy absent assistance of counsel. The court identified two interests: first, defendant's liberty interest, in that the adjudication of paternity would be res judicata in any subsequent criminal proceeding to enforce any obligations arising out of the paternity judgment; and second, defendant's personal property and familial interests.75

Next, the court evaluated the risk of an erroneous adjudication of paternity in the absence of procedural safeguards such as appointed counsel to protect defendant's rights. It concluded that without counsel to advise indigent defendants, many of whom are illiterate and unfamiliar with the judicial process, a defendant's constitutional right to a free blood grouping test would be rendered meaningless, and there would be no effective cross-examination of the accusing mother; in short, the complexities of a paternity suit would act as a barrier to an unrepresented indigent defendant's opportunity to be heard.76

Finally, the court looked at the State's interest in reducing costs and minimizing litigation. While the court conceded that the State's financial and administrative interests are important, it found that these interests are outweighed by the defendant's important private interests.77

70. 53 N.C. App. at 652, 281 S.E.2d at 767 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). Although the Supreme Court in Mathews set out these three factors for determining what procedures are necessary to ensure fundamental fairness under the due process clause of the fourteenth amendment to the United States Constitution, the court of appeals concluded that the same test was applicable in evaluating the due process requirements of the North Carolina Constitution. 53 N.C. App. at 652, 281 S.E.2d at 767.
71. Id. at 652, 281 S.E.2d at 768 (quoting Lassiter, 452 U.S. at 27).
72. Id. See also Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980) (proceeding to establish paternity not quasi-criminal in nature and thus not deserving of jury trial merely because plaintiff must prove paternity beyond reasonable doubt).
73. 53 N.C. App. at 652, 281 S.E.2d at 768.
74. Id.
75. Id. at 653-57, 281 S.E.2d at 768-70.
76. Id. at 657, 281 S.E.2d at 771.
77. Id. at 660-61, 281 S.E.2d at 772.
The court concluded its analysis by balancing the three factors, first against one another and then collectively against the "weakened presumption" that no right to counsel attaches unless a defendant's personal liberty is at stake. As a result of this balancing, the court concluded that the three factors outweighed the presumption, and thus the indigent defendant was entitled to court-appointed counsel. That right was based on both the fourteenth amendment of the United States Constitution and on the law-of-the-land provision of the North Carolina Constitution. The court observed that its holding was not inconsistent with current North Carolina case law, and that a similar result had been reached in several other jurisdictions as well as by the Uniform Parentage Act.

2. Procedural Due Process

North Carolina courts decided several cases in 1981 concerning procedural due process. In State v. Taylor the North Carolina Supreme Court

78. "On the imaginary scales of justice, the defendant's substantial liberty, property and familial interests ...; the significant risk of an erroneous adjudication of paternity under the present procedures ...; and the State's minimal countervailing monetary interests ... overwhelm the already weakened presumption against the right to appointed counsel in cases of this nature." Id. at 661, 281 S.E.2d at 773.
79. Id. See U.S. Const. amend. XIV; N.C. Const. art. I, § 19.
80. The court looked exclusively at the North Carolina Supreme Court's decision in Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980). The Jolly decision stands for the proposition that counsel is not automatically required in a civil contempt proceeding; rather, the need for counsel in each proceeding must be evaluated on its own merits. See 53 N.C. App. at 661, 281 S.E.2d at 773.
83. In State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 526, further rev. denied, 303 N.C. 318, 281 S.E.2d 657 (1981), the North Carolina Court of Appeals held that a jury instruction did not violate defendant's due process rights because the charge contained only a permissive inference of guilt rather than a mandatory presumption of guilt, as defendant claimed. Id. at 223, 275 S.E.2d at 537. Since there was "a rational connection between the basic and elemental facts such that upon proof of the basic facts . . ., the elemental facts . . . are more likely to exist," id., and because there was other evidence that, when coupled with the inference, was sufficient for the jury to find the elemental facts beyond a reasonable doubt, the court found that defendant's due process rights were not violated. Id.
84. In State ex rel. Lee v. Penland-Bailey Co., 50 N.C. App. 498, 274 S.E.2d 348 (1981), the court of appeals held that the Sedimentation Pollution Control Act of 1973, N.C. Gen. Stat. § 113A-50 to -66 (1981), did not apply retroactively to an event that preceded the July 1, 1973 effective date of the Act but which produced sedimentation and siltation after that date. The court concluded that the legislative intent behind the enactment of this statute was to control future erosion and sedimentation. 50 N.C. App. at 502, 274 S.E.2d at 351. Moreover, the statute was still constitutional if retroactively applied in this instance because defendant failed to show that the Act as applied interfered with any of his vested rights or accrued liabilities. Id. at 503-04, 274 S.E.2d at 352. The position of the court was consistent with that of the supreme court in Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); and Booker v. Duke University Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).
85. In State v. Hodges, 51 N.C. App. 229, 275 S.E.2d 533 (1981), the court of appeals held that a
held that the State’s refusal to give defendant notice prior to trial of all aggravating circumstances upon which the State intended to rely in seeking the death penalty in the event of a conviction for first degree murder was not a violation of defendant’s due process rights. Stating that the factors set out in G.S. 15A-2000(e)\(^8\) are the only aggravating circumstances upon which the State can rely, the court ruled that the statutory notice is sufficient to satisfy the requirements of due process.\(^8\)

In *Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc.*\(^87\) the court of appeals rejected defendant’s contention that G.S. 105-366 and -368,\(^88\) which provide for the prehearing garnishment of a defendant’s bank account for nonpayment of taxes due on a bulk sale, violated defendant’s rights to due process and equal protection under the United States Constitution. The court found that the statutory scheme fell within the special circumstances exception rule that a taking before a hearing violates due process because the government’s interest in collecting its unpaid revenues outweighs the individual interests of the defendant involved.\(^89\) Moreover, the statutory scheme provides for a subsequent judicial determination of rights involved.\(^90\)

---

The court noted that while several states, by statute, have required that such notice be given before trial, e.g., Del. Code Ann. tit. 11, § 4209(c)(1) (1979), the requirement is only a statutory one, and the North Carolina General Assembly has not enacted similar legislation. 304 N.C. at 257, 283 S.E.2d at 768. See also State v. Ketchie. 286 N.C. 387, 211 S.E.2d 207 (1975) (when defendant does not contend that informant participated in or witnessed the alleged crime, he has no constitutional right to discover the name of the informant).

86. The court noted that while several states, by statute, have required that such notice be given before trial, see, e.g., Del. Code Ann. tit. 11, § 4209(c)(1) (1979), the requirement is only a statutory one, and the North Carolina General Assembly has not enacted similar legislation. 304 N.C. at 257, 283 S.E.2d at 768.
89. 54 N.C. App. at 275-77, 283 S.E.2d at 419-20. In *Parratt v. Taylor*, 451 U.S. 527, (1981), the Supreme Court recognized that “the necessity of quick action by the State . . . can, when coupled with the availability of some meaningful means by which to assess the propriety of the State’s action at some time after the initial taking, satisfy the requirements of procedural due process.” Id. at 534. See also *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) (“Where only property rights are involved, mere postponement of judicial inquiry is not a denial of due process, if the opportunity for ultimate judicial determination of liability is adequate.”).
90. 54 N.C. App. at 277-77, 283 S.E.2d at 419-20. The court also rejected defendant’s argument that because G.S. 105-368 contains no standards for application and its use is therefore left to the tax collector’s discretion, it leaves open the possibility for invidious discrimination in its application. The scheme involves a permissible delegation of discretionary authority to the tax collector, the court held, and defendant failed to establish a discriminatory purpose or impact in its application. 54 N.C. App. at 277, 283 S.E.2d at 421. See also *State ex rel. Dorothea Dix Hospital v. Davis*, 292 N.C. 147, 222 S.E.2d 698 (1977).

Several decisions by the United States Supreme Court have dealt with the due process re-
In *State v. Jones*\(^9^1\) the North Carolina Court of Appeals ruled that a county ordinance regulating the location and appearance of junkyards and automobile graveyards did not violate article I, section 19 of the North Carolina Constitution\(^9^2\) even though the ordinance admittedly was enacted to promote aesthetic values only.\(^9^3\) The court expressly declined to follow the North Carolina Supreme Court's decision in *State v. Brown*\(^9^4\) that a statute prohibiting the placement of abandoned automobiles within 150 yards of a paved highway was not within the State's police power because it was intended only to improve aesthetic qualities.\(^9^5\) The court of appeals concluded that its decision in *Jones* nevertheless was consistent with "the trend in the cases decided by our Supreme Court."\(^9^6\)

Finally, in *Sheppard v. Moore*\(^9^7\) the United States District Court for the Middle District of North Carolina dismissed a complaint alleging that a sheriff-defendant had violated plaintiff's due process rights under 42 U.S.C. § 1983\(^9^8\) by failing to obey an order requiring him to return a knife and gun collection that he had confiscated for use as evidence in an earlier trial. Relying primarily on the recent decision by the United States Supreme Court in *Parratt v. Taylor*,\(^9^9\) the district court held that the North Carolina tort action


92. "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.
93. 53 N.C. App. at 469, 281 S.E.2d at 93.
95. The supreme court noted that substantive due process requires that a legislature or a municipality exercise its public power only in ways that promote the public health, safety, morals, or general welfare. Cf. Berman v. Parker, 348 U.S. 26 (1954) (fourteenth amendment does not proscribe state action that regulates for aesthetic purposes only).
96. 53 N.C. App. at 470-71, 281 S.E.2d at 94. In support of its conclusion, the court of appeals cited only two cases: A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979) (upholding a zoning ordinance that regulated building appearances for several reasons, including for aesthetic purposes); and Cumberland County v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672 (1980) (holding in a decision limited to the facts of the case, that an ordinance regulating highway signs could be based on aesthetic considerations). But see Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), in which the supreme court recognized the United States Supreme Court's decision in Berman v. Parker, 348 U.S. 26 (1954) (state statute that regulated for aesthetic purposes only not violative of fourteenth amendment), but declined to give a similar interpretation to article I, § 19 of the North Carolina Constitution.
for conversion provided a means of redress for improper deprivation of property sufficient to satisfy the requirements of procedural due process.\textsuperscript{100}

\section*{E. North Carolina Constitution\textsuperscript{101}}

\subsection*{1. Separation of Powers}

In 1981, G.S. 143B-283(d) was amended to increase the membership of the Environmental Management Commission by four, with two members to be appointed from the North Carolina House of Representatives and two from the Senate.\textsuperscript{102} This change raised the question whether legislative membership on the Commission\textsuperscript{103} violated the separation of powers clause of the North Carolina Constitution.\textsuperscript{104} In a case of first impression, \textit{State ex rel.}\textsuperscript{105}

\begin{footnotesize}
\textsuperscript{100} The district court noted that in Gallimore v. Sink, 27 N.C. App. 65, 218 S.E.2d 181 (1975), the court of appeals had held a sheriff liable for conversion on facts almost identical to those present in this case. 514 F. Supp. at 1377. Therefore, while the plaintiffs here properly alleged that they had suffered a deprivation at the hands of defendants, and that the defendants had acted under color of state law, they failed to satisfy the final prerequisite of a valid fourteenth amendment claim under § 1983 by showing the absence of an adequate remedy for the violation under state law. Id. at 1375.

The court also dismissed plaintiff's complaint under 42 U.S.C. § 1985 (1976), because it revealed no racial or other class-based animus, and plaintiffs admitted to having no evidence of such animus. 514 F. Supp. at 1378.

\textsuperscript{101} Chapter 504 of the 1981 Session Laws amends Article II, sections 2, 4 and 8 of the Constitution to provide four-year terms for members of the General Assembly. The amendments will be submitted to the voters at the next statewide election. Law of June 5, 1981, ch. 504, § 1, 1981 Sess. Laws, 1st Sess., 781.

Article VI of the North Carolina Constitution provides that no one convicted of a felony may be elected to public office. N.C. Const. art. 6, § 2(3). The federal district court for the Eastern District of North Carolina recently ruled that even though a conviction has been appealed, the individual still remains ineligible. Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981). The court reasoned that once convicted at the trial level, a defendant is presumed guilty and the trial court proceedings are presumed regular.

In In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), the North Carolina Supreme Court upheld the constitutionality of various Winston-Salem annexation ordinances, relying substantially on its previous decision in In re Annexation Ordinances, 253 N.C. 637, 117 S.E.2d 795 (1961).

In Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981), the court of appeals addressed the issue of plaintiff's standing to seek an injunction against a North Carolina Department of Corrections regulation that prohibited the release of the psychiatric and psychological records of plaintiff's deceased husband. See 5 N.C. Admin. Code 2D.0601(b). The court held that plaintiff did not have standing for several reasons. First, she was not a member of the class of all present and former prisoners on whose behalf she sought to bring a class action suit. See N.C. Gen. Stat. § 1A-1, Rule 23(a) (1969). Second, plaintiff was decedent's next of kin, not his personal representative, and therefore did not have standing to sue to enforce the decedent's constitutional rights under G.S. § 28A-18-1 ("survival of actions to and against personal representative"). Finally, any property rights that the decedent might have had in the records passed to the estate's legal representative rather than to the plaintiff. Accordingly, the trial court's order dismissing plaintiff's cause for lack of standing was affirmed. 53 N.C. App. at 592, 281 S.E.2d at 410.


\textsuperscript{104} "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. 1, § 6. See also State ex rel. Lanier v. Vines, 274 N.C. 486, 494, 164 S.E.2d 161, 165-66 (1968) ("It is for the State to determine whether and to what extent its powers shall be kept separate between the executive, legislative and judicial departments of its government.").

\textsuperscript{105} The court noted that in Gallimore v. Sink, 27 N.C. App. 65, 218 S.E.2d 181 (1975), the court of appeals had held a sheriff liable for conversion on facts almost identical to those present in this case. 514 F. Supp. at 1377. Therefore, while the plaintiffs here properly alleged that they had suffered a deprivation at the hands of defendants, and that the defendants had acted under color of state law, they failed to satisfy the final prerequisite of a valid fourteenth amendment claim under § 1983 by showing the absence of an adequate remedy for the violation under state law. Id. at 1375.

The court also dismissed plaintiff's complaint under 42 U.S.C. § 1985 (1976), because it revealed no racial or other class-based animus, and plaintiffs admitted to having no evidence of such animus. 514 F. Supp. at 1378.

\textsuperscript{101} Chapter 504 of the 1981 Session Laws amends Article II, sections 2, 4 and 8 of the Constitution to provide four-year terms for members of the General Assembly. The amendments will be submitted to the voters at the next statewide election. Law of June 5, 1981, ch. 504, § 1, 1981 Sess. Laws, 1st Sess., 781.

Article VI of the North Carolina Constitution provides that no one convicted of a felony may be elected to public office. N.C. Const. art. 6, § 2(3). The federal district court for the Eastern District of North Carolina recently ruled that even though a conviction has been appealed, the individual still remains ineligible. Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981). The court reasoned that once convicted at the trial level, a defendant is presumed guilty and the trial court proceedings are presumed regular.

In In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), the North Carolina Supreme Court upheld the constitutionality of various Winston-Salem annexation ordinances, relying substantially on its previous decision in In re Annexation Ordinances, 253 N.C. 637, 117 S.E.2d 795 (1961).

In Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981), the court of appeals addressed the issue of plaintiff's standing to seek an injunction against a North Carolina Department of Corrections regulation that prohibited the release of the psychiatric and psychological records of plaintiff's deceased husband. See 5 N.C. Admin. Code 2D.0601(b). The court held that plaintiff did not have standing for several reasons. First, she was not a member of the class of all present and former prisoners on whose behalf she sought to bring a class action suit. See N.C. Gen. Stat. § 1A-1, Rule 23(a) (1969). Second, plaintiff was decedent's next of kin, not his personal representative, and therefore did not have standing to sue to enforce the decedent's constitutional rights under G.S. § 28A-18-1 ("survival of actions to and against personal representative"). Finally, any property rights that the decedent might have had in the records passed to the estate's legal representative rather than to the plaintiff. Accordingly, the trial court's order dismissing plaintiff's cause for lack of standing was affirmed. 53 N.C. App. at 592, 281 S.E.2d at 410.


\textsuperscript{104} "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. 1, § 6. See also State ex rel. Lanier v. Vines, 274 N.C. 486, 494, 164 S.E.2d 161, 165-66 (1968) ("It is for the State to determine whether and to what extent its powers shall be kept separate between the executive, legislative and judicial departments of its government.").
Wallace v. Bone, the North Carolina Supreme Court considered the effect of the separations clause on G.S. 143B-283(d). After an examination of the history of the doctrine of separation of powers, the decisions of other states and the specific provisions of the North Carolina Constitution (in conjunction with the statutory provisions for the Environmental Management Commission), the supreme court concluded that the amendment was unconstitutional.

The court first noted that in each of the three constitutions adopted since North Carolina's statehood, there had been an express statement of the doctrine of separation of powers. In contrast, the United States Constitution contains no such explicit provision, but the principle nevertheless has been carefully protected. While the court could find no North Carolina case law to support its position, it interpreted the lack of cases as demonstrating the importance of separation of powers in North Carolina. The court concluded "that the principle of separation of powers is a cornerstone of our state and federal governments."

Second, the court surveyed numerous cases from other states considering the question of legislative encroachment on executive matters. Its review showed that a large number of states refused to allow legislators to serve on executive boards or commissions. South Carolina and Kansas, on the other hand, seem to have moved away from strict adherence to the separation of powers principle; the trial court in Wallace had relied on decisions from these jurisdictions. The supreme court, however, seemed to reason that since North Carolina had such a strong tradition of belief in the separation of powers, it was more appropriate to follow decisions from states with similar orientations.

In the third section of its opinion, the court considered the application of
the principle to the Environmental Management Commission. Although the parties had stipulated that the Commission "is a quasi-independent regulatory agency of the State with quasi-legislative and quasi-judicial powers and duties," the description of its powers and duties in the General Statutes clearly indicates that the Commission is primarily administrative or executive in nature. The court ruled that the legislature could not create an organization to implement legislation and then maintain control over the implementation by including senators or representatives in the organization's membership.

The court did recognize, however, as have many other states, that the complexity of modern governments and the problems they must confront compel cooperation among the three branches. While other jurisdictions have suggested that this requires more flexibility in the application of the separation of powers principle, the supreme court in dicta implied that it will permit a mingling of the legislative and executive branches only in the case of study commissions.

A significant omission in the court's opinion is the lack of any indication of the effect its ruling of unconstitutionality should have on the existence of the Environmental Management Commission or the forty-nine other boards and commissions on which legislators serve. Courts in other states have dealt with the problem in a straightforward manner. If the board was composed only partially of legislators, the court severed the portion of the statute providing for legislative membership and declared the remainder of the statute to be constitutional. Thus, the board or commission could still perform its duties, and the legislature later could provide for additional nonlegislative members. This seems to be the most practical and efficient solution.

2. Access to the Courts

In Bolick v. American Barmag Corp. the North Carolina Court of Ap-

---

113. 304 N.C. at 593, 286 S.E.2d at 80.
114. The Commission promulgates rules and regulations to be used to protect the State's water and air resources. The Commission also has the power to grant permits, conduct investigations, institute actions in superior court, review local programs, declare emergencies, approve dam construction and establish air and water quality standards. N.C. Gen. Stat. § 143B-282 (1978).
115. 304 N.C. at 608, 286 S.E.2d at 88.
116. Id.
117. See, e.g., Greer v. State, 233 Ga. 667, 668, 212 S.E.2d 836, 838 (1975) ("It must be conceded that separation of powers is not a rigid principle."). The United States Supreme Court has also approved the idea of cooperation. O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("[T]he branches are] independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.").
118. 304 N.C. at 608, 286 S.E.2d at 88.
120. While the cited courts were acting in the absence of severability clauses, the North Carolina General Assembly has provided for such a clause. Law of June 28, 1977, ch. 771, § 22, 1977 N.C. Sess. Laws 1012.
121. 54 N.C. App. 589, 284 S.E.2d 188 (1981).
peals declared the Products Liability Act unconstitutional as violating article I, section 18 of the North Carolina Constitution, which guarantees individuals a right to seek redress in the courts. The State argued that the Act, which set the date of purchase as the time at which the statute of limitations began to run, was a valid statute of limitations. The court responded by noting that a statute of limitations cannot begin to run until a cause of action accrues, and that there can be no accrual until there has been an injury. In working to bar some actions before any injury occurred, the Act could have denied some injured individuals access to the courts for otherwise perfectly valid claims, thus violating the constitutional protection.

3. Right to Jury Trial

In In re Ferguson the North Carolina Court of Appeals held that a party does not have a right to trial by jury in a parental rights termination proceeding. The court noted that article I, section 25 of the North Carolina Constitution guarantees the right to jury trial only in those cases in which the right existed at common law or by statute at the time the Constitution was adopted. The present statute, G.S. 287.30, which provides for a nonjury hearing in parental rights termination proceedings, was not enacted until 1969, subsequent to the adoption of the present state constitution. Thus, the statute did not violate the party's right to a jury trial.

122. "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." N.C. Gen. Stat. § 1-50(6) (Cum. Supp. 1981).
124. 54 N.C. App. at 593, 284 S.E.2d at 191.
125. Id. at 594, 284 S.E.2d at 191-92.
130. 50 N.C. App. at 684, 274 S.E.2d at 880.
131. The court on its own motion raised and then summarily rejected the argument that the right to jury trial in this case was guaranteed under the due process clause of the fourteenth amendment to the United States Constitution. U.S. Const. amend. XIV. Its reasoning was the same as that rejecting the claim under the North Carolina Constitution; namely, that neither the common law nor any statute provided for a jury trial in such cases at the time the Constitution was adopted. See Dairy Queen, Inc. v. Wood, 369 U.S. 894 (1962) (any legal issue, whether or not incidental, for which jury trial is properly and timely requested must be submitted to a jury); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (if case presents both legal and equitable claims, legal claim should be tried first in order to preserve party's seventh amendment right to jury trial on common issues); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979) (right to jury trial under article I, § 25 of North Carolina Constitution requires initial determination by trial court that case includes factual determinations requiring jury trial). See generally McCoid, Procedural Reform and the Right to Jury Trial, 116 U. Pa. L. Rev. 1 (1967); Van Hecke, Trial by Jury in Equity Cases, 31 N.C.L. Rev. 157 (1953).
In Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education the court of appeals rejected several constitutional challenges to an extended day care program conducted by the school board at a local elementary school. Plaintiffs, owners and operators of various commercial day care centers, had sought an injunction prohibiting the school board from operating the program.

The court first ruled that the program did not violate the requirement of the North Carolina Constitution that there be a "general and uniform system of free public schools." That mandate, said the court, "does not require every school . . . throughout the State to be identical in all respects." The court also held that charging participants a tuition fee did not violate the provision's requirement of a free public education, because the fee covered supplemental services rather than the students' basic education.

The court next rejected plaintiffs' argument that the use of school funds in the program violated the constitution's requirement that all expenditures of tax dollars be for a "public purpose." It reasoned that in so far as the program furthers the education of participating students, it furthers society's broad interest in an educated populace, and thus serves a predominantly public purpose.

Martha Anne Geer
William R. Whitehurst

133. The program was designed to alleviate the problem of "latch key" children—that is, children left unsupervised from the time that school closes to the time that their parents return home from work. Id. at 135 n.1, 285 S.E.2d at 112 n.1. It is open to all children enrolled at the school, but there is a $15 per month tuition fee to cover the program's operating costs.
134. The superior court had granted summary judgment for the defendant; the court of appeals affirmed that judgment.
135. N.C. Const. art. IX, § 2(1).
136. 55 N.C. App. at 138, 285 S.E.2d at 113 (citing Board of Educ. v. Board of Comm'rs, 174 N.C. 469, 93 S.E. 1001 (1917)).
138. While the vast majority of the program's expenses are covered by the tuition paid by participants, see note 133 supra, the program is given free use of the elementary school facilities, and that use generates heating, lighting and general maintenance expenses. The court termed these expenses "nominal." 55 N.C. App. at 144, 285 S.E.2d at 117.
139. "The power to tax shall be exercised . . . for public purposes only . . . ." N.C. Const. art. V, § 2(1). Although this provision speaks only in terms of the taxing power, the supreme court has interpreted it as applying to the spending power as well. Mitchell v. Industrial Div. Fin. Auth., 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968).
140. 55 N.C. App. at 145, 285 S.E.2d at 117. See also Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979); Mitchell v. Industrial Div. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968) ("For a use to be public . . . . the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity."). See generally Note, Restricting Revenue Bond Financing of Private Enterprise, 52 N.C.L. Rev. 859 (1974). Two additional arguments advanced by the plaintiffs were summarily rejected by the court.
First, the court rejected the argument that the legislature could not constitutionally delegate to the school board the authority to maintain the day care program. 55 N.C. App. at 143, 285 S.E.2d at 116. Second, the court rejected the argument that the program violates plaintiffs' personal and property rights under Art. I, section 19 of the North Carolina Constitution and the fourteenth amendment of the United States Constitution. Id. at 147, 285 S.E.2d at 118 ("The plaintiffs have no vested property rights in providing after school care.").
V. CRIMINAL LAW

A. Abolition of Distinction Between Accessories Before the Fact and Principals

On June 25, 1981, the North Carolina General Assembly ratified an act effective July 1, 1981, that abolishes all distinctions between accessories before the fact and principles to the commission of a felony. Under the statute a person who previously would have been guilty as an accessory before the fact to any felony will now be guilty and punishable as a principal to that felony. The Act contains a qualified exception to the abolition of the distinction for persons convicted of capital felonies. If the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators or accessories to the crime, the person shall be guilty only of a Class B felony.

This statute is apparently a legislative reaction to the decision of the North Carolina Supreme Court in State v. Small. The court in that case refused to impose liability as a principal upon a defendant who allegedly hired two co-conspirators to kill his wife. Defendant was not present at the time of the murder. Under the then-existing statutes, a defendant not at the scene of the crime was an accessory and as such was subject to punishment distinct from that of a principal. The court, in recognizing that such distinctions were matters for the legislature, stated that "[i]f held otherwise would be to expand

1. In an attempt to curb the theft and easy disposal of stolen silver, platinum, and gold jewelry and other valuables, the 1981 General Assembly also enacted an Act to Regulate Precious Metal Businesses. Law of July 10, 1981, ch. 956, § 1, 1981 N.C. Sess. Laws, 1st Sess. 1471 (codified at N.C. Gen. Stat. §§ 66-163 to -173 (Cum. Supp. 1981)). Any dealer with precious metal purchases constituting greater than 10% of his total business is required to apply for a permit from a local law enforcement agency, to be issued only upon the furnishing of extensive identification information, a record of former felony convictions and a record of all convictions within the preceding five years. No permits are issued to applicants convicted of a felony involving larceny, moral turpitude or receipt of stolen goods within five years of the application. In an effort to assure compensation to owners of property suffering a loss traceable to a permit holder's violation of the new statute, a $10,000 bond must be executed before a permit is issued. To facilitate the identification and recovery of articles sold to dealers by persons other than the rightful owners, dealers must maintain records identifying each seller and each item purchased, and are prohibited from removing from the premises any items purchased for a period of five days from the date of purchase. Conducting business in mobile homes, trailers and other structures that are easily movable or abandoned readily is no longer permissible. Conviction for violation of the statute results in the usual misdemeanor fine of no more than $500 and in imprisonment of no more than six months, plus ineligibility for obtaining another permit within three years of conviction.
4. Id.
6. See Survey of Developments in North Carolina Law, 1980—Criminal Law, 59 N.C.L. Rev. 1123, 1123-26 for a discussion of State v. Small. The Small court refused to adopt the rule used for federal prosecutions expressed in Pinkerton v. United States, 328 U.S. 640 (1946). In the federal law of conspiracy, the overt act of one conspirator may be deemed the act of all the conspirators. Id. at 646-47. As a result, all conspirators are criminally liable as principals for the substantive offenses committed in furtherance of the conspiracy by one of the conspirators.
the scope of accessorial liability beyond the legislative design."

B. Homicide

The North Carolina Supreme Court reviewed several murder convictions in 1981. In two cases involving the merger rule the court distinguished the situation in which a defendant is convicted of first degree murder by a jury verdict that is based on a theory of premeditation and deliberation as well as on a theory of felony murder, from the situation in which a defendant is convicted of first degree murder by a jury verdict that fails to specify the theory or theories on which the jury relied. Under the merger rule, when the commission of a major crime by its very nature includes a lesser offense, the lesser offense is merged into the former, resulting in no punishment for the lesser offense. In *State v. Rook,* because the jury found defendant guilty on both premeditation/deliberation and felony murder theories, the underlying felony of rape was not subject to the merger rule, and defendant could be sentenced for rape in addition to first degree murder. Furthermore, the rape constituted a proper aggravating circumstance to be considered in sentencing on the first degree murder conviction. In *State v. Silhan,* however, the jury failed to specify the theory on which it based its first degree murder conviction. The court ruled that when the jury verdict is silent on its basis for conviction, the "case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule." As a result the underlying felony merges into the murder conviction, precluding a separate judgment and sentence on the crime of rape or other felony. Furthermore, the underlying felony may not be submitted as an aggravating circumstance in sentencing on the murder conviction.

8. 301 N.C. at 417, 272 S.E.2d at 135.
12. Id. at 231, 283 S.E.2d at 750.
15. Id. at 262, 275 S.E.2d at 477-78.
16. Id.
18. 302 N.C. at 268, 275 S.E.2d at 478.
The court in *Rook* also construed G.S. 15A-2000(c), which requires a jury recommending the death sentence to set forth in writing the “statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt.” The statute does not expressly contain a similar requirement for mitigating circumstances but requires the jury to state in writing whether the “mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.” The issue in *Rook* was whether there is a statutory or constitutional requirement that the jury return specific findings on the mitigating circumstances submitted to it. The court concluded that this requirement could not be read into the statute without sacrificing the statute’s protections against “arbitrary, capricious, excessive or disproportionate imposition of the death penalty.” In the court’s opinion such a requirement would unduly constrict the jury in its consideration of any and all mitigating circumstances. The court also relied on G.S. 15A-2000(d), which does not require specific jury findings on mitigating circumstances to be presented to the supreme court on review of judgment and sentencing in capital punishment cases.

C. Rape

The North Carolina Supreme Court had two occasions in 1981 to review convictions of first degree rape under the new North Carolina statute,
Defendants in both cases were convicted of first degree rape, which is defined by the statute as engaging in forcible, nonconsensual vaginal intercourse with another person in which the perpetrator "employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." Both of the court's opinions examined the sufficiency of the evidence on each of the essential elements of first degree rape: consent, force, and employment or display of a dangerous or deadly weapon.

In *State v. Sturdivant* defendant observed prosecutrix having car trouble, told her that he was a mechanic and offered assistance if she would drive to his nearby house. After doing so, she agreed to drive him to his friend's house, whereupon he directed her to drive down a dirt road that ended at a tobacco barn. Defendant then pulled her out of the car and into the barn where he raped her. Subsequently, she was ordered to take off her dress and in so doing she picked up a tobacco stick from the floor and hit him with it. Defendant then beat her face with his fists and said he was going to kill her and took out a pocketknife. Prosecutrix testified at trial that she then pleaded with him not to kill her and to let her go, but he cut off her slip with the pocketknife and had repeated forcible intercourse with her.

Defendant contended on appeal that there was insufficient evidence to convict him of first degree rape on the theory that he had employed a deadly weapon during the commission of the rape. He argued that, although there was testimony that he had displayed the knife to her after the first act of intercourse, there was no evidence showing that he had employed the knife during the first or subsequent acts of intercourse. The *Sturdivant* court found that the knife had been "employed" in satisfaction of the requirements of G.S. 14-27.2(a)(1)(a) in that defendant had used the knife to threaten his victim with death, thereby discourage further resistance, and to remove her under-
clothing, thereby "expediting the execution of the additional sexual assaults." Noting that conviction under the former statute had required a specific showing by the prosecution that the weapon was used by the defendant to overcome the resistance or to procure the submission of the victim, the court found that there was no requirement under the new statute, G.S. 14-27.2(a)(2)(a), of an express showing that a deadly weapon was used in a particular manner. Under the new statute, the prosecution must show only that a dangerous or deadly weapon was employed or displayed in the course of a rape. The court apparently assumed that the legislature intended to make implicit in the new statute the logical assumption that such use of a dangerous or deadly weapon always has some tendency to at least assist the accused in accomplishing his "evil design" upon a usually unarmed victim.

In State v. Barnette the North Carolina Supreme Court again addressed the interrelation of the elements of force, consent, and the employment or display of a dangerous or deadly weapon under G.S. 14-27.2(a). Prosecutrix testified that after meeting Barnette and several other men at a bar, she went with them to a party where she was raped repeatedly by several of the men. The arguments asserted by Barnette challenging his conviction depended largely on testimony by prosecutrix that defendant Hughes had threatened and pointed a shotgun at her before any of the sexual episodes occurred, and later, forced her to put the barrel of the shotgun in her mouth after she had been raped by another defendant and by Barnette but before she was raped by Barnette a second time.

Defendant Barnette was convicted of first degree rape upon submission to the jury of the alternative theories that he acted alone or with another defendant in employing or displaying a deadly weapon, or that he was aided and abetted by another person. Barnette argued on appeal that there was insufficient evidence to convict him under either theory. Nevertheless, the court found that Hughes' forcing the victim to put the gun in her mouth and Bar-

34. Id. at 300-01, 283 S.E.2d at 725.
36. 304 N.C. at 299, 283 S.E.2d at 724 (emphasis original).
37. Id., 283 S.E.2d at 725.
38. In a footnote, the court stated:
   We perceive that the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed.
Id. at 299 n.1, 283 S.E.2d at 725 n.1.
40. There were five defendants in State v. Barnette. Barnette's conviction for first degree rape was affirmed on appeal, as was the conviction of Hughes for first degree rape. Hughes' conviction for first degree sexual offense was reversed. Defendant Cashwell's conviction of first degree rape was remanded for judgment for verdict of second degree rape, Coles' conviction for second degree rape was affirmed and Smith's conviction of first degree sexual offenses was remanded for judgment for verdict of guilty of second degree sexual offense. Id. at 470, 284 S.E.2d at 311-12.
41. Id. at 459, 284 S.E.2d at 305. See note 6 supra.
nette's sexual intercourse with her, despite her verbal protest immediately following that incident, gave rise to a reasonable inference that Hughes had helped "prepare for the commission of the crime by displaying or employing a deadly weapon in order to overcome the victim's resistance and enable Barnette to commit the crime." Thus, there had been an employment or display of a dangerous or deadly weapon or an aiding and abetting by another person under G.S. 14-27.2(a) and (c).

Barnette also argued that although Hughes’ display of the shotgun may have caused fear of serious bodily harm, it was not directed to overcome prosecutrix’s will to resist sexual intercourse; consequently, evidence on the essential element of the use of force was deficient. The court considered this contention in conjunction with Barnette’s assertion that the failure to instruct the jury that the essential element of force is proved only if a rape victim’s consent was induced by a reasonable fear of serious bodily harm. On the issue of the jury instruction on consent, the court held that although a threat of serious bodily harm that reasonably induces fear would in fact satisfy the force requirement and negate consent, there had never been a requirement that the jury must find consent using an objective standard of reasonableness. The court stated that even if a reasonableness standard was required and the jury in the instant case believed prosecutrix was in fact threatened with a deadly weapon, it “follows that the fear engendered was both reasonable and of violence.”

Regarding Barnette’s argument that there was no evidence that the display of force by use of the shotgun was directed against the victim’s will to resist sexual advances, the court answered that an explicit threat was unnecessary and that the facts permitted a reasonable inference that Hughes’ display of force with the weapon was intended to make the victim submit to intercourse with Barnette.

D. Armed Robbery

The North Carolina Supreme Court in State v. Gibbons addressed for the first time the issue whether the mere possession of a firearm during the course of a robbery is sufficient for conviction under G.S. 14-87, robbery with a firearm. The evidence in Gibbons tended to show that defendant, with two

---

42. Id. at 460, 284 S.E.2d at 306 (citing State v. Burns, 287 N.C. 102, 116, 214 S.E.2d 56, 65, cert. denied, 423 U.S. 933 (1975)).
44. 304 N.C. at 461, 284 S.E.2d at 306.
45. Id.
46. Id.
47. 303 N.C. 484, 279 S.E.2d 574 (1981).
48. Id. at 488, 279 S.E.2d at 577. The statute provides in pertinent part:

Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.
companions, broke into a woman’s rural home by using the butt of a shotgun to break the glass in a door. The gun was then propped against a wall and there was testimony that the robbery victim could not see the gun. Gibbons was found guilty by a jury of robbery with a firearm under the statute. On appeal, the court noted that while the statute on its face neither required the actual use of a weapon nor excused the mere possession of a weapon alone during the course of a robbery, there was indeed a requirement that the use or possession threaten or endanger the life of a person. Because there was no evidence that the shotgun was pointed at or otherwise used to threaten the victim, the burden of proof on the essential element of possession was satisfied but the requirement that the life of the victim be endangered or threatened by such possession was not. Consequently, the court reversed defendant’s conviction of robbery with a firearm and remanded for sentencing for common-law robbery.

E. Embezzlement

In State v. Thompson the North Carolina Court of Appeals held that a conviction was not void for variance when defendant was tried and convicted for violation of the private sector embezzlement statute rather than the statute applicable to public officials. Defendant had been employed as City Clerk by the City of Saluda, North Carolina and had written salary checks to herself above the amount of salary authorized for her. In briefly passing upon this issue, the court noted that the indictment against defendant did not refer specifically to any statute; consequently, it was sufficient to charge defendant with violations of either statute. Also, both statutes created a felony offense, and the sentence imposed upon defendant was within the maximum permissible under either statute.


49. Defendant also was found guilty of first degree burglary, felonious conspiracy, and assault with a deadly weapon inflicting serious injury. 303 N.C. at 485, 279 S.E.2d at 575.

50. There was evidence that defendant had beaten the victim severely as he demanded money from her; consequently, as an alternative theory to that of mere possession, the prosecution argued that defendant’s fists constituted a “dangerous weapon, implement or means” under the statute. The court, however, ruled that the instructions to the jury concerning the use of fists as a deadly or dangerous weapon had been restricted to the crime of assault with a deadly weapon. Thus, the jury could not have convicted defendant of armed robbery under that theory, and it was unnecessary for the court to reach that issue. Id. at 490, 279 S.E.2d at 575-77.

51. Id., 279 S.E.2d at 578. Cf. State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981). Although defendant in Melvin made no actual gesture or verbal threat of harm to the victim by the use or by the threatened use of the firearm, the court held that evidence that the victim saw defendant’s hand over a gun when he demanded money was sufficient to satisfy the essential element of the threatened use of the firearm which endangered or threatened her life. Id. at 433, 281 S.E.2d at 105.

52. 303 N.C. at 491, 279 S.E.2d at 579.


55. Id. § 14-92.

56. Under G.S. 15A-644(a) and -924(6), omission of the citation of the applicable statute in the indictment is not ground for reversal of a conviction. Id. §§ 15A-644(a), -924(6) (1978).

57. 50 N.C. App. at 487, 274 S.E.2d at 383.
F. Hit-and-Run

In *State v. Fearing* the North Carolina Supreme Court interpreted North Carolina's hit-and-run statutes. While relying on its earlier decisions in *State v. Ray* and *State v. Glover*, the court clarified its position on the essential elements required for the crime of hit-and-run. In these earlier cases, the court had made clear that knowledge of a collision or accident was required. The collision must have resulted in injury to a person, but neither *Ray* nor *Glover* had clarified whether knowledge of such injury by the defendant also was required. The *Fearing* court held that "in prosecutions under G.S. 20-166(a) the state must prove that the defendant knew (1) that he had been involved in an accident or collision, and (2) that a person was killed or physically injured in the collision." This knowledge may be actual or implied.

The dissent forcefully argued that G.S. 20-166(a) requires a driver to stop when he knows that there has been an accident or collision, even if he does not know that a person has been injured or killed. According to the dissent, the statutory language "resulting in injury" merely modified the kind of accident about which a defendant must be aware, and was not meant to be an element of defendant's knowledge. Furthermore, the majority's opinion rendered the statute internally inconsistent: if a driver leaves the scene of an accident or collision believing only that he was in an accident and that property damage was involved, he will be innocent even though a person was in fact injured or killed, but guilty of a misdemeanor if no person was in fact injured or killed.

G. Contempt

Two contempt cases decided by the North Carolina Court of Appeals provide interesting interpretations and applications of the governing statutes

---

59. G.S. 20-166(a) provides: "The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182." N.C. Gen. Stat. § 20-166(a) (1978). G.S. 20-166(b) requires "[t]he driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person" to immediately stop at the scene and exchange relevant information with the other people involved. G.S. 20-182 provides that "every person convicted of willfully violating G.S. 20-166... shall be punished..." Id. § 20-182 (1978 & Cum. Supp. 1981) (emphasis added).
60. 229 N.C. 40, 47 S.E.2d 494 (1948).
62. 304 N.C. at 477, 284 S.E.2d at 491.
63. Id. at 477, 284 S.E.2d at 491.
64. Id. at 482-83, 284 S.E.2d at 493-94. The majority based its interpretation on the opinion in *Ray*, but the wording in *Ray* merely presents the same problem of interpretation, rather than establishing a reasonable solution. Id. at 481-85, 284 S.E.2d at 493-95.
65. N.C. Gen. Stat. § 20-166 (1978 & Cum. Supp. 1981). If someone is injured or killed, the driver cannot be prosecuted under G.S. 20-166(a) according to the majority decision because he did not know that someone was injured or killed, and the driver cannot be prosecuted under G.S. 20-166(b) because that act applies only to an accident or collision "in which there is not involved injury or death of any person." If no person is injured or killed, however, the driver can be prosecuted under G.S. 20-166(b) for a misdemeanor.
to the respective facts of each case. *State v. Johnson*\(^66\) concerned a hearing on a motion for revocation and modification of a pretrial release order at which defendant was ejected from the courtroom for misconduct. The State, over objections by the defense, moved that the court hold defendant in contempt of court. The trial court deferred the motion until the hearing was completed. Defendant was allowed to return to the courtroom after oral arguments and the submission of written materials. The State again moved that defendant be held in direct contempt. The court ruled that the motion would be considered at a later time, but after final arguments the trial court recessed for the evening. The following morning, with defendant present, the trial court conducted a hearing on the criminal contempt charge and allowed arguments. The court found defendant in wilful and direct contempt and ordered a twenty-day prison term.\(^67\)

On appeal defendant argued that the contempt proceeding was not substantially contemporaneous as required under G.S. 5A-14\(^68\) for summary contempt proceedings and that he was not given a written order to appear and show cause as provided in G.S. 5A-15\(^69\) for plenary contempt proceedings. The court of appeals held that the contempt conviction was substantially contemporaneous with the direct contempt on the previous day, obviating the need for the written order to appear. The court reasoned that the word "substantially" qualified the word "contemporaneously" and did not require the contempt proceedings immediately to follow the misconduct.\(^70\) Although the court recognized the requirement for due process safeguards in summary punishment cases,\(^71\) the court found that those safeguards were met. The court found that, by his removal, defendant was put on notice of his misconduct, and that to impose a sentence before the hearing's conclusion might have antagonized further the already hostile defendant and may have caused further disruption.\(^72\)

The court of appeals struck down a contempt conviction in *State ex rel.*

---


67. Id. at 595, 279 S.E.2d at 78.


(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

69. Id. § 5A-15 states:

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

70. 52 N.C. App. at 596, 279 S.E.2d at 79.


72. 52 N.C. App. at 596-97, 279 S.E.2d at 79-80.
Zimmerman v. Mason.\textsuperscript{73} Defendant in Mason removed padlocks and a posted copy of a temporary restraining order that was affixed to his building pursuant to a state action alleging that defendants were operating a public nuisance.\textsuperscript{74} Defendant contended that since the temporary restraining order by its terms did not forbid removal of the locks and the copy of the order, he was not in violation.\textsuperscript{75} The court agreed and reversed defendant's contempt conviction.\textsuperscript{76}

H. Defenses\textsuperscript{77}

1. Voluntary Intoxication

In State v. Gerald\textsuperscript{78} the North Carolina Supreme Court considered the question of what type of evidence is sufficient to require an instruction to the jury on the defense of voluntary intoxication. Voluntary intoxication, though not a legal excuse for a crime, may be sufficient to negate the existence of specific intent and thus make the defendant guilty of a lesser degree of the crime charged.\textsuperscript{79} For the defense of intoxication to be available, the evidence must show that at the time of the criminal act the defendant's mind and reason were so completely intoxicated and overthrown that a specific intent could not be formed.\textsuperscript{80} In the absence of this evidence, the court is not required to instruct the jury on this defense.\textsuperscript{81}

In Gerald defendant was convicted of second degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant had been drinking and had quarreled with several persons, finally deciding to leave with his girlfriend. His girlfriend refused to go, and decedent

\textsuperscript{73} 54 N.C. App. 155, 282 S.E.2d 518 (1981).
\textsuperscript{75} The temporary restraining order stated in part:
That the defendant [sic], their servants, agents, and employees be, and they are hereby enjoined and restrained from entering, operating, maintaining, removing the contents or any portions thereof, and otherwise using those certain premises in the town. . . .
54 N.C. App. at 157, 282 S.E.2d at 519. The pertinent language of N.C. Gen. Stat. § 19-2.3 (1978) states:
Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.
\textsuperscript{76} The court construed G.S. 19-2.3 to mean that the posted restraining order by its own terms must forbid its own removal. The court also concluded that removal of the padlocks, not forbidden by the order, did not constitute a violation nor fall within the order's prohibition from using the premises. 54 N.C. App. at 157, 282 S.E.2d at 519-20.
\textsuperscript{77} In State v. Molko, 50 N.C. App. 551, 274 S.E.2d 271 (1981), the North Carolina Court of Appeals held that fear of a homosexual attack is a fear of great bodily harm for self-defense purposes. Defendant had been found guilty of assault with a deadly weapon with intent to kill. Defendant alleged that he acted in fear of a homosexual attack.
In State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981), the North Carolina Supreme Court discussed the difference between a perfect and an imperfect right of self-defense. Perfect self-defense excuses a killing altogether, while imperfect self-defense, in which the defendant initiates the quarrel, will reduce a charge of murder to voluntary manslaughter.
\textsuperscript{78} 304 N.C. 526, 284 S.E.2d 312 (1981).
\textsuperscript{80} State v. McLaughlin, 286 N.C. 579, 213 S.E.2d 238 (1975).
\textsuperscript{81} Id.
told him to leave her alone. Defendant left, saying he would be back with his gun. When defendant returned, he was carrying a shotgun. He walked up to the decedent and shot him in the head, instantly killing him. A woman who had been chatting with decedent, the only eyewitness to the killing, began to run away. Defendant shot her in the back, injuring her.

Defendant appealed the assault conviction, arguing an intoxication defense based on the testimony of several witnesses who had seen defendant drinking that afternoon or had detected an odor of alcohol on defendant's person after the crime. The court stated that "there was ample evidence that defendant had been drinking, but not to an extent that he was intoxicated or unable to reason." 82 A mere showing that a defendant had been drinking will not raise an inference of intoxication. For the defense to be raised, there also must be clear evidence of the defendant's inability to reason. In Gerald the same witnesses who testified that defendant had been drinking also testified that he did not appear to be intoxicated. 83

2. Entrapment

In State v. Neville 84 defendant was convicted of possession with intent to sell and selling LSD. On appeal, defendant claimed that it was error for the trial court to refuse to give an instruction on the defense of entrapment. Both the North Carolina Court of Appeals and Supreme Court affirmed his conviction.

Defendant claimed that he was involved in a scheme that was intended to appear as if he were selling drugs; however, he specifically denied actually possessing or selling LSD. He also relied on the defense of entrapment. In rejecting the entrapment defense, the supreme court cited the majority rule that precludes the assertion of entrapment when the defendant denies one of the essential elements of the offense charged: 85 "Where a defendant claims he has not done an act, he cannot also claim that the government induced him to do that act." 86

The supreme court distinguished this case from other cases in which a defendant was allowed to raise the entrapment defense even while denying the commission of the crime. In those cases, the defense was allowed because either the state's own evidence raised an inference of entrapment 87 or the defendant denied the intent required for the crime. 88

---

82. 304 N.C. at 521, 284 S.E.2d at 319.
83. Examples of such testimony are: "[Gerald] was drinking at the time but hadn't had that much. He wasn't drunk."; "I could smell an odor of alcohol about Gerald. . . . He did not appear to be intoxicated at the time." Id. at 522, 284 S.E.2d at 319.
86. 302 N.C. at 626, 276 S.E.2d at 375.
87. See State v. Knight, 230 S.E.2d 732 (W. Va. 1976). In this instance, "submission of the defense is obviously proper." 302 N.C. at 626, 276 S.E.2d at 375.
88. See United States v. Demma, 523 F.2d 981 (9th Cir. 1975). In this instance, "the entrapment itself is an assertion that it was the will of the government, and not of the defendant, which
cence did not raise an inference of entrapment, and defendant denied the acts rather than the intent required for the crime.

I. North Carolina Drug Paraphernalia Act

In 1981 the North Carolina General Assembly enacted the North Carolina Drug Paraphernalia Act which makes the possession, manufacture or delivery, and advertisement of drug paraphernalia misdemeanors. Drug

spawned the commission of the offense.” 302 N.C. at 626, 276 S.E.2d at 375. See also McCarr v. State, 294 Ala. 87, 312 So. 2d 382 (1975).

89. In Village of Hoffman Estates v. Flipside, 50 U.S.L.W. 4267 (U.S. Mar. 3, 1982), the United States Supreme Court considered a municipal ordinance requiring a business to obtain a license before selling items “designed or marketed for use with illegal cannabis or drugs.” Id. at 4269. Flipside, a seller of novelty devices, smoking accessories and drug-related literature, challenged the ordinance without applying for the license or utilizing administrative procedures to obtain clarification of the ordinance's application to his activities, on the grounds that it was facially vague and overbroad. The Court of Appeals for the Seventh Circuit reversed judgment for the City, declaring the language of the ordinance unconstitutionally vague. Id. at 4268-69.

The Supreme Court found that, while the ordinance regulated the sale of items displayed in the proximity of drug-related literature, it neither regulated nor prohibited sale of the literature itself, and that the regulation of drug-related items was a reasonable restriction of commercial speech only, because it limited communication of activity proposing an illegal transaction. The Court then stated that whether the ordinance was overbroad in encompassing the protected commercial speech of others was irrelevant, because the overbreadth doctrine was inapplicable to commercial speech. Id. at 4269. Finally, the Court held that Flipside failed to show that the ordinance was impermissibly vague in all of its applications: the ordinance as applied was sufficiently clear to provide Flipside with ample warning of the obligations imposed by the ordinance, because at least some items such as “roach clips” were covered unequivocally by the licensing requirement. Id. at 4269-70.

The effect of the Court’s decision on future prosecutions under the North Carolina Drug Paraphernalia Act is uncertain in that North Carolina’s new statute is distinguishable from the ordinance in Hoffman Estates. Instead of imposing a licensing requirement, the North Carolina statute flatly prohibits the sale and possession of drug paraphernalia. Also, the North Carolina Act is clearly penal, while the ordinance in Hoffman Estates was “quasi-criminal” in imposing nominal civil penalties only. Nevertheless, the Court in Hoffman Estates, commenting that state laws regulating or prohibiting the sale of drug paraphernalia have been enacted recently in many communities, held that such legislation is not facially vague or overbroad so long as it does not reach constitutionally protected conduct and is reasonably clear in its application to the individual complainant. Id. at 4271. In a footnote, the Court remarked that the hostility of lower courts to drug paraphernalia laws may be due to a belief that these laws are ineffective in curtailing illegal drug use, a belief not to be regarded as a finding of vagueness in the laws. Id. at 4269 n.9. Consequently, it is apparent that the Court did not intend to strictly limit the application of its holding in Hoffman Estates to licensing ordinances identical to that of the Village of Hoffman Estates.


92. Id. § 90-113.23.

93. Id. § 90-113.24.

94. The General Assembly also enacted a bill establishing a drug education program. Law of July 10, 1981, ch. 922, 1981 N.C. Sess. Laws, 1st Sess. 1408. Persons with no previous convictions relating to the possession of controlled substances, who plead guilty or are found guilty of a misdemeanor for possession of a controlled substance or for possession of drug paraphernalia under the new North Carolina Drug Paraphernalia Act, may be placed on probation without the entering of a finding of guilty; however, the court may require the defendant to fulfill conditions of probation by participating in a drug education program to be approved by the Department of Human Resources. If the accused completes the terms of probation, the proceedings against him are dropped. N.C. Gen. Stat. § 90-96(a) (Cum. Supp. 1981).

There is also a provision for the expunction of records for first offenders of the North Carolina Drug Paraphernalia Act. Id. § 90-96(e).
paraphernalia, as broadly defined in the Act, includes instruments ranging from equipment designed to identify or analyze the purity, effectiveness, or strength of controlled substances to ordinary devices such as spoons, blenders, and mixers commonly found in kitchens. Whether an object is drug paraphernalia for purposes of conviction under the Act depends on factors such as proximity of the object to other paraphernalia, prior controlled substance convictions of the person in control of the object, and the existence of residue of a controlled substance on the object. The prohibition of delivery, manufacture with intent to deliver, or possession with intent to deliver drug paraphernalia, in conjunction with the prohibition of procuring advertisements with the purpose of promoting the sale of objects intended or designed for use as drug paraphernalia, makes apparent the legislative intent and expectation that the statute will be used most effectively in the prosecution of commercial retailers of prohibited paraphernalia rather than the prosecution of individuals possessing "paraphernalia."

J. Impersonation of Firemen and Emergency Medical Services Personnel

On May 21, 1981, the North Carolina General Assembly ratified an "Act to Create the Crime of Impersonation of Firemen and Emergency Medical Services Personnel." This statute became effective October 1, 1981. It is now a misdemeanor for a person, with intent to deceive, to impersonate a fireman or any emergency medical services personnel if (1) the impersonation is made with intent to impede the performance of the duties of a fireman or any emergency medical services personnel, or (2) any person reasonably relies on the impersonation and as a result suffers injury to person or property.

PHILLIP G. CONRAD
BRIAN VINCENT FRANKEL
KAREN J. LAMP

96. Id. § 90-113.21(a)(8).
97. Id. § 90-113.21(b)(6).
98. Id. § 90-113.21(b)(2).
99. Id. § 90-113.21(b)(5).
100. Id. § 90-113.23(a).
101. Id. § 90-113.24(a).
VI. CRIMINAL PROCEDURE

A. Searches and Seizures


In the heavily litigated area of fourth amendment rights, in which abrupt shifts and outright reversals of prior decisions are not uncommon, one principle has remained unchallenged: when a private individual has conducted an ostensibly "unconstitutional" search, the limitations of the fourth amendment do not apply. An initial question that thus arises is whether a challenged action is "private action" or "state action." Application of the distinction has at times proved difficult, particularly when a "private" individual has sufficient governmental contacts to fall on the cusp of the private action/state action dichotomy.

Searches by public school officials have proved to be especially controversial. In *State v. Keadle* the North Carolina Court of Appeals considered whether a resident advisor at a state university has sufficient contact with the state to warrant subjecting his actions to fourth amendment scrutiny. In a questionable holding, the court found that he did not.

The view that the fourth amendment does not apply to searches by private individuals had its origin in *Burdeau v. McDowell*. There the United States Supreme Court considered whether papers taken from petitioner's office by private detectives who had dynamited his safes could be submitted to a grand jury. Justice Day, writing for a divided Court, held that the "origin

† This subsection was written by Mack Sperling.

1. The fourth amendment to the United States Constitution provides:

   The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. Const. amend. IV.

2. See, e.g., Rakas v. Illinois, 439 U.S. 128, 142 (1978) (overruling the holding in Jones v. United States, 362 U.S. 257, 267 (1960), that "anyone legitimately on premises where a search occurs may challenge its legality," because that phrase created "too broad a gauge for measurement of Fourth Amendment rights"); Katz v. United States, 389 U.S. 347 (1967) (overruling the holding in Olmstead v. United States, 277 U.S. 438 (1928), that a wiretap on a phone line does not constitute a fourth amendment intrusion); Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (overruling the holding of Frank v. Maryland, 359 U.S. 360 (1959), that administrative searches of private residences are reasonable without a warrant, because such warrantless searches constitute a "significant intrusion upon the interests protected by the Fourth Amendment").

3. A search by a private individual cannot be "unconstitutional" for the simple reason that the fourth amendment "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). See notes 6-9 and accompanying text infra.


7. Justice Brandeis filed a dissenting opinion in which Justice Holmes concurred. Id. at 476. Brandeis criticized the government's acceptance of the papers, ending with the often quoted statement that "in the development of our liberty insistence upon procedural regularity has been a
and history [of the fourth amendment clearly showed] that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."\(^8\) Because private activity, with no governmental involvement, led to the seizure in *Burdeau*, the Court ruled that the fourth amendment was inapplicable. Now known as the "Burdeau rule," this interpretation of the fourth amendment's scope has survived relatively unmolested since its inception.\(^9\)

In cases in which the actor conducting the search is indisputably a private individual, there has been little difficulty in applying the rule.\(^10\) Problems arise when the search is conducted by a private person who acts pursuant to authority conferred by the government, making his conduct arguably state action. While there is a certain amount of statutory regulation of the conduct of school officials,\(^11\) the more difficult question is whether the school official is

---

8. Id. at 475.


10. See, e.g., *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (federal agents actively joined airline employees in searching the contents of a passenger's package); *People v. Fierro*, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965) (motel manager instructed by police to seize narcotics from guest's room).

11. No North Carolina statute explicitly gives a school official power to search, but public high schools and state colleges and universities are subject to substantial statutory regulation nonetheless. Chapter 115 of the North Carolina General Statutes regulates elementary and secondary education. See, e.g., N.C. Gen. Stat. at §§ 115C-299, -315 (Cum. Supp. 1981) (hiring of employees); id. § 115C-309 (student teachers); id. §§ 115C-364, -366 (admission and assignment of pupils). Chapter 116 of the General Statutes, regulating higher education, deals with the state...
acting directly as a state agent merely by virtue of his employment by the state. Courts that have considered this issue have come to differing results.\textsuperscript{12}

In \textit{In re Donaldson}\textsuperscript{13} a California court found a high school vice-principal "not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures."\textsuperscript{14} The court focused primarily on the statutory duty imposed upon the principal to provide an appropriate atmosphere for learning. In addition, the court noted that the primary purpose of the search had been not to obtain convictions, but to secure evidence of student misconduct.\textsuperscript{15} It would seem, however, that the \textit{Donaldson} court was less than precise in analyzing the issue. While refusing to subject the principal's search to constitutional scrutiny (ostensibly because he was a private person), the court nevertheless engaged in a fourth amendment reasonableness analysis by focusing on the circumstances under which the search had been conducted.

In \textit{People v. Stewart}\textsuperscript{16} a New York court engaged in similarly circuitous reasoning. The court held that a high school dean who had forced a student to empty his pockets was a private person for fourth amendment purposes, basing this conclusion on the fact that the dean's duty as an educator made him responsible for the "safety and welfare of (his) students . . . ."\textsuperscript{17} Thus, in the court's opinion, the search had been reasonable under the circumstances.\textsuperscript{18} Actually, it is unnecessary to find that a search is private on the one hand, and then to label it "reasonable" on the other. Private searches are not prohibited by the fourth amendment even if unreasonable.

The court of appeals in \textit{Keadle} relied heavily on the decision \textit{State v. Kappes},\textsuperscript{19} in which an Arizona court, under similar facts, considered the applicability of the fourth amendment to a search by a resident advisor. A University of Arizona regulation provided that a school official could enter a student's dormitory room to make routine maintenance inspections after posting a notice in the dormitory twenty-four hours beforehand. Two resident advisors

\footnotesize{university system. See, e.g., N.C. Gen. Stat. § 116-11(2) (1978) ("The Board of Governors shall be responsible for the general . . . control of all affairs of the constituent institutions.").}


\footnotesize{13. 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).}

\footnotesize{14. Id. at 511, 75 Cal. Rptr. at 222.}

\footnotesize{15. Apparently, the court was arguing that state of mind plays a crucial role in determining whether a school official should be subjected to the fourth amendment. Yet even where individuals have been motivated by a desire to secure a conviction, courts have not transformed private action into that of the state. See note 10 supra. Constitutional rights may be violated regardless of the state of mind of the guilty party. The \textit{Donaldson} court focused on the purpose of the search in classifying it as private—since motivated by a private objective (discipline), it could not have become state action by virtue of what it uncovered.}

\footnotesize{16. 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970).}

\footnotesize{17. Id. at 60, 313 N.Y.S.2d at 256.}

\footnotesize{18. Id.}

\footnotesize{19. 26 Ariz. App. 567, 550 P.2d 121 (1976).}
entered Kappes' room in accordance with these regulations and discovered marijuana in plain view on defendant's desk. The court refused to allow a motion to suppress, holding that “the actions of the student resident advisors in carrying out room inspections serve the internal requirements of the university... [but] are [not] tainted with that degree of governmental authority which will invoke the fourth amendment.” Despite this finding, this court also went on to consider whether the search had been unreasonable, and concluded that it had not been.

These decisions miss the mark. It should not matter whether the search is made by a dean of a public high school or by a resident advisor at a state university; each is given substantial authority by the state. Each is indisputably a state employee and is subject to the direct control of the state through various administrative bodies. In short, each acts pursuant to the powers and duties conferred by the state. As such, their conduct certainly rises to the level of state action and demands fourth amendment scrutiny. The Donaldson case is particularly questionable. That court focused on the statutory duties that the principal had been discharging, and then went on to conclude that the principal's actions were not state action because he had complied with the statutes. It would seem, however, that the court's conclusion that the principal acted pursuant to these statutes mandates a finding of state action under the Donaldson facts.

Some courts have adopted this reasoning and have found the actions of

---

20. Id. at 570, 550 P.2d at 124. The court skirted the issue of why the search did not rise to the requisite degree of governmental involvement.

21. A possible explanation for the superfluous analysis seen in these cases is that courts in high school search cases tend to state an alternative holding: namely, because the school stands in loco parentis to its students, it shares the parents' right to search their children's possessions. But even under this approach, the reasonableness of the search would seem to be irrelevant. Regardless, the in loco parentis doctrine has no application at the college level. See, e.g., Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968).

22. See note 44 infra.

23. In Morale v. Griegel, 422 F. Supp. 988 (D.N.H. 1976), the mere fact that a university resident advisor was a state employee was sufficient to warrant a finding of state action. See note 42 infra.

24. N.C. Gen. Stat. § 115C-36 (1978) delegates control over “all matters pertaining to the public schools in their respective administrative units” to county and city boards of education. Resident advisors are subject to the control of the Board of Governors of the University of North Carolina through N.C. Gen. Stat. § 116-11(2) (1978), which states that the Board “shall be responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions.”

25. One commentator criticized the Donaldson decision as follows:

The court's theory is quite inescrutable. A vice-principal of a high school obviously exercises the power of the state when he performs the duties assigned to him. Although it is possible for any government employee to act privately, the facts reported in the case completely belie any notion that the search challenged in this case was undertaken in an individual capacity. In fact, most of the court's opinion is devoted to various justifications of the vice principal's action because he was acting in his official capacity: sharing the authority of the master key to all student lockers, insuring the protection of all students, preserving the law-and-order atmosphere necessary for the educational process, and partaking of the school's in loco parentis power.

W. Buss, Legal Aspects of Crime Investigation in the Public Schools 37 (1971).
public school officials to be state action.\textsuperscript{26} In \textit{State v. Young},\textsuperscript{27} for example, a school principal discovered marijuana after forcing three students to empty their pockets. In deciding whether to apply the exclusionary rule, the Georgia Supreme Court stated, "[W]e think it too plain to be controverted that public school officials are state officers acting under color of law, whose action is therefore state action which must comport with the Fourth Amendment standards applicable to the given situation."\textsuperscript{28}

In \textit{Young} the court found the principle so clear that it required no analysis. In \textit{State v. Baccino}\textsuperscript{29} a Delaware court thought that additional justification was appropriate. There the seizure occurred when the principal of a public high school took a student's coat and discovered hashish in the pocket. The court ruled that the principal was a state official for fourth amendment purposes because (1) he was subject to the supervision and control of the board of education, and (2) he was a state employee.\textsuperscript{30} The courts that have found public school officials to be "private" persons for fourth amendment purposes have disregarded these substantial contacts with the state. In \textit{State v. Keadle}\textsuperscript{31} the North Carolina Court of Appeals took the same approach.

In \textit{Keadle} a resident advisor\textsuperscript{32} in a dormitory on the University of North Carolina at Chapel Hill campus entered defendant's room to turn off a light that Keadle had left on. While in the room, he noticed a blanket covering an object on defendant's bed. He lifted the blanket and discovered a tape deck, which he believed had been stolen from another dormitory resident. After bringing the alleged owner to Keadle's room to identify the tape deck, the advisor notified the campus police who obtained a search warrant and seized the tape deck.

The trial court granted Keadle's motion to suppress the evidence, ruling that the resident advisor's conduct constituted an unreasonable search by an employee and agent of the State of North Carolina acting in a quasi law enforcement capacity.\textsuperscript{33} The North Carolina Court of Appeals reversed. After noting that the fourth amendment's protections have traditionally been confined to governmental rather than private action, the court of appeals dis-

\textsuperscript{26} See note 12 supra.
\textsuperscript{27} 234 Ga. 488, 216 S.E.2d 586 (1975).
\textsuperscript{28} Id. at 494, 216 S.E.2d at 591.
\textsuperscript{29} 282 A.2d 869 (Del. Super. Ct. 1971).
\textsuperscript{30} Id. at 871.
\textsuperscript{31} 51 N.C. App. 660, 277 S.E.2d 456 (1981).
\textsuperscript{32} The initial hurdle to this analysis is classifying a resident advisor as a "school official." Although indisputably falling at the bottom of the university power structure, a resident advisor has the requisite amount of power and responsibility to be considered a school official. His primary duty is to act as an ombudsman, thus placing him in an advisory capacity to the student. See generally Dep't of Univ. Hous., Div. of Student Affairs, Univ. of N.C. at Chapel Hill, Resident Assistant Manual (1981). In that role alone, he acts as a "funnel" to more powerful school officials. In addition, the resident advisor is also charged with enforcing the university's rules and regulations. Id. at 126. From the perspective of the student, the resident advisor is certainly cloaked with the power of a school official.
\textsuperscript{33} 51 N.C. App. at 661, 277 S.E.2d at 458.
missed two theories under which the advisor's search might have been viewed as governmental action for fourth amendment purposes.

The court first considered whether the search had been instigated at the behest of law enforcement officers. Judge Morris rightly dismissed this contention. Given the absence of any evidence that the resident advisor "had any direction, instruction, or request from any law enforcement officer" to search Keadle's room, a theory of government instigation could not be supported.

Second, the court examined whether the advisor's contact with the state, by virtue of his position as an employee of a state-supported university, was in itself sufficient "to make him a quasi law enforcement officer or agent of the state for [the] purpose of making the fourth amendment and the exclusionary rule applicable . . . ." The court found insufficient state contacts, but also relied on the premise that the imposition of the exclusionary rule on actions of resident advisors would have no deterrent effect.

The court further noted

34. Id. at 664, 277 S.E.2d at 459. Although Keadle involved absolutely no presearch encouragement by a government officer, courts have required a minimum of such encouragement before characterizing a search as governmental. In United States v. Robinson, 504 F. Supp. 425 (N.D. Ga. 1980), for example, a Drug Enforcement Agency agent seized a suitcase and took it to a police station in the company of an airline employee. The agent laid keys taken from defendant on the desk, stating that they appeared to fit the suitcase. He asked defendant to consent to a search, but defendant refused. The airline employee then took the keys and opened the bag, believing he had power to do so under the tariff laws. The court found sufficient governmental involvement to trigger the fourth amendment because the airline employee had opened the bag at the "unspoken, but real, encouragement of" the DEA agent. Id. at 431.

35. 51 N.C. App. at 664, 277 S.E.2d at 459.

36. The deterrent effect of the exclusionary rule was seriously called into question in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971), in which a dissenting Chief Justice Burger stated that the rule was "practically ineffective in accomplishing its stated objective of deterrence." Deterrence nevertheless remains the primary justification for the rule. See United States v. Calandra, 414 U.S. 338 (1974). Since the exclusionary rule is a preventive rather than a remedial measure, Elkins v. United States, 364 U.S. 206 (1960), the argument against suppression of evidence obtained by private individuals is that they feel no compulsion to obey the exclusionary rule. Because their searches are not motivated by an effort to obtain a conviction, the possibility of failure in a criminal prosecution would present no threat to their actions.

One commentator has argued that application of the exclusionary rule would in fact have a deterrent effect, and that the rule should therefore be applied:

Colleges and universities . . . are . . . intimate communities, and those who improperly searched a student's room, such as resident advisors and head residents, may even live on the same hall as the accused student. If the college is unable to discipline the student because the evidence was illegally seized, these employees will have to suffer the continued presence of the undisciplined student near their living quarters.


An additional justification for the exclusionary rule has been the need to ensure judicial integrity. In Terry v. Ohio, 392 U.S. 1, 13 (1968), the Court expressed this justification as follows:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions . . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

An occasional court has seized on this aspect of the rule in an effort to justify imposing the rule in a public school search context. For example, in Smyth v. Lubbers, 398 F. Supp. 777, 794-95 (W.D. Mich. 1975), the court stated:

The application of an exclusionary rule to College disciplinary hearings where the College authorities have seized evidence in violation of the Fourth Amendment rights will
that the advisor had neither "the status nor the authority of a law enforcement officer,"\textsuperscript{37} and that his actions had not been motivated by a desire to obtain a criminal conviction.

The court's effort, and failure, to label the resident advisor a "quasi law enforcement officer"\textsuperscript{38} reveals a misunderstanding of the basic application of the fourth amendment. The fourth amendment is not limited to searches by law enforcement officers, but extends to cover a wide range of "activities of sovereign authority."\textsuperscript{39} In \textit{Camara v. Municipal Court},\textsuperscript{40} for example, the Supreme Court considered whether the fourth amendment's warrant requirement extends to the activities of government housing inspectors. In holding that these inspectors fell within the amendment's reach, the Court noted that "[t]he basic purpose of [the fourth amendment] . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."\textsuperscript{41} There was no line drawn separating government law enforcement officers from other governmental officials.

The court of appeals in \textit{Keadle} also considered whether the resident advisor was an "agent of the state" for purposes of fourth amendment analysis. In concluding that he had not acted in that capacity, the court ignored several compelling reasons why the advisor should have been considered a state agent. First, he was a state employee,\textsuperscript{42} and thus had direct contact with, and supervision from, the state. Second, in entering Keadle's room, the advisor was discharging duties specifically imposed upon him by the University, and entered with the aid of a master key provided to him by the University.\textsuperscript{43} Finally, special circumstances surround the dormitory-resident/resident-advisor rela-

\begin{itemize}
  \item preserve the integrity and thus the legitimacy of the College as the maker and enforcer of regulations. Institutions which enforce the law should not infringe upon fundamental constitutional rights in doing so.
  
  Given the Court's holding in United States v. Janis, 428 U.S. 433 (1976), the continued viability of the judicial integrity rationale for the exclusionary rule is open to doubt. In \textit{Janis} the Court refused to extend the rule to civil proceedings and noted that the "prime purpose of the rule, if not the sole one," is deterrence. Id. at 446.
  
  37. 51 N.C. App. at 664, 277 S.E.2d at 459.
  
  38. Id. at 664, 277 S.E.2d at 459-60.
  
  
  
  41. Id. at 528. Of course, the argument could be made that a government housing inspector really acts in the capacity of a law enforcement officer. The Court apparently found no need to address this problem. For an application of the \textit{Camara} rationale in the school search context, see W. Buss, supra note 25, at 32-36.
  
  42. See note 23 supra. The University of North Carolina denominates resident assistants as "student employees," perhaps in an attempt to insulate them from charges of state action. Interview with Jody Harpster, Associate Director for Residence Life, University of North Carolina at Chapel Hill (Nov. 10, 1981). In addition, the Resident Assistant Manual states that "resident assistants are not to be considered 'Officers of the University.'" Dep't of Univ. Hous., supra note 32, at 132.
  
  Mere words or classifications should not bar a finding of state action. Courts should instead look at the factual circumstances involved. Even if resident assistants could be considered private persons, their conduct becomes state action if the result of a request by a government official. See note 9 supra. The state gave Goldberg authority to enter Keadle's room; thus, his entrance was state action.
  
  43. Interview with Jody Harpster, supra note 42.
\end{itemize}
tionship. In the world of the college dormitory, where the police rarely intrude, the resident advisor acts essentially as the dormitory "policeman." He makes substantial recommendations on the appropriate disciplinary action that is if rules or regulations are violated. These factors severely undercut the court's holding that the resident advisor enjoyed neither the "status" nor the "authority" of an agent of the state. For practical purposes, he had both.

The denial of Keadle's motion to suppress also was based partially on the court's finding that the search had been motivated not by a desire to secure a criminal conviction, but by a duty to fulfill administrative responsibilities. The court relied heavily on the Arizona court's decision in *Kappes* for this proposition. In that case, however, the resident advisors discovered contraband in plain view while legitimately in the room for maintenance purposes. In *Keadle* the resident advisor discovered the contraband hidden beneath defendant's blanket. Given his knowledge of the missing tape deck, one might assume that the advisor's actions were somewhat motivated by a desire to identify the culprit and secure a criminal conviction. If this was the case, then the search arguably fell outside the scope of the advisor's administrative responsibilities. The court's holding therefore could be viewed as sanctioning an unrestricted search by a resident advisor once he has entered a dormitory student's room on an administrative pretext. Such a view all but strips dormitory residents of their right "to be secure in their persons, houses, papers and effects . . ."48

The court's final argument for not characterizing the resident advisor's

---

44. Resident advisors, also called resident assistants, are instructed as follows:

As the RA, you are the person on your floor charged with the responsibility of responding to a resident or visitor's behavior which is outside these [rules and regulations]. At times, you will have to ask a resident to turn down a stereo, quiet down a party, restrain from blatant violation of Federal or State Laws (such as smoking marijuana) and more.

Dep't of Univ. Hous., supra note 32, at 126.

45. The disciplinary procedure outlined in the Resident Assistant Manual for a violation of university rules is as follows: (1) verbal warning, (2) written warning by resident assistant's supervisor (the area director), (3) recommendation of probation by resident assistant to area director, (4) recommendation of cancellation of housing contract by resident assistant to area director.

Dep't of Univ. Housing, supra note 32, at 127.


47. 51 N.C. App. at 660, 277 S.E.2d at 457. The contention that the tape deck beneath the blanket was not in plain view may hinge on the quality of the blanket's fabric. In United States v. Drew, 451 F.2d 230 (5th Cir. 1971), the court adopted an "indirect" plain view approach in a case in which a police officer searched the defendant's car after seeing the outline of a pistol through a blue opaque plastic folder. In *Keadle*, if Goldberg had clearly been able to identify the outline of a tape deck beneath the blanket, his search might be justified under a Drew/Kappes rationale. There is nothing in the case that would support this reasoning, however.

48. U.S. Const. amend. IV. This seriously intrudes not only on the student's constitutional rights, see note 1 supra, but also on his contractual rights under his housing agreement. University regulations, incorporated by reference into the housing contract that each student signs, provide that "[t]he University conducts regular maintenance, safety, and health inspections of rooms, but these inspections do not involve the observation of anything not in plain sight in the room. Drawers, closets, etc. are not opened." Univ. of N.C. at Chapel Hill, Room to Live for Undergraduates, 1981-82, at 36. The regulations also provide that "searches will normally be made only pursuant to a search warrant." Id.

It seems clear that Goldberg's search was made in violation of University regulations and that a "consent" argument based on the housing contract could not be supported.
conduct as state action was equally unpersuasive. To invoke the fourth amendment, the court theorized, would require a concomitant application of the exclusionary rule. But since the exclusionary rule would have no deterrent effect on actions of a resident advisor, the court concluded that fourth amendment analysis was inappropriate.

The court of appeals failed to recognize that it could have found a fourth amendment violation of Keadle's rights without invoking the exclusionary rule. In *United States v. Calandra*, the Supreme Court noted that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

Applying this analysis, the court could have extended constitutional protection to Keadle, but refused to apply the exclusionary rule. The court in *State v. Young* took this approach and defined a middle ground between private persons and governmental law enforcement agents. This "intermediate group" was found to be subject to the fourth amendment, but not to the exclusionary rule. The *Young* approach would not leave a student whose fourth amendment rights had been violated by a public school official totally without remedy. The aggrieved party could bring an action under 42 U.S.C. § 1983 for monetary damages from both the resident assistant individually and from the state as his employer, based on the constitutional violation.

49. See note 36 and accompanying text supra.
50. 414 U.S 338 (1974). The *Calandra* Court held that the exclusionary rule would not be extended to grand jury proceedings.
51. Id. at 348.
53. Even the *Burdeau* Court did not contemplate that those victimized by private searches would be left remediless. Justice Day stated, "We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstance herein disclosed . . . ." 256 U.S. at 475.
54. That statute provides in pertinent part as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction be subjected, any citizen of the United States or other person thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
55. According to Imbler v. Pachtman, 424 U.S. 409, 417 (1976), 42 U.S.C. § 1983 creates a "species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution.

Fourth amendment violations by state officers are clearly actionable under 42 U.S.C. § 1983. Marrero v. City of Hialeah, 625 F.2d 499, 514 (5th Cir. 1980). In *Marrero* plaintiffs brought a § 1983 suit against the Hialeah police department for injury to their reputations as a result of an unconstitutional search. The court noted: Since the fourth amendment protects some of our most cherished rights, and the injury to reputation flowing from the violation of those rights may be devastating, we have no doubt that a principle of fair compensation requires that damage to reputation caused by a violation of fourth amendment rights be compensable." Id. at 514 n.19. See also Paul v. Davis, 424 U.S. 693, 710 n.5 (1976).

Conceivably, a plaintiff could bring an action under § 1983 when he had suffered no actual damages (as probably would have been the case in *Keadle*). In Carey v. Piphus, 435 U.S. 247
Although this remedy is certainly not as desirable as application of the exclusionary rule, it at least recognizes that constitutional protections extend to a student's dormitory room and limit intrusions by university officials.

It is well recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\(^55\) It seems reasonable to assume that they do not shed their fourth amendment rights there either.\(^57\) Indeed, courts in the past have found that students enjoy fourth amendment protection from official intrusion into their dormitory rooms.\(^58\) The *Keadle* court's justification for not characterizing a search by a resident advisor's actions as state action does not survive careful scrutiny. For the nearly two million young Americans who consider their dormitory room "home,"\(^59\) fourth amendment protection is both constitutionally mandated and appropriate in a society that views college students as adults.

2. Stop and Seizure

The North Carolina Court of Appeals decided three cases involving the differences between an investigatory "stop" and a fourth amendment "seizure." In *State v. Grimmett*\(^60\) the court held that traditional *Terry v. Ohio*\(^61\) analysis revealed that only a legitimate stop rather than a seizure had taken place when a police officer intitially approached and spoke to defendant in the

---

57. See W. Buss, supra note 25, at 27.
60. 54 N.C. App. 494, 284 S.E.2d 144 (1981). See also note 111 and accompanying text infra.
61. 392 U.S. 1 (1968) (Not all personal intercourse between policemen and citizens involves seizures of persons.)
Furthermore, applying Reid v. Georgia, the court concluded that Grimmett's nervousness and inability to identify himself thereafter did not provide sufficient articulable facts on which to base a reasonable suspicion that Grimmett was engaged in criminal activity and thus to justify a subsequent seizure. The court went on to indicate, however, that Grimmett's consent to accompany the officer precluded the necessity of finding any reasonable and articulable suspicion of criminal activity to justify a seizure.

The North Carolina Court of Appeals also applied Reid in State v. Cooke. Officers had approached defendant Cooke at the Charlotte, North Carolina airport based upon the following observations of defendant's behavior: (1) nervousness, (2) difficulty in getting a suitcase into a locker, (3) failing to acknowledge his companion when he walked past, and (4) failing to dress "conservatively" as does the "normal business traveler." The court concluded that these facts did not support a reasonable suspicion that Cooke and his companion were engaged in criminal activity. Thus, the police had no right to stop and detain Cooke.

In State v. Peck a university security officer stopped a vehicle and arrested the driver for not carrying his driver's license. As the security officer had orders not to leave the campus, he placed a call for assistance and a state highway patrolman responded. The patrolman approached the passenger side of the vehicle to check the passenger in the car and began a conversation with the defendant-passenger. After observing defendant's appearance and learning that he did not feel well, the patrolman asked him whether he had any drugs in the car or on him. When defendant responded by reaching into his pants, the patrolman grabbed defendant's arm and pulled it out, bringing the corner of a plastic bag into plain view. The bag was seized, and defendant was arrested for possession of marijuana. The majority held that defendant's unhealthy appearance rendered the patrolman's question appropriate and thus affirmed the trial court's admission of the bag into evidence. The dissent,

---

62. 54 N.C. App. at 494-95, 284 S.E.2d at 149. The officer approached Grimmett in a public place, stated his purpose, and requested that Grimmett speak with him. Grimmett agreed to talk and to enter the terminal with the officer. At no time did the officer present a weapon, use physical contact, or threaten Grimmett. Furthermore, the officer testified that had Grimmett refused to talk to him, he would have had to let Grimmett go.

63. 448 U.S. 438 (1980) (while in some circumstances a person may be detained without probable cause to arrest, any curtailment of liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity; nervousness will not suffice).

64. 54 N.C. App. at 501-02, 284 S.E.2d at 150.

65. See note 62 and accompanying text infra.


67. 54 N.C. App. at 37-38, 282 S.E.2d at 804.


69. Id. at 306, 283 S.E.2d at 386. Defendant's "condition" included dilated pupils, red eyes, mucous in the corner of his mouth and the fact that he was "cotton-mouthed."

70. Id. at 306-07, 283 S.E.2d at 386. The majority emphasized the patrolman's right to be where he was at the time he observed defendant. As it is clear that a policeman has the right to address questions to anyone in the streets, it may be that Peck could have refused to answer. See
taking judicial notice of the officer's uniform and weapon, and observing that
the officer's accusation was sufficient to give rise to a reasonable apprehension
by defendant that he was at least being detained for investigation, concluded
that the patrolman's questioning constituted a seizure.\textsuperscript{71} The dissent rejected
the argument that the patrolman had a reasonable suspicion that defendant
illegally possessed a controlled substance at the time he asked the question,
and suggested that the trial court should have suppressed the evidence that
flowed from the initial intrusion.\textsuperscript{72}

A recent United States Supreme Court denial of certiorari inspired a
lengthy dissent that questioned the North Carolina Supreme Court's applica-
tion of the fourth amendment. In \textit{Trapper v. North Carolina}\textsuperscript{73} defendant
sought to obtain United States Supreme Court review of his conviction\textsuperscript{74} after the
North Carolina Supreme Court dismissed his appeal for lack of a substan-
tial constitutional question.\textsuperscript{75} Although the United States Supreme Court de-
nied certiorari, Justice Brennan, joined by Justice Stewart, dissented
vigorously. Brennan concluded that the available facts—(1) the officer had
heard unusual boat and truck noises and had seen a locked gate on defen-
dant's property; (2) the officer had known that that portion of the coastal county
was regularly used by marijuana smugglers; (3) the officer had seen a boat
inexplicably grounded in the area; and (4) he allegedly had been fired on while
surveying the suspect property from the water—left a substantial question
whether the stop of defendant's truck was based on a reasonable suspicion
resting on objective, articulable facts that the driver was involved in criminal
activity.\textsuperscript{76}

3. Legitimate Expectation of Privacy

The Court of Appeals for the Fourth Circuit, the North Carolina
Supreme Court, and the North Carolina Court of Appeals all considered the

\textsuperscript{71} 54 N.C. App. at 307-08, 283 S.E.2d at 387 (Wells, J., dissenting). The dissenting judge
apparently relied on the definition of seizure provided by Mr. Justice Stewart in \textit{United States v. Mendenhall}, 446 U.S. 544, 554 (1980):

We conclude that a person has been "seized" within the meaning of the Fourth
Amendment only if, in view of all of the circumstances surrounding the incident, a rea-
sonable person would have believed that he was not free to leave. Examples of circum-
stances that might indicate a seizure, even where the person did not attempt to leave,
would be the threatening presence of several officers, the display of a weapon by an
officer, some physical touching of the person of the citizen, or the use of language or tone
of voice indicating that compliance with the officer's request might be compelled.

\textsuperscript{72} See note 63 and accompanying text supra.

\textsuperscript{73} 451 U.S. 997 (1981).

\textsuperscript{74} State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680 (1980).

\textsuperscript{75} 301 N.C. 405, 273 S.E.2d 450 (1980).

\textsuperscript{76} 451 U.S. at 1000-01. For a discussion of \textit{State v. Trapper} that reaches the same conclu-
sion reached by Mr. Justice Brennan, see \textit{Survey of Developments in North Carolina Law}, 1980—
U.S. 411 (1981) (although a police officer may make inferences and deductions an untrained per-
son may not, police must have a particularized and objective basis for suspecting the particular
person stopped).
question of what constitutes a "legitimate expectation of privacy" sufficient to invoke fourth amendment protections. In Lee v. Gilstrap plaintiff brought a section 1983 civil rights action against police officers to recover damages for their alleged illegal entry and arrest of him while he was at his mother-in-law's house. The Court of Appeals for the Fourth Circuit summarily held that plaintiff had no privacy interest in his mother-in-law's house. While the lack of analysis leading to that conclusion is somewhat disturbing, the judiciary's general dislike of section 1983 actions may partially explain the summary treatment.

In State v. Greenwood a police officer searched and inventoried the contents of a pocketbook found in a vehicle during a standard inventory of that vehicle. The North Carolina Supreme Court held that the North Carolina Court of Appeals erred in holding that the pocketbook and its contents should have been suppressed. The supreme court based its reversal on defendant's failure to show that the search and seizure of the pocketbook, which defendant had stolen, infringed upon his own personal rights under the fourth amendment. While the court's conclusion that "no thief has any reasonable expectation of privacy in his use of the property he has stolen" is undoubtedly correct, the court's discussion in arriving at that conclusion is somewhat confusing. Citing State v. Eppley, the court broadly stated that "[a]bsent owner-
ship or possessory interest in the premises or property, a person has no standing to contest the validity of a search.” After the United States Supreme Court ruling in *Rakas v. Illinois* and its legitimate expectation of privacy test, however, ownership or possession is not a prerequisite to a reasonable expectation of privacy, and “standing” is not a separate question requiring independent determination by the court. By suggesting that ownership or possession may constitute a prerequisite to fourth amendment protection and that standing is a separate issue, the court misapplied *Rakas*, yet arrived at a correct conclusion on the facts of the case.

The North Carolina Court of Appeals decision in *State v. Cooke* is notable for its thorough treatment of what constitutes a legitimate expectation of privacy in allegedly abandoned property. Emphasizing that a reasonable expectation of privacy does not depend on actual possession and control at the time of an illegal search, the court said that a bailment relationship may carry with it a justified expectation of privacy; consequently, when Cooke entrusted the safekeeping of his suitcase to his travelling companion he did not relinquish his expectation of privacy in its contents. After Cooke returned to find the police were searching his companion’s suitcase, he denied ownership of his own suitcase. The court of appeals concluded that even if Cooke’s disclaimer of ownership was an abandonment, it was not a voluntary one. The lack of probable cause to seize Cooke’s suitcase and the threat that an illegal search was about to take place rendered defendant’s disclaimer involuntary and a product of police misconduct so that he had not relinquished all expectations of privacy in the property.

4. Searches Under Warrant

In *State v. Tripp* two police officers followed a trail of cigarettes and chewing gum from the site of a felonious larceny to a trailer near which one of the officers had seen a subject whom he could not identify. They knocked on the trailer door and requested and received permission to enter. After the occupants denied the officer’s request to search the trailer, one officer left to obtain a search warrant while the other remained behind in the trailer.

---

88. 301 N.C. at 707-08, 273 S.E.2d at 440.
89. See note 77 supra.
91. 54 N.C. App. 33, 282 S.E.2d 800 (1981). See also notes 66-67 and accompanying text supra; notes 108-09 and accompanying text infra.
93. 54 N.C. App. at 43, 282 S.E.2d at 807. See 3 W. LaFave, supra note 86, § 11.3.
94. 54 N.C. App. at 43, 282 S.E.2d at 807.
95. A dissenting judge would remand for findings of fact and conclusions of law concerning the abandonment and related legitimate expectations of privacy in the searched suitcase. Id. at 46, 282 S.E.2d at 809 (Martin, J., dissenting).
96. See text accompanying notes 66-67 supra.
97. 54 N.C. App. at 44-45, 282 S.E.2d at 808. See also United States v. Beck, 602 F.2d 726, 729-30 (5th Cir. 1979).
98. 52 N.C. App. 244, 278 S.E.2d 592 (1981).
Approximately one hour later a search under warrant disclosed several stolen items.

In holding the seized evidence properly admitted into evidence, the North Carolina Court of Appeals joined those jurisdictions that have upheld the legality of “securing” premises pending issuance of a search warrant when both probable cause and exigent circumstances, such as possible destruction of evidence, exist.99 The court emphasized, however, that the officer's conduct was relatively non-intrusive, indicating that it might not accept this alternative in situations in which the officer's presence is more intrusive and, therefore, unreasonable.100

In State v. Brooks101 the North Carolina Court of Appeals had occasion to discuss the constitutionality of G.S. 15A-256, which authorizes the “[d]etention and search of persons present in private premises or vehicles to be searched.”102 The court in dictum stated that the constitutionality of that statute was unaffected by the United States Supreme Court's holding in Ybarra v. Illinois.103 The court's conclusion on that point is questionable.

The purpose of G.S. 15A-256 is to forbid the quick transfer of easily hidden contraband from one party to another immediately prior to execution of a search warrant. In an effort to minimize undue infringement on the privacy of individuals who happen to be in the vicinity of the person or place described in the warrant, the legislature imposed two conditions that must be met before unnamed individuals can be searched: (1) the search of premises and persons designated in the warrant must prove unsuccessful and (2) the warrant must be executed on private premises or in vehicles. Furthermore, any evidence seized from persons not named in the warrant must be suppressed unless of the same type described in the warrant.104

---


100. 52 N.C. App. at 251-52, 278 S.E.2d at 597-98. The officer conducted no search. Testimony pointed out his politeness during his one hour wait in the trailer. Furthermore, he allowed defendant to change clothes during that time. Id.

101. 51 N.C. App. 90, 275 S.E.2d 202, cert. denied, 302 N.C. 632, 280 S.E.2d 441 (1981). See also State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981) (officers had right to detain defendant and another on premises while apartment was being searched pursuant to search warrant; court citing G.S. 15A-256 as authority).


An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property.


104. See Dellinger, Subchapter II. Law Enforcement and Criminal Investigation, 10 Wake Forest L. Rev. 363, 374-75 (1974).
Ybarra requires that probable cause be articulated with respect to the particular individual to be searched or seized. Indeed, "[t]his requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." 105 State v. Watlington, 106 which upheld the constitutionality of G.S. 15A-256, was decided three years prior to Ybarra. One commentator who has analyzed the North Carolina statute's constitutionality in light of Ybarra has concluded that Ybarra might prohibit the North Carolina approach, 107 despite the qualifications the drafters appended in efforts to lessen infringements on legitimate privacy expectations.

5. Exceptions to the Warrant Requirement

In State v. Cooke 108 the court of appeals, applying standard fourth amendment analysis, found no exigent circumstances to justify the warrantless search of defendant's suitcase once it was in the possession and control of police officers. 109 The court rejected the State's argument that taking time to obtain a search warrant would have delayed Cooke's subsequent arrest, because it found that there was no need to make an immediate arrest. In addition, the court noted that a magistrate would first have to find probable cause to issue a search warrant before any arrest could follow. 110

In State v. Grimmert 111 the court of appeals applied United States v. Mendenhall, 112 a recent United States Supreme Court decision, in concluding that police officers did not violate defendant's fourth amendment rights because defendant had voluntarily assented to the officer's requests (1) to talk, (2) to go inside the airport terminal, (3) to produce identification, and (4) to move to the basement area of the terminal. Significantly, the court held that voluntary consent did not require explicit notice of the right to refuse to comply with the officer's requests. 113

In State v. Cooper 114 the court of appeals dealt with the search incident to arrest exception to the warrant requirement. 115 The court concluded that af-

105. 444 U.S. at 91.
107. Note, Individualized Probable Cause is Necessary to Search Persons Incidentally on Premises Subjected to a Warrant Authorized Search, 4 U. Ark. Little Rock L.J. 115, 122 n.60 (1981). This same writer described the North Carolina approach as "unique." Id. at 119 n.36.
110. 54 N.C. App. at 39, 282 S.E.2d at 805.
111. 54 N.C. App. 494, 284 S.E.2d 144 (1981). See also notes 60-65 and accompanying text supra.
112. 446 U.S. 544 (1980).
113. 54 N.C. App. at 502-03, 284 S.E.2d at 150-51.
115. The court also indicated a willingness to extend the plain view doctrine to include contraband discovered through any of the officer's senses, especially smell. Id. at 352, 278 S.E.2d at 534.
After the defendant had been arrested and placed in the officer's patrol car, the officer's subsequent search of defendant's vehicle did not constitute a valid search incident to arrest. Applying the standard criteria for a valid search incident to arrest, the court determined that the area searched was not within the defendant's immediate control such that he could either reach a weapon or conceal or destroy evidence.\(^\text{116}\) It should be noted that the recent United States Supreme Court holding in *New York v. Belton*\(^\text{117}\) provides an expanded search incident to arrest rule that would seem to allow a different result on these facts.\(^\text{118}\)

In *State v. Hall*\(^\text{119}\) the court of appeals held that a police officer's search of a small, closed, opaque medicine bottle and seizure of its contents exceeded the permissible scope of a valid inventory search of a lawfully impounded automobile.\(^\text{120}\) Emphasizing the purpose of the inventory—to safeguard the contents of lawfully impounded vehicles—the court concluded that the officers could have fulfilled the caretaking function by listing the closed bottle itself on the inventory form.\(^\text{121}\) Significantly, the bottle was brown and its contents were not in plain view.\(^\text{122}\) In its careful delimitation of the scope of the inventory search, the court expressed great concern that the inventory exception could potentially provide a convenient method to bypass the fourth amendment's warrant requirement.\(^\text{123}\)

### B. Miranda Warnings

In *State v. Odom*\(^\text{124}\) the supreme court unanimously held that the admission of evidence of defendant's refusal to submit to a gunshot residue test is not violative of due process. Defendant was arrested following a shooting and charged with assault with intent to kill. After she was read her *Miranda* rights she was asked to submit to a gunshot test, which she refused to take until she had talked with her lawyer. The test was never administered, but at trial, on cross-examination, the prosecution asked defendant whether she had

---


118. The Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest search the passenger compartment of that automobile" including the "contents of any containers found within the passenger compartment." 453 U.S. at 460.

Of course, a state can continue to impose a stricter standard for the search incident to arrest. Furthermore, since *Belton v. New York* was a 5-4 decision and its author, Justice Stewart, has retired, Justice O'Connor's vote will be important in determining the fate of the Supreme Court's new and expanded search incident to arrest rule.


120. 52 N.C. App. at 498-500, 279 S.E.2d at 115-16.

121. 52 N.C. App. at 499, 279 S.E.2d at 115. As the court points out, numerous other courts have limited the inventory search. Id. at 501, 279 S.E.2d at 116. Some courts, however, do allow the more detailed inventory. See 2 W. LaFave, supra note 86, § 7.4(a).

122. 52 N.C. App. at 499-502, 279 S.E.2d at 115-17; note 113 and accompanying text supra.

123. 52 N.C. App. at 501-02, 279 S.E.2d at 116-17.

refused to take the residue test.\textsuperscript{125} The court of appeals\textsuperscript{126} overturned the conviction, following the rule laid down in \textit{Doyle v. Ohio}\textsuperscript{127} that it would be "fundamentally unfair and a deprivation of due process"\textsuperscript{128} to allow the prosecution to use defendant's reliance on her constitutional right to remain silent to impeach\textsuperscript{129} her credibility.\textsuperscript{130} The court recognized no constitutional difference between exercising one's right to remain silent and exercising one's right to request the assistance of counsel.\textsuperscript{131}

In reversing the court of appeals' decision, the supreme court first held that defendant had no constitutional right to counsel at that point in the proceeding. The court analogized the gunshot residue test to other scientific non-testimonial examinations such as blood tests and handwriting analyses, and held that the gunshot residue test was not a "critical stage"\textsuperscript{132} in the proceedings giving rise to a constitutional right to counsel.\textsuperscript{133} The court then distinguished \textit{Doyle} by noting that the prosecution in that case was prohibited from using defendant's silence for impeachment purposes because defendant could not be penalized for exercising his constitutional right to remain silent.\textsuperscript{134} The giving of \textit{Miranda} rights assured defendant only that "she would not be penalized for exercising her constitutional right to counsel."\textsuperscript{135} Since Odom did not yet have a right to counsel, admission of her refusal to take the test in the absence of counsel was not a violation of due process.\textsuperscript{136}

In support of this analysis the supreme court relied upon the recent Supreme Court decision in \textit{Jenkins v. Anderson}\textsuperscript{137} which held that impeachment by use of pre-arrest silence does not violate due process.\textsuperscript{138} Defendant

\begin{itemize}
  \item \textsuperscript{125} Id. at 164, 277 S.E.2d at 353.
  \item \textsuperscript{126} State v. Odom, 49 N.C. App. 278, 271 S.E.2d 98 (1980).
  \item \textsuperscript{127} 426 U.S. 610 (1976). See also State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980) (comment by a prosecuting attorney upon defendant's post-arrest silence is constitutionally impermissible).
  \item \textsuperscript{128} 49 N.C. App. at 280, 271 S.E.2d at 100 (quoting Doyle v. Ohio, 426 U.S. at 618).
  \item \textsuperscript{129} The court of appeals was not entirely convinced that defendant's refusal to submit to a residue test was a "statement" inconsistent with her testimony, but it did not directly address the issue. 49 N.C. App. at 280, 271 S.E.2d at 99. This evidential question has been addressed in the context of a defendant's silence being used against him for impeachment purposes. See State v. Lane, 301 N.C. at 385-86, 271 S.E.2d at 275-76 (dictum that silence may be used for impeachment when, at the time of defendant's silence, it would have been natural for him to speak); Jenkins v. Anderson, 447 U.S. 231, 239 n.5 (1980). See generally 3 J. Wigmore, Evidence § 1042 (J. Chadbourn rev. ed. 1970).
  \item \textsuperscript{130} 49 N.C. App. at 280, 271 S.E.2d at 100 (citing Doyle v. Ohio, 426 U.S. at 618). See also State v. Lane, 301 N.C. at 383-84, 271 S.E.2d at 274-75.
  \item \textsuperscript{131} 49 N.C. App. at 281, 271 S.E.2d at 100.
  \item \textsuperscript{132} See United States v. Wade, 388 U.S. 218 (1967). A critical stage is one during which counsel is necessary to preserve defendant's right to a fair trial through meaningful cross-examination. It is thought that cross-examination at the trial itself is sufficient to protect defendant's interests in attacking objective scientific evidence. Id. at 227.
  \item \textsuperscript{133} 303 N.C. at 167, 277 S.E.2d at 355. See Gilbert v. California, 388 U.S. 263 (1967) (taking of handwriting samples not a critical stage); Schmerber v. California, 384 U.S. 757 (1966) (sixth amendment right to counsel does not attach to the giving of blood tests).
  \item \textsuperscript{134} 303 N.C. at 168, 277 S.E.2d at 355. See Doyle v. Ohio, 426 U.S. at 618.
  \item \textsuperscript{135} 303 N.C. at 168, 277 S.E.2d at 355 (emphasis in original).
  \item \textsuperscript{136} Id. at 168, 277 S.E.2d at 355-56.
  \item \textsuperscript{137} 447 U.S. 231 (1980).
  \item \textsuperscript{138} Id. at 238.
\end{itemize}
there was arrested for murder, and at trial claimed the shooting was self-defense. On cross-examination the prosecution asked him why he did not report the crime until two weeks after the shooting, thereby using defendant’s pre-arrest silence to imply that defendant had fabricated his story. The Supreme Court in *Jenkins* observed that the critical difference between the facts in *Doyle* and those before the court was that in the latter the failure to speak came before defendant was taken into custody and given his *Miranda* warnings. It was crucial to the Court’s reasoning in *Jenkins* that no governmental action had induced defendant to remain silent for the two weeks before the arrest, and therefore the fundamental unfairness of impeachment by post-arrest silence was not present.

In *Odom* the supreme court reasoned that even though defendant had been told that she had a right to an attorney, the state had done nothing to induce her to believe that she had a constitutional right to counsel at that point in the proceedings. The court did not explain why the giving of *Miranda* warnings did not induce defendant to think that she had a constitutional right to request the assistance of counsel. As the court of appeals pointed out, surely an arrested person who has been read his rights should be able to rely on the assertion that he has a right to see an attorney. To say that a defendant would not be induced to believe that a constitutional right to an attorney exists at that point is to impute to the defendant an understanding of when the proceeding has reached a “critical stage.” Otherwise, the defendant is confronted with the dilemma that the Supreme Court held was unfair in *Doyle*: either refraining from exercising what may well be a constitutional right, or being penalized for asserting it.

The court of appeals in *State v. Perry* held that a bail bondsman had no obligation to give *Miranda* warnings to defendant, because a bail bondsman is not acting as a law enforcement officer or as an agent of the state when taking a bail jumper into custody. Thus, the bondsman was permitted to testify to his conversation with defendant that took place as the two were driving back to the police station following his recapture of defendant. The court regarded the bondsman’s action as purely private, arising out of the bail contract between the principal and his surety, and noted the generally accepted principal that statements made to private individuals are not protected

139. Id. at 234.  
140. Id. at 239-40.  
141. Id. at 240.  
142. 303 N.C. at 168, 277 S.E.2d at 355-56.  
143. 49 N.C. App. at 281, 271 S.E.2d at 100.  
146. Id. at 542, 274 S.E.2d at 262.  
147. The bondsman asked defendant a general question as to why he left without paying the bond premium. Id.  
148. Id.
by *Miranda* requirements.\textsuperscript{149}

The question was raised whether G.S. 85C-7,\textsuperscript{150} which grants a bondsman authority to recapture his principal, creates a law enforcement officer in the person of a bail bondsman. In holding that it does not, the court stated that the statute was merely a codification of the common law right of recapture that had been recognized in North Carolina for many years.\textsuperscript{151} Numerous courts have held that a bail bondsman, acting independently, is not cloaked with state authority.\textsuperscript{152} It has been argued that courts have their own official means for securing the presence of wayward defendants,\textsuperscript{153} and that the right of a bondsman to apprehend his principal is purely contractual, requiring no legislative fiat.\textsuperscript{154} Since the justification for requiring *Miranda* warnings is to deter unlawful police interrogation tactics,\textsuperscript{155} and since the bondsman has no particular interest in the defendant's guilt or innocence, this approach would appear to be sound.

Other courts have held that a bondsman did act as an arm of the state, and was therefore subject to constitutional limitations on his actions. These courts generally dealt with cases involving more significant state participation in the rearrest; for instance, a bondsman acting under authority of a state bench warrant.\textsuperscript{156} In the absence of significant state involvement, however, the acts of a bondsman are apparently subject to few constitutional limitations.\textsuperscript{157}

Nevertheless, there are several arguments that the court did not consider directly which would support the contrary position that a bail bondsman is an agent of the state. One argument is that the state-licensed and regulated bondsman, as provided in G.S. 85C, is an integral part of the state's pretrial release program, and therefore should be treated like an official of that pro-


\textsuperscript{150} N.C. Gen. Stat. § 85C-7 (1981) provides: "For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or by his written authority endorsed on a certified copy of the undertaking, may request any judicial officer to order arrest of the defendant."

\textsuperscript{151} 50 N.C. App. at 542, 274 S.E.2d at 262. For statements of the common law right of recapture, see *State v. Lingerfelt*, 109 N.C. 775, 14 S.E. 75 (1891); *Taylor v. Taintor*, 83 U.S. (Wall.) 366, 371 (1872). See also *Note, Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966 (1961).


\textsuperscript{153} 505 F.2d at 554.

\textsuperscript{154} Id. See also *People v. Houle*, 13 Cal. App. 3d 892, 895, 91 Cal. Rptr. 874, 875-76 (1970).

\textsuperscript{155} *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971).


\textsuperscript{157} Even when the bondsman does act with a cloak of state authority, it does not necessarily follow that he will be treated for constitutional purposes as if he were a police officer. In *Kear*, 474 F. Supp. at 802, the court recognized fourth amendment restrictions on bondsman authority to recapture, but it did not go so far as to hold that a bondsman must obtain a warrant before rearresting his principal.
Another is that legislatures often make available to the bail bondsman judicial process and police power, unavailable to most individuals, to aid him in the completion of his task and the protection of his investment. In addition, there is case law to support the proposition that when bail is given the prisoner is still technically under the control of the court and is regarded as delivered to the custody of his bondsman. Each of these arguments suggests that a bail bondsman acts with some state authority when he recaptures a bail jumper. Perry holds that when the only state involvement is the statutory regulation of the bondsman's activities, and the recapture is made pursuant to a private bail contract, the state's association with the bondsman is not significant enough to warrant treating him as an arm of the state's law enforcement program for Miranda purposes.

In State v. Porter defendant was arrested after a high-speed chase in connection with the armed robbery of a store, and was taken into custody without being apprised of his constitutional rights. As the officers were driving him to the station, a police supervisor radioed the patrolmen and asked them if they had found a bank bag in defendant's possession. When defendant Porter heard this question he responded, "The bank bag is in the car." One of the patrolman then asked defendant, "What bank bag?", and the defendant answered, "The bag from the robbery." The primary issue was whether defendant's second response was inadmissible as the result of a custodial interrogation conducted before the defendant was informed of his right to remain silent. The court narrowed the question to "whether, in the brief conversation between defendant Porter and [the patrolman], the officer should have known that the respondent would suddenly be moved to make an incriminating response." Relying on Rhode Island v. Innis, and the United States Supreme Court's emphasis there on the brief and casual nature of the policeman's remarks, the court held that this conversation was not a

158. 505 F.2d at 558 (Hufstedler, J., dissenting).
159. See N.C. Gen. Stat. § 85C-7 (1981); 505 F.2d at 557 (Hufstedler, J., dissenting).
161. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872); State v. Lingerfelt, 109 N.C. 775, 14 S.E. 75 (1891). See also Federal Bail Procedures: Hearings on S. 1357 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 6 (1966) (statement of Sen. Ervin): "[I]n modern times, the bail bondsman is an arm of the court performing a service in aid of civil law. As such, he should be subject to procedures that recognize and protect the rights of the accused as much as do other agents of law enforcement."
163. Id. at 569, 274 S.E.2d at 862.
164. There was opposing evidence that the inquiry was actually, "What bag, turkey?" Id. at 576-77, 274 S.E.2d at 867 (Martin, J., dissenting).
165. Id. at 571, 274 S.E.2d at 862.
166. The court held that defendant's reply to the radio communication was clearly spontaneous and not the product of a custodial interrogation. Id. The dissent also agreed on this point. Id. at 579, 274 S.E.2d at 867 (Martin, J., dissenting).
167. Id. at 571-72, 274 S.E.2d at 863. This framing of the issue is almost a direct quotation from Rhode Island v. Innis, 446 U.S. 291, 303 (1980).
169. Id. at 302-03.
custodial interrogation.\textsuperscript{170} In the view of the court, a question posed to a defendant is not part of a custodial interrogation if it merely asks the defendant to explain or clarify something he has already said voluntarily.\textsuperscript{171} The officer's question, "What bank bag?", was a permissible response to defendant's voluntary spontaneous reply to the radio communication; the officer was "still getting the big picture."\textsuperscript{172}

In holding that this conversation did not constitute a custodial interrogation the court may have misplaced its reliance on \textit{Innis}. The holding in \textit{Innis} was that the term "interrogation" refers to "express questioning" and any other words or actions that the police "should know are reasonably likely to elicit an incriminating response."\textsuperscript{173} The conduct of the police officers there consisted of a conversation between them that defendant overheard. Because the conversation was not directed at defendant (at least not in form),\textsuperscript{174} it is easy to understand why the Court felt that the officers should not have known that their remarks would elicit an incriminating response. By way of contrast, however, the officer in \textit{Porter} directed his question to defendant; the very purpose of the second question was to elicit an incriminating response.\textsuperscript{175}

\textit{Innis} did not address the question whether a voluntary in-custody statement becomes the product of an in-custody interrogation simply because the officer asks defendant to explain or clarify a statement that previously was offered voluntarily. For this proposition the court relied on three pre-\textit{Innis} North Carolina cases: \textit{State v. McZorn},\textsuperscript{176} \textit{State v. Haddock},\textsuperscript{177} and \textit{State v. Blackmon}.\textsuperscript{178} Each of these cases, however, concerned a confession by a defendant who had been read his \textit{Miranda} rights and had waived them voluntarily.\textsuperscript{179} Although the court noted that the circumstances in \textit{Porter} were

\begin{itemize}
\item 170. 50 N.C. App. at 572, 274 S.E.2d at 863.
\item 171. Id.
\item 172. Id. The court noted that there was no evidence that the officer knew what was taken at the store. His first involvement with the case came when he pursued defendant's car in response to a radio call. This fact contributed to the court's determination that the officer's question was a "natural response" to defendant's spontaneous remark, because he was trying to "get the big picture." Id. The dissent, however, was persuaded that the officer must have known he had apprehended one of the robbers and that his question was not just an innocent query. Id. at 578-79, 274 S.E.2d at 867 (Martin, J., dissenting).
\item 173. 446 U.S. at 301.
\item 174. Id. at 302. In a conversation between themselves, the officers in \textit{Innis} expressed their concern over the safety of handicapped children who were known to play in the neighborhood where defendant had hidden his gun. Defendant, who was seated in the back seat of the patrol car, interrupted the conversation and volunteered to show the officers where they could find the gun. Id. at 294-95.
\item 175. See 50 N.C. App. at 579, 274 S.E.2d at 867 (Martin, J., dissenting).
\item 177. 281 N.C. 675, 190 S.E.2d 208 (1972).
\item 178. 284 N.C. 1, 199 S.E.2d 431 (1973).
\item 179. In \textit{McZorn}, defendant, after being warned of his rights, confessed that he had shot the victim. An officer then asked him to "explain what happened." 288 N.C. at 432, 219 S.E.2d at 211. In \textit{Blackmon}, defendant, again after he had been read his rights, made incriminating statements in response to a comment by his co-defendant. A sheriff then asked him if he cared to make any further statement. 284 N.C. at 4, 199 S.E.2d at 436. In \textit{Haddock}, despite being twice assured of his right to remain silent, defendant began confessing, whereupon an officer asked him to further explain one of his statements. 281 N.C. at 680, 190 S.E.2d at 211.
\end{itemize}
"somewhat different" \(^{180}\) than the facts in these cases, it apparently did not think the distinction was significant. \(^{181}\) Given, however, that the courts in \textit{McZorn, Haddock} and \textit{Blackmon} relied primarily on the fact that the defendants had knowingly waived their rights, \(^{182}\) \textit{Porter} must be viewed as an extension of the reasoning in those cases.

A second important question that the \textit{Porter} court faced was whether the testimony should have been excluded as to Porter’s codefendant Ross, because the extra-judicial statement of a codefendant was used against him without his having a chance to cross-examine the declarant. The State had argued that the voir dire editing of the statement "the bag we got from the robbery" to "the bag from the robbery" so sanitized the statement as not to implicate Ross. The appellate court disagreed. The statement following the chase, arrest and handcuffing left the jury with a single natural inference, namely, that both men had been involved in the robbery. Nevertheless, and in contravention of the United States Supreme Court decision in \textit{Bruton v. United States}, \(^{183}\) the court held that the statements were admissible as to Ross.

In \textit{Bruton} the Supreme Court stated that while the confession of a defendant could be introduced as competent evidence against that defendant as an exception to the hearsay rule (admission of a party), the statement could not be considered by the jury against a codefendant because it was "inadmissible hearsay" as to the codefendant. \(^{184}\) The Court held that, as a practical matter, the jury could not be expected to heed limiting instructions and would consider the incriminating extrajudicial statement of the defendant against the codefendant as well, even though as to the codefendant the statement would be an inadmissible violation of the codefendant's rights granted by the confrontation clause of the Constitution. \(^{185}\) But the court of appeals ruled that the \textit{Bruton} rule would not apply if defendant Porter's exclamation could be characterized as a spontaneous utterance. \(^{186}\) The court reasoned that such an exclamation would not constitute inadmissible hearsay as to codefendant Ross but would be admissible by virtue of its credibility and reliability as a spontaneous utterance. \(^{187}\)

As the dissent points out, this holding was a complete misinterpretation of \textit{Bruton}. In this case, Porter, the out-of-court declarant, did not testify at the trial. Ross had no way to cross-examine Porter. Ross' right of cross-examination, secured by both the confrontation clause of the sixth amendment of the United States Constitution and article I of the North Carolina Constitution, was violated by the admission of this testimony. The majority apparently held

---

\(^{180}\) 50 N.C. App. at 572, 274 S.E.2d at 863.

\(^{181}\) While the court was cognizant of the distinction, it did not attempt to reconcile the decisions. Id.

\(^{182}\) 288 N.C. at 432-33, 219 S.E.2d at 211; 281 N.C. at 682-83, 190 S.E.2d at 212-13; 284 N.C. at 12, 199 S.E.2d at 438.

\(^{183}\) 391 U.S. 123 (1968).

\(^{184}\) Id. at 137.

\(^{185}\) Id. at 129.

\(^{186}\) 50 N.C. App. at 573, 274 S.E.2d at 863.

\(^{187}\) Id. at 578, 274 S.E.2d at 865 (Martin, J., dissenting).
that if the extra-judicial statement is credible and reliable, the nondeclarant defendant's rights to cross-examination have somehow been fulfilled, and there is no violation of the *Bruton* rule. But this view ignores the essential purpose served by cross-examination. It is the credible witness whom the defendant needs to cross-examine. When the testimony is so incredible as to defy belief by a jury, a defendant may well waive his right to cross-examine. In any case, constitutional rights cannot be made to turn on whether this court, or any other court, is of the opinion that an extra-judicial statement is credible. The opinion implies that *Bruton* is limited to "confessions." The *Bruton* Court, however, stated only that its rule applies where the powerfully incriminating extra-judicial statements of a codefendant "are deliberately spread before the jury in a joint trade." Constitutional rights should not depend on the particular hearsay exception the court employs to admit the statement against one of the codefendants.

C. Double Jeopardy

The United States Supreme Court has recently described the decisional law on the double jeopardy clause of the fifth amendment as a "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." The difficulties inherent in judicial application of the clause are evidenced by *State v. Andrews* and *State v. Perry* where two different panels of the North Carolina Court of Appeals on the same day reached conflicting decisions on defendants' contentions that they were subjected to multiple punishments upon convictions of felonious larceny and felonious

---

188. 391 U.S. at 135-36.
189. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
193. The two panels decided *Andrews* and *Perry* on the same day. Six months later, a third panel followed *Perry*, Judge Vaughn dissenting. *State v. Carter*, 55 N.C. App. 192, 284 S.E.2d 733 (1981). Thus, seven of the twelve judges on the court of appeals have considered this issue.
194. Apparently, an en banc procedure does not exist in which the court of appeals might resolve conflicts between different judicial panels. See N.C. Gen. Stat. §§ 7A-14 to -21 (1981). A party, however, does have the right to an appeal to the North Carolina Supreme Court in any case "in which there is a dissent." Id. § 7A-30.
195. Defendants were sentenced under G.S. § 14-72(a), which provides in pertinent part:

Larceny of goods of the value of more than four hundred dollars ($400.00) is a Class H felony. The receiving or possessing of stolen goods of the value of more than four hundred dollars ($400.00) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H Felony. . . . Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than four hundred dollars ($400.00), is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.


In *Perry* the conviction of felonious larceny was vacated and remanded for entry of a judgment of misdemeanor larceny, 52 N.C. App. at 59, 278 S.E.2d at 281, because of the trial court's failure to instruct the jury to determine the value of the stolen property and the court's failure to
possession of stolen property. In Andrews defendant asserted that the larceny and the subsequent possession of the property stolen "constitute[d] a single criminal offense" that permitted only a single punishment. In Perry defendant contended that possession of stolen property constituted a lesser included offense of larceny, and therefore he could not be convicted and punished for both crimes. The court of appeals panel that considered Andrews rejected defendant's claim, Judge Clark dissenting. The Perry panel, Judge Robert M. Martin dissenting, found that defendant stated a substantial double jeopardy claim, and vacated and dismissed the conviction for possession of stolen property.

Though each defendant framed his contentions differently, for double jeopardy purposes, the issue whether an act that violates two distinct statutes encompasses the "same offense" or constitutes a greater and lesser included offense by reference to the same standard. In Brown v. Ohio the United States Supreme Court determined that the rule of Blockburger v. United States was the appropriate standard to determine whether two statutory violations were sufficiently distinguishable to permit successive prosecutions or cumulative punishment. In Blockburger the Court held that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

Therefore, an offense and its lesser included offense are viewed as "the same offense" when determining the applicability of the double jeopardy clause. Because the double jeopardy clause is applicable to the states through the fourteenth amendment, this federal constitutional standard is controlling on submit the issue of misdemeanor larceny. Id. at 53, 278 S.E.2d at 277. This fact, however, has no effect on the applicability of the double jeopardy clause to the issues presented in Andrews and Perry. See 52 N.C. App. at 56 n.1, 278 S.E.2d at 279 n.1.

Defendants were sentenced under G.S. § 14-71.1, which provides in pertinent part:

If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing shall or shall not have been previously convicted, or shall or shall not be amenable to justice... N.C. Gen. Stat. § 14-71.1 (1981).

See C. Whitebread, supra note 80, at 503; Brown v. Ohio, 432 U.S. 161, 167 n.6 (1977) ("a lesser included and a greater offense are the same under Blockburger").
state courts,206 and, though the Blockburger standard was originally developed as a test of statutory intent,207 the test has been adopted as a method of analysis for alleged double jeopardy violations.208 Furthermore, the Supreme Court has found Blockburger to be the standard against which state statutes are to be tested for double jeopardy purposes.209

The Supreme Court has recognized that the double jeopardy clause "consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."210 The first two areas of protection are not implicated in either Perry or Andrews. It is the last area of protection, dealing with judicial interpretation of the substantive law, which is the focal point of the issues raised in Perry and Andrews.

When multiple punishment is at issue, "the role of the [double jeopardy clause] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."211 Where the legislature has defined a single offense and the resulting punishment, the clause prohibits a court from disregarding legislative intent and subjecting a defendant to multiple punishment. It is not enough for the court to interpret the statute to provide multiple punishment and then summarily find that this was the legislative intent. The double jeopardy clause requires that the determination of legislative intent be subject to exacting scrutiny.

Viewed in this manner, the clause appears to act as a restriction only upon the court.212 Nevertheless, because legislative acts will be construed with ref-


207. In Blockburger the issue was whether petitioner could be subjected to cumulative punishment for two separate sales of morphine not in or from its original stamped package in violation of 26 U.S.C. §§ 692, 696 (1927). 284 U.S. at 301. The Court made no mention of the double jeopardy clause in its opinion.

208. See, e.g., Brown v. Ohio, 432 U.S. 161, 166 (1977) ("Unless 'each statute requires proof of an additional fact which the other does not,' Morey v. Commonwealth, 108 Mass. 433, 434 (1871), the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment."); Simpson v. United States, 435 U.S. 6, 11 (1978) ("The Blockburger test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes.").


211. Brown v. Ohio, 432 U.S. at 165; see also Whalen v. United States, 445 U.S. 684, 697 (Blackmun, J., concurring) ("The only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent . . . the sentencing court from imposing greater punishments, than the Legislative Branch intended") (emphasis in original); Commonwealth v. Crocker, 1981 Mass. Adv. Sh. 1916, —, 424 N.E.2d 524, 529 (1981). Thus, the double jeopardy clause ensures that the "power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with" the legislative branch of government. Whalen v. United States, 445 U.S. at 689.

ference to double jeopardy considerations, it has been recognized that the clause "acts as an indirect restraint on the legislature, because it demands a certain standard of clarity from the legislature before multiple punishment will be allowed." The dispositive issue, therefore, is whether the legislative intent, as embodied in its statutory provisions, is sufficiently unambiguous that multiple punishment was clearly the desired legislative purpose. Even if the legislative intent was clear, however, further inquiry must be made to determine whether the substantive offenses pass the Blockburger standard, to make certain that the statutorily defined offenses are not in actuality one offense.

This two-tiered inquiry is suggested by Heflin v. United States,1214 Jeffers v. United States,115 Simpson v. United States116 and Iannelli v. United States.117 In all these cases, "[b]efore an examination [was] made to determine whether cumulative punishments for the two offenses [were] constitutionally permissible, it [was] necessary, following [the] practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction." In Heflin, Simpson and Jeffers, this inquiry revealed that Congress had not intended cumulative punishment,119 so it was unnecessary to proceed further. In contrast, the inquiry in Iannelli revealed that Congress did intend to punish each statutory violation separately, so further analysis using the Blockburger rule was necessary to determine whether the offenses were distinct.120

The continuing validity of this two-tiered analysis has been called into question by Albernaz v. United States.118 In Albernaz, the Court merged the issue of legislative intent into the Blockburger standard,122 declaring that "the

214. 358 U.S. 415 (1959) (prosecution under Federal Bank Robbery Act, 18 U.S.C. § 2113 (1976), for bank robbery in violation of § 2113(d) and for receiving the stolen property in violation of § 2113 (c)).
220. 420 U.S. at 785 n.17.
222. See text accompanying note 203 supra.
question of what punishments are constitutionally permissible is not different
from the question of what punishment the Legislative Branch intended to be
imposed.”223 The concurring opinion, however, questioned the validity of this
statement, claiming that it was “supported neither by precedent nor reasoning
and was unnecessary to reach the Court’s conclusion.”224 The concurring
Justices expressed adherence to the two-tiered inquiry, finding that “[n]o mat-
ter how clearly it spoke, Congress could not constitutionally provide for cumu-
lative punishments unless each statutory offense required proof of a fact that
the other did not, under the criterion of Blockburger.”225

The Albernaz rule will prevent the application of the “rule of lenity”226 in
those cases where legislative intent is ambiguous but where the Blockburger
standard finds that the distinct statutes punish separate offenses. Rather than
resolving legislative ambiguity against turning a single transaction into multi-
ple offenses, the legislature will be presumed to have intended cumulative pun-
ishment if it frames its statutes so that they satisfy Blockburger. Furthermore,
if the statutes fall under Blockburger, that “rule should not be controlling
where . . . there is a clear indication of contrary legislative intent.”227 In such
a case, where the legislature “intended . . . to impose multiple punishment,
imposition of such sentences does not violate the Constitution.”228

Albernaz therefore reverses the order of the inquiry suggested by cases
such as Simpson and Jeffers.229 The initial inquiry is whether the statutes in
question provide punishment for the “same offense” under the Blockburger
rule. If the answer is in the negative, no further inquiry will be necessary, and
the punishments will be valid. If, however, application of the Blockburger rule
finds the statutes to describe but one offense, then one must look for a “clear
and unmistakable legislative judgment”230 to prescribe cumulative punish-
ments.231

The Blockburger case itself has been all but ignored by the North Caro-
lina Supreme Court and Court of Appeals.232 This consequence is not surpris-

223. 450 U.S. at 344.
224. Id. at 345 (Stewart, J., concurring). Justice Stewart was joined by Justices Stevens and
225. Id.
226. Bell v. United States, 349 U.S. 81, 84 (1955); see note 219 supra.
228. Albernaz v. United States, 450 U.S. at 344. In such a case, it appears that any potential
constitutional claim which a defendant has would fall under the eighth amendment’s prohibition
against “cruel and unusual punishment.” See Westen & Drubel, supra note 213, at 114.
229. See text accompanying notes 214-220 supra.
231. This analysis is consistent with the “conclusion that the Double Jeopardy Clause operates
as a rebuttable presumption against multiple punishment.” Westen & Drubel, supra note 213, at 122.
The presumption is rebuttable by strong evidence of contrary legislative intent. Id.
232. Prior to Perry and Andrews, Blockburger had been cited once both by the North Carolina
Supreme Court and Court of Appeals. State v. Tolley, 290 N.C. 349, 362, 226 S.E.2d 353, 364
(1976); State v. Vert, 39 N.C. App. 26, 30, 249 S.E.2d 476, 478, cert. denied, 296 N.C. 739, 254
S.E.2d 181 (1978). In Tolley the court cited Blockburger for the proposition “that a sentence of
imprisonment which is within the maximum authorized by statute is not cruel or unusual punish-
ment unless the punishment provisions of the statute itself are unconstitutional.” 290 N.C. at 362,
ing, however, since the case presented no constitutional issues. Nevertheless, both courts have articulated an almost identical standard to determine whether an act that violates two distinct statutes is the "same offense" for double jeopardy purposes. The supreme court has also articulated a test to determine whether one offense is a lesser included offense of another: "One offense is a lesser included offense of a more serious offense if all the essential elements of the lesser offense are also essential elements of the greater offense; and therefore proof sufficient to support a conviction on the more serious offense would also support conviction on the lesser offense."

When reduced to their basic rationale, these standards seem relatively easy to apply. The disparate results in Perry and Andrews demonstrate, however, that what looks good in theory may be difficult in application. In Andrews, the court of appeals found that:

[i]the element of possession is different from, and not included in the elements of taking or carrying away required for larceny. The incidental fact that possession goes with the taking and asportation is not significant in law as defeating the legislative right to ban both or either offense. . . . The elements of taking and carrying away of the property are not essential to the offense of possession of stolen property. . . . Thus, the requirements of Blockburger . . . are satisfied.

226 S.E.2d at 364. In Vert the court of appeals described Blockburger as the "same evidence" test. 39 N.C. App. at 30, 249 S.E.2d at 478. This label is technically a misnomer for "the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Illinois v. Vitale, 447 U.S. 410, 416 (1980). Therefore, "[i]f each [statute] requires proof of a fact that the other [statute] does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975). Accord, State v. Revelle, 301 N.C. 153, 163, 270 S.E.2d 476, 482 (1980) ("double jeopardy does not occur when the evidence to support two or more offenses overlaps, but only when the evidence presented on more than one charge is identical").

233. See note 206 supra.


236. The test can be reduced to a simple algebra-like formula:

\[ \text{If offense number 1 requires proof of elements A and B, and offense number 2 requires proof of only element A, then offense number 2 is a lesser-included offense of offense number 1 and convictions for both are barred. Although this "pure" example of lesser and greater offenses has never been presented to the Supreme Court, the plain language of Blockburger requires this result, since offense number 2 does not require proof of an element not required to prove offense number 1. Similarly, when offense number 1 requires proof of elements A and B, and offense number 2 requires proof of element C, convictions for both offenses will be barred when human experience indicates that in every instance the facts needed to prove elements A or B will also prove element C.} \]


The court of appeals panel in *Perry*, on the other hand, found that:

> evidence establishing commission of the offense of larceny necessarily also establishes commission of the offense of possession of the stolen property which was the subject of the larceny. It is impossible to take and carry away the goods of another without in the process possessing those goods with knowledge that they are stolen. There are no facts to be proven in establishing possession of stolen goods which are not also proven in establishing the larceny of those goods. The prosecutor who has made out a case of larceny *ipso facto* has also made out a case of possession of the stolen goods which were the subject of the larceny.238

The contradictory results reached by the different panels of the court of appeals may be evidence that in its present form, the *Blockburger* test is difficult to apply.

Perhaps the test needs to be rephrased to simplify its application. Paraphrasing various United States Supreme Court applications of the test suggests various alternatives. For example, if as a matter of North Carolina law, larceny "does not always entail proof of [possession of stolen goods], then the two offenses are not the same under the *Blockburger* test."239 Or, the inquiry might be whether a conviction for larceny "cannot be had without proving all the elements of the offense of [possession of stolen goods]."240 Another variation is whether possession of stolen goods "requires no proof beyond that which is required for conviction of [larceny]."241 These formulations may provide the necessary tools to determine whether the essential element of "taking and carrying away"242 required for larceny subsumes the essential element

239. Illinois v. Vitale, 447 U.S. 410, 419 (1980) (emphasis added) (Illinois Supreme Court's finding that an involuntary manslaughter prosecution is barred after driver has been convicted for failure to reduce speed was vacated and remanded because failure to reduce speed may not always be a necessary element of the reckless act necessary to prove manslaughter by automobile). Cf. *Ex parte Nelson*, 131 U.S. 176 (1889) (proof of illegal cohabitation sufficient to prove adultery because the crime of cohabitation presumptively would involve the crime of adultery).

See also *State v. Griffin*, 51 N.C. App. 564, 277 S.E.2d 77 (1981). In *Griffin* defendant, after being involved in an auto accident, pleaded guilty to failure to yield the right of way in violation of N.C. Gen. Stat. § 20-158 (1978 & Cum. Supp. 1981). Several days later, a party involved in the accident died, and defendant was charged with death in violation of N.C. Gen. Stat. § 20-141.4 (1978). The court of appeals upheld defendant's double jeopardy claim, since the State had stipulated that it would rely on no other evidence in the second prosecution other than defendant's former guilty plea. This result seems proper under *Vitale*, for the Court in that case indicated that if the State relied on evidence from the former prosecution to sustain its second prosecution, the defendant's double jeopardy claim would be "substantial." 447 U.S. at 420. Similarly, in *Griffin*, although failure to yield the right of way is not "always" an element of death by vehicle, if the former is the *only* evidence of the latter, a conviction on the former charge should bar the latter prosecution. Note, however, the caveat in *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977) ("[a]lternative exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence").

240. *Whalen v. United States*, 445 U.S. 684, 694 (1980) (convictions for rape and killing committed in the course of the rape reversed since Congress did not authorize consecutive sentences for offenses that are the "same offense" under the *Blockburger* test).
of "possession" necessary for a violation of G.S. 14-71.1.243 If "[a]bsent a special or technical definition or other clear indication to the contrary, words in a statute [are to be] given their common and ordinary meaning,"244 then "taking" does include "possession."245

Possession of the stolen goods is a necessary component of the act of larceny. Possession must constitute a continuing offense246 in order for the double jeopardy clause to prohibit punishment both for possession and for larceny.247 If the possession that necessarily occurs with larceny is treated as a single continuing course of action rather than as a series of separate acts, then the "Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."248

The North Carolina courts have held that possession of recently stolen property raises a rebuttable presumption that the possessor stole the property,249 and this would tend to support the view that possession is a continuing offense subsumed within larceny. The doctrine applies,

only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act, . . . and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief.250

The implication from this language is that the presumption is permissible because it is likely that a thief has continuing possession of goods which he earlier had stolen. Yet other past decisions by the court concerning charges of both possession and another offense seem to refute the continuing offense theory. For example, the court has denied a claim of double jeopardy when a defendant has been convicted of both possession and sale of narcotics.251 In these cases, however, illegal sale does not "always entail proof of"252 illegal possession.

245. One definition of "take" is "to get into one's hands or into one's possession, power, or control by force or strategem." 2 Webster's Third New International Dictionary (Unabridged) 2329 (1971).
246. "A continuing offense is an unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force however long a time it may occupy." State v. Johnson, 212 N.C. 566, 570, 194 S.E.2d 319, 321 (1937).
247. The legislature could, of course, segment the continuing offense into separately punishable units without running afoul of the double jeopardy clause. 432 U.S. at 169 n.8. This practice, however, would raise eighth amendment issues of "cruel and unusual punishment," see Westen & Drubel, supra note 213, at 114, as well as potential due process questions, see 432 U.S. at 169 n.8.
252. See note 239 supra.
For instance, the sale may be effected without actually possessing the item,—for example, by using a third person to accomplish the transfer.\textsuperscript{253} Also, "[w]hile possession may be part of the sale, the possession may be legal and the sale illegal; therefore, they are separate and distinct offenses."\textsuperscript{254} A further example is a prosecution for both possessing and transporting a prohibited substance.\textsuperscript{255} Here, the cumulative punishment seems to relate to the temporal relationship between the acts; the defendant is punished both for possessing and then for transporting the material.\textsuperscript{256} Both of these situations are thus distinguishable from Perry and Andrews, in that the initial act (possession) does not necessarily encompass the later distinct act (sale or transportation). Larceny, on the other hand, is an initial distinct act which appears to encompass the continuing offense of possession.

The supreme court’s recent analysis in State v. Davis\textsuperscript{257} gives a hint of the likely resolution of the Perry and Andrews conflict.\textsuperscript{258} In Davis, defendant was indicted for receiving stolen property in violation of G.S. 14-71,\textsuperscript{259} but was convicted of possession of stolen property in violaton of G.S. 14-71.1.\textsuperscript{260} The defendant argued that since he was convicted of an offense with which he was not charged, there was prejudicial error requiring his conviction be overturned.\textsuperscript{261} The court of appeals disagreed, determining that possession of stolen goods was a lesser included offense of receiving stolen property, and therefore there was no error in the conviction.\textsuperscript{262} The supreme court found on appeal that possession of stolen property was not a lesser included offense of receiving stolen property, and arrested judgment.\textsuperscript{263}

The Davis opinion, relied on heavily by the court of appeals in Andrews,\textsuperscript{264} determined that:

\[
\text{[t]he element of possession is different from, and not included in, the element of receiving, and vice versa. To convict a defendant under G.S. 14-71.1 the state must prove among other things that the defendant possessed rather than received, stolen goods. To convict under G.S. 14-71 the state must prove that defendant received, rather than possessed, stolen goods . . . . Although at first glance possession may seem to be a component of receiving, it is really a separate}
\]

\textsuperscript{253} This analysis, however, ignores the possibility of constructive possession.

\textsuperscript{254} State v. Cameron, 283 N.C. at 203, 195 S.E.2d at 489.


\textsuperscript{256} See, e.g., Albrech v. United States, 273 U.S. at 11 ("There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has the power to prohibit and punishing also the completed transaction").

\textsuperscript{257} 302 N.C. 370, 275 S.E.2d 491 (1981). For further discussion of Davis, see text accompanying note 447 infra.

\textsuperscript{258} In each case, defendant has an appeal of right since there was a dissent in the court of appeals decision. See N.C. Gen. Stat. § 7A-30(2) (1981).


\textsuperscript{260} Id. § 14-71.1.


\textsuperscript{262} 48 N.C. App. 386, 269 S.E.2d 242 (1980).

\textsuperscript{263} 302 N.C. 370, 275 S.E.2d 491 (1981).

\textsuperscript{264} 52 N.C. App. at 33-36, 277 S.E.2d at 863-64.
and distinct act. . . . [T]he unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment. 265

Thus, although the court viewed possession as "a continuing offense beginning at the time of receipt," 266 it refused to find that possession was subsumed within the elements of receipt. 267 Without elaboration, the court found that "the legislature intended possession and receiving to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter." 268

Even if the court, contrary to its analysis in Davis, concludes that possession of stolen goods and larceny constituted the "same offense," the court would still have to decide whether the legislature nevertheless intended to punish each separately. This legislative intent should be "clear and unmistakable"; 269 the proliferation of statutory offenses often added in piecemeal fashion by amendment 270 requires that multiple punishment not be imposed inadvertently as a result of the unforeseen overlap of statutory definitions. Thus, the court must determine whether the legislature intended to effect an important policy interest in enhancing the punishment of a particular combination of offenses. 271 To resolve the issue presented in Perry and Andrews, the court must determine the purpose behind the enactment of G.S. 14-71.1. Was the statute promulgated to further the punishment of one who steals and continues to possess the stolen goods, or was it enacted to provide an alternative source of punishment if the state could not prove the larceny, but could prove possession?

Both the Perry and Andrews courts found legislative intent supportive of their conflicting interpretations of the scope of G.S. 14-71.1 and G.S. 14-72. The Perry court found that both statutes proscribed punishments for the "same offense." 272 The court noted that when the General Assembly enacted

265. 302 N.C. at 373-74, 275 S.E.2d at 494.
266. Id. at 374, 275 S.E.2d at 494 (emphasis added).
267. Although receiving stolen goods is not a lesser included offense of larceny, see, e.g., State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974), and possession of stolen goods is not a lesser included offense of receiving stolen goods, State v. Davis, 302 N.C. 390, 275 S.E.2d 491 (1981), these decisions do not necessarily lead to the conclusion that possession is therefore not a lesser included offense of larceny. Statutory elements that are not common to larceny and receipt, and to receipt and possession, may still be common elements of larceny and possession. For example, if larceny requires proof of elements ABC, receipt requires proof of elements CDE and possession requires proof of elements BCF, then possession will be a lesser included offense of larceny. But if larceny requires elements ABC, receipt requires elements BDE and possession requires elements BCF, then none of the offenses is a lesser included offense of any of the others.
268. 302 N.C. at 374, 275 S.E.2d at 494.
269. Iannelli v. United States, 420 U.S. at 791.
272. 52 N.C. App. at 54, 278 S.E.2d at 278.
G.S. 14-71.1 creating the offense of felony possession of stolen goods, it also amended G.S. 14-72(a) to create the offense of misdemeanor possession of stolen goods. The court determined that the purpose of these enactments was "to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving." Thus, the court viewed G.S. 14-71.1 as a measure to shore up a deficiency in the penal statutes creating "for the State a position to which to recede when it cannot establish the elements of . . . larceny but can effect proof of possession of stolen goods." Rather than segmenting the single act into two distinct statutory violations, the court reasoned that if enhanced punishment was the purpose of the legislation, this purpose "could be achieved by the far simpler expedient of merely augmenting the penalty for the larceny itself."

In contrast, the Andrews court determined:

The legislature's intent that possession of stolen property be a distinct crime and not a lesser included offense of larceny is found in the language of the statute itself. N.C.G.S. 14-71.1 contains the following: "[A]ny person [who possesses stolen property] . . . may be indicted and convicted, whether the felon stealing [such property] . . . shall or shall not have been previously convicted . . ." . . . It is clearly the intent of the legislature to allow the state to convict and punish a defendant for both larceny and the felonious possession of the property so stolen.

The court also noted that "[t]he punishment for both offenses is the same," leading to the belief that "the legislature created a separate crime of equal degree with larceny when it passed N.C.G.S. 14-71.1." Furthermore, the court placed much reliance on the language of Albernaz v. United States that "[w]here Congress intended, as it did here, to impose multiple punish-

274. Id. § 2 (codified at N.C. Gen. Stat. § 14-72 (1981)).
275. 52 N.C. App. at 54, 278 S.E.2d at 278 (quoting State v. Kelly, 39 N.C. App. 246, 248, 249 S.E.2d 832, 833 (1978)).
276. See, e.g., State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974) (failure to present evidence of receipt of stolen property possessed by defendant caused reversal of conviction under G.S. 14-71; court noted that General Assembly has not provided that possession of stolen goods is a crime).
277. 52 N.C. App. at 54, 278 S.E.2d at 278.
278. Id.
279. 52 N.C. App. at 36, 277 S.E.2d at 864 (emphasis in original).
280. Id.
281. Id. The fact that both statutes provide for equal punishment seems to preclude a finding that one is a lesser included offense of the other. See, e.g., Annot., 11 A.L.R. Fed. 173, 178 (1972) (under Fed. R. Crim. P. 31(c), to be a "necessarily included" offense, the "claimed lesser offense [must have] a lighter penalty attached to it than does the charged offense"). Nevertheless, for double jeopardy purposes, if the offenses can be deemed the "same offense," under the Blockburger test, similarity of penalties should not bar the double jeopardy claim.
ment, imposition of such sentences does not violate the Constitution." 283

The resolution of the issue of legislative intent is problematic. Due to the lack of any formal legislative history in North Carolina, the court must construe legislative intent from the language of the statute itself and from the circumstances leading to its adoption. On their face, neither statute evidences a clear and unambiguous intent to provide enhanced punishment. As Davis demonstrates, however, the court is likely to infer legislative intent to impose cumulative punishments from the most minimal evidence. When the North Carolina Supreme Court sets sail upon the "Sargasso Sea" 284 of double jeopardy law, one can expect that, despite the serious problems presented, the court knows exactly where its destination lies. 285

Postscript

As this Survey went to press, the North Carolina Supreme Court resolved the issues presented in Perry. 286 The court, in an opinion by Justice Meyer, affirmed the court of appeals' remand of resentencing upon a verdict of guilty of misdemeanor larceny and affirmed, on different grounds, the vacating and dismissal of the conviction for stolen property. 287 The court claimed to reach its result without deciding the double jeopardy issue. 288 Rather, the court focused on the presumed intent of the legislature in enacting the statutory offense of possession. In interpreting this legislative intent, the court reasoned "first, that larceny and possession of the property stolen in the larceny are separate and distinct offenses and therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses; and second, that although it could have done so, the legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both offenses." 289

283. 52 N.C. App. at 37, 277 S.E.2d at 864 (quoting Albernaz v. United States, 450 U.S. 333, 344 (1981)).
285. In other double jeopardy cases, both the supreme court and the court of appeals reaffirmed the general rule that if an order of mistrial is declared for a "manifest necessity," a subsequent prosecution on the same offense does not place the defendant in double jeopardy. In State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981), and State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981), both courts found that although the defendants had been subjected to previous prosecutions, in neither case were the circumstances so overbearing that a further retrial could be prohibited. Neither case demonstrated oppressive nor harassing practices by the state; therefore, "the public's interest in a final adjudication of guilt or innocence outweigh[ed] the defendant's right to be free from further judicial scrutiny after a mistrial is declared." 303 N.C. at 446, 279 S.E.2d at 547.
286. 305 N.C. 225, 287 S.E.2d 810 (1982). Andrews, argued before the court on November 9, 1981, had not been resolved by this time.
287. 305 N.C. at 237, 287 S.E.2d at 817. Though disclaiming to deal with the double jeopardy issue, the court's discussion of the nature of the two offenses followed traditional double jeopardy analysis by employing the Blockburger test. See 305 N.C. at 232, 287 S.E.2d at 814; see also text accompanying notes 189-96 supra. Justice Carlton found that "[a]ny discussion about double jeopardy is wholly unnecessary to the disposition of this case and may come back to haunt this Court in the future." 305 N.C. at 237, 287 S.E.2d at 817 (Carlton, J., concurring).
288. 305 N.C. at 231, 287 S.E.2d at 814.
289. See text accompanying notes 201-09 supra.
In finding that the offenses were separate and distinct, the court applied a Blockburger-type test as elucidated in State v. Cameron. The court found that "proof of asportation is required for the larceny charge but not for the possession charge, while proof of possession after the larceny is complete is required for the possession charge but not for the larceny charge." Thus, "each crime requires proof of an additional fact which the other does not." Consequently, the Blockburger test demonstrated a legislative intent that larceny and possession of the property stolen were to be separate and distinct offenses.

In the second phase of its inquiry, the court looked to the purpose of the possession statute to discern the scope of punishment that the legislature intended when one criminal act encompassed both offenses. The court determined that the statutory crime of possession of stolen property was an effort "to plug a loophole" in the common-law offense of larceny. Finding the rationale of State v. Kelly persuasive, the court reasoned that the possession statute was directed to those situations in which "one was found in possession of stolen goods and the State was unable to prove either the larceny or receiving." Consequently, the court was obligated to find that "though a defendant may be indicted and tried on charges of larceny, receiving and possession of the same property, he may be convicted of only one of those offenses.

State v. Perry is an unexpected, but welcome, resolution of this troublesome issue. As expected, the court found larceny and possession of the stolen property to constitute separate and distinct offenses. One may quarrel with this finding, for the court did not persuasively refute the claim that possession is a continuing offense subsumed within the act of larceny. Furthermore, if recent United States Supreme Court opinions are scrutinized, a finding that larceny and possession constitute separate and distinct offenses might have led to the automatic inference that multiple punishment was intended. By go-

290. 305 N.C. at 231-32, 287 S.E.2d at 814.
291. Id. at 230-31, 287 S.E.2d at 815.
292. Id. at 234, 287 S.E.2d at 815 (quoting Blockburger v. United States, 248 U.S. 299, 304 (1912)).
293. Justice Carlton, who concurred in the result only, "disapproved of this portion of the opinion and considered it 'dictum.'" 305 N.C. at 237, 287 S.E.2d at 817 (Carlton, J. concurring).
294. Id. at 234-35, 287 S.E.2d at 816.
295. 39 N.C. App. 246, 249 S.E.2d 832 (1978); see also text accompanying notes 275-78 supra.
296. 305 N.C. at 235-36, 287 S.E.2d at 816-17.
297. Id. at 236-37, 287 S.E.2d at 817.
298. See text accompanying notes 257-68 supra.
299. In distinguishing the elements of proof required for each offense, the court stated that "proof of possession after the larceny is complete is required for the possession charge but not for the larceny charge." 305 N.C. at 234, 287 S.E.2d at 815 (emphasis added). Thus, the court did not deal with the possible identity of elements while the larceny is in progress. The court could not refute the "assertion of the Court of Appeals, [that] it may be impossible to take and carry away goods without possessing them." Id. at 235, 287 S.E.2d at 816. From the court's disposition of the case, however, the resolution of this issue may be unnecessary. It seems clear that the court is segmenting the single criminal act into two separate offenses; the offense of possession begins only after the larceny has been completed.
300. See Albemarle v. United States, 450 U.S. at 337, 344; Whalen v. United States, 445 U.S. at 691-92; Brown v. Ohio, 432 U.S. at 166. These cases appear to proceed on the assumption that if
ing beyond the "separate and distinct offense" analysis and surveying the intent and purposes of the legislative enactment, the court has correctly focused on the ultimate concern of the double jeopardy clause: "assuring that the court does not exceed its legislative authorization" in imposing punishment.

D. Right to Speedy Trial

1. Preindictment Delay

In *State v. Salem* the North Carolina Court of Appeals retreated from the dual burden test previously required for sustaining a fifth amendment due process claim on the grounds of unreasonable preindictment delay. The dual burden test, which first arose in this jurisdiction in the context of the sixth amendment speedy trial guarantee in *State v. Johnson* and which was subsequently applied by the United States Supreme Court in the fifth amendment preindictment context in *United States v. Marion*, requires that a defendant prove both (1) intentional and unnecessary delay caused for the convenience or advantage of the State, and (2) prejudice to the defendant as a result of the delay. The court in *Salem* did not totally abandon this test, but focused instead upon a balancing approach in which the reasonableness of the delay is weighed against the prejudice to the accused.

Defendant in *Salem* was convicted on a charge stemming from a sale of narcotics which occurred in December 1977. An indictment was issued in April, 1978, but that indictment was dismissed by judicial order over a year later. A second indictment was issued in August, 1979, after defendant had been arrested in May of the same year. The trial court denied defendant's motion to dismiss for undue preindictment delay, considering only the period of time between the event and the issuance of the original indictment.

The court of appeals held that the proper time interval for consideration on the preindictment delay motion was the period between the event and the arrest, a period of almost a year and a half. The court reasoned that, upon dismissal, the original indictment became null and void and could not, there-

---

225-31 supra.

301. Brown v. Ohio, 432 U.S. at 165; see note 211 supra.


307. 50 N.C. App. at 426, 274 S.E.2d at 506.

308. Id. at 422, 274 S.E.2d at 503-04.

309. Id. at 425, 274 S.E.2d at 505.

310. Id.

311. Id.

312. Id.
fore, establish the date defendant was "accused" for purposes of a preindictment delay motion. The court next applied its new balancing approach and found that defendant had not shown that the delay was either brought about by the State intentionally to harass him or to handicap his defense, and that he had not demonstrated significant prejudice resulting from the delay.313

Surprisingly, the court failed to mention its year old decision in State v. Davis,314 which held that the dual burden requirement was the appropriate test in any preindictment delay case.315 Nevertheless, the decision of the court in Salem would have been the same under either approach. Consequently, it will be interesting to see whether the balancing approach will supplant the dual burden test in the absence of an express rejection by the North Carolina courts of either the test itself or the cases that espoused it.

The conflicting approaches discussed in Salem were also considered by the North Carolina Supreme Court in State v. McCoy.316 The court first paid lip service to the dual burden approach,317 but then backed away from it in favor of the balancing test, citing State v. Dietz318 for its recognition that a majority of the courts weigh "the reasonableness of the delay against the prejudice to the accused."319

More importantly, the McCoy court recognized a distinction between a fifth and a sixth amendment speedy trial claim.320 After affirming the trial court's decision that defendant had been denied neither his statutory nor his constitutional right to a speedy trial, the court stated that it need not determine whether sixth amendment speedy trial standards or fifth amendment due process standards apply to any period of delay between the issuance of an arrest warrant and defendant's actual arrest when both events precede indictment, because this defendant could not prevail under either standard.321 Nevertheless, the court saw fit to distinguish the two standards: "[because] the constitut-

313. Id. at 425-28, 274 S.E.2d at 505-07. The court saw the state's legitimate need to protect the existence of an ongoing undercover operation as a reasonable justification for at least a portion of the delay. It also pointed to the procurement of the earlier indictment as evidence of lack of harassment intentions on the part of the state. Finally, it asserted that the delay was the fault of the defendant himself, since he was aware the S.B.I. agents were looking for him. As to defendant's claim of prejudice, the court held that general averments of impaired memory and lost witnesses could not establish prejudice without a demonstration that evidence lost as a result of the delay would have been significant or helpful to the defense of the case.


316. 303 N.C. 1, 277 S.E.2d 515 (1981).

317. Id. at 7-8, 277 S.E.2d at 522.


319. 303 N.C. at 8, 277 S.E.2d at 522 (citing State v. Dietz, 289 N.C. at 491, 223 S.E.2d at 359). The court in McCoy, like the court in Salem, failed to reject expressly the dual burden test.

320. In McCoy the warrant for defendant's arrest was not served upon him until almost four months after its issuance, during which time he had been hospitalized for treatment of wounds received during perpetration of the alleged murder for which he was charged. 303 N.C. at 6, 277 S.E.2d at 521. The court was considering whether or not the "constitutional speedy trial clock begins to run at the time any formal complaint is issued against defendant notwithstanding that no indictment has been issued nor an arrest made," a conclusion which other state courts had often reached. Id. at 10, 277 S.E.2d at 524.

321. The court expressed disapproval with the state's failure to serve the arrest warrant for the
tional speedy trial mandate is designed for protection of other interests in addition to ensuring a fair trial for defendant, its violation may occur even in the absence of actual prejudice to the defense of the case. Given this distinction, the court may be unwilling to apply either the dual burden or balancing tests in a future case involving a sixth amendment speedy trial claim.

In leaving open the question of which standard applies to the interval between the issuance of an arrest warrant and actual arrest, the supreme court failed to provide guidance for the criminal lawyer confronted with a case in which the interval involves a significant period of time. Justice Exum, however, in the opinion for the court, did make a good argument for application of the constitutional speedy trial standards in such instances, though he was careful to point out that the court reserved judgement on the issue. If the applicable standard should make a difference in a future case, it is likely that the argument advanced in McCoy would win out; but until that time, the careful attorney must diligently pursue both fifth and sixth amendment remedies in cases involving a delay between issuance of an arrest warrant and actual arrest.

2. Constitutional Right to a Speedy Trial

Several recent cases left no doubt that the North Carolina Court of Appeals would employ the four factor balancing test, first announced in Barker v. Wingo, as the sole standard for determining whether a defendant's constitutional right to a speedy trial had been violated. In these cases the court continued its repudiation of State v. McKoy, in which the North Carolina Supreme Court held that a twenty-two month delay between arrest and trial was an impermissible delay in violation of the sixth amendment in the absence of reasonable explanation from the prosecution. The initial retreat began in the 1979 case of State v. Branch, in which the court of appeals held that a twenty-three month delay between arrest and trial was not per se a violation of defendant's right to a speedy trial.

In State v. Shelton 140 days passed between defendant's indictment on

four month period, but did not find the delay to have been prejudicial because of the circumstances of the case. Id. at 13 n.3, 277 S.E.2d at 526 n.3.

322. Id. at 8, 277 S.E.2d at 522.

323. Id. at 7-10, 277 S.E.2d at 522-24. Justice Carlton indicated in a concurring opinion, which was joined by three other justices, that he considered the extensive discussion of the question whether the sixth amendment right to speedy trial attaches at the time the arrest warrant is issued to be pure dictum.


327. Id. The McKoy decision was surprising because little prejudice to defendant was shown.


329. Id.

charges of armed robbery and his subsequent trial. In holding the delay insufficient to establish prejudice by itself, the court of appeals cited the 1980 case of State v. Hartman for the proposition that 319 days, standing alone, is not sufficient time to constitute unreasonable and prejudicial delay. It is now apparent that no period of time, standing alone, will automatically constitute a violation of a defendant’s right to a speedy trial, but that the length of the delay will be but one factor in the determination.

The other three factors that will be weighed in making the determination whether defendant’s speedy trial right has been violated include the reason for the delay, assertion of the right by the defendant and actual prejudice to the defendant. The test is a tough one, as recent decisions demonstrated, and it is now apparent that a delayed trial which meets the time limits prescribed in North Carolina’s speedy trial act will not, absent extraordinary circumstances, be held to be a denial of the sixth amendment right. Courts will be careful not to combine the two issues because it is clear the legislature intended the constitutional test to stand alongside the statutory test. Nevertheless, decisions finding delays of five years, twenty-three months, and fourteen months insufficient to show a sixth amendment violation point to the conclusion that the careful separation of the statutory test and constitutional test is of little substantive value.

3. Speedy Trial Act

The North Carolina Speedy Trial Act was both amended by the General Assembly and criticized by practitioners during the year. The act was also the basis for many criminal appeals, almost all of which were unsuc-

---

331. Id. at 636, 281 S.E.2d at 689.
332. 49 N.C. App. 83, 270 S.E.2d 609 (1980).
333. 53 N.C. App. at 638, 281 S.E.2d at 689.
338. There is a separate section included in the Act that provides, “No provision of this Article shall be interpreted as a bar to any claim of denial of a speedy trial as required by the Sixth Amendment to the Constitution of the United States.” N.C. Gen. Stat. § 15A-704 (1978).
343. This statement is not intended as a criticism of the court’s approach. Because the legislature so carefully separated the two speedy trial protections they must be treated as distinct entities.
cessful, and was interpreted in a variety of contexts by both the supreme court and the court of appeals. The attention that the act has received suggests that it may not be the answer to the problem to which it is addressed.

The most important of the statutory amendments amounted to a legislative admission that the act has not worked as well as had been hoped. The original act set October 1, 1981 as the effective date of the 90-day limit, but an amendment left the limit at 120 days until October 1, 1983—a full 2-year extension. Another amendment made the sanctions contained in the act inapplicable at the district court level until October 1, 1983. Both of these amendments, which were accompanied by several minor qualifications and changes, indicate the hope of the legislature that the act will eventually prove successful, but the changes fall far short of answering criticism that the statute has created a “technical fiasco.” The legislature must be of the opinion that the small reduction in the waiting time before trial over the past several years, which has come at the expense of numerous dismissals for noncompliance with the Act, will eventually accelerate to the point where the statute is serving its purpose well.

In State v. Young and State v. Charles the courts considered the dates for the beginning of the 120-day period, concluding that the period runs from the occurrence of the last of the enumerated events in the statute—arrest, service of criminal process, waiver of indictment, or indictment. In Young the supreme court rejected defendant’s argument that the lapse of more than 120 days between arrest and trial violated the “spirit” of the statute. Likewise, in Charles the court of appeals strictly applied the “whichever occurs last” clause. These decisions make it clear that, once a defendant has been indicted, the statute no longer pertains to the period which passed subsequent to arrest but prior to indictment.

347. Only one of the many reported decisions in the area concerned a successful appeal on statutory speedy trial grounds. See State v. Vaughan, 51 N.C. App. 408, 276 S.E.2d 518 (1981). The plea has met with greater success at the trial level. See Price, supra note 346, at 215.
349. The desire for prompt disposition of criminal cases is not justification for a statute that “tends to provide a technical defense to criminal responsibility for those criminal defendants who are capable of manipulating the system.” Price, supra note 346, at 215.
352. Id. §§ 4-12, 11-12.
353. Id. §§ 1-9.
355. Id. at 215.
356. Id.
360. 302 N.C. at 388, 275 S.E.2d at 432.
361. 53 N.C. App. at 571, 281 S.E.2d at 441 (1981).
The date of indictment for the purpose of the running of the time period is often not clear itself, as demonstrated in State v. Moore. A new indictment was obtained on January 7, 1980. On February 11, 1980, defendant's motion for dismissal pursuant to the speedy trial act was allowed without prejudice. Defendant was subsequently recharged and convicted on the same charge. Defendant appealed on the ground that the court erred in allowing his motion to dismiss without rather than with prejudice. But the court of appeals failed to reach that question. The court held that, pursuant to G.S. 15A-646, the indictment of January 7 superseded the indictment of August 27, preventing the expiration of the 120-day limit between indictment and trial. Thus, the court concluded that the motion should not have been granted in the first instance.

The decision of the court of appeals in Moore leaves a loophole available to the State, because the sanctions of the Act can be avoided by obtaining new indictments which supersede ones previously issued. The decision runs contrary to G.S. 15A-701(a)(3), which provides:

> When a charge is dismissed . . . , and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction . . then [the trial shall begin] within 120 days from the date the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge.

The court did not even mention this section of the Act, apparently finding that

363. Id. at 27, 275 S.E.2d at 259.
364. Id.
365. Id.
366. Id.
367. Id.

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

369. 51 N.C. App. at 28, 275 S.E.2d at 259-60.
370. The court pointed out that in this case, the State had "valid reason to obtain a new indictment," and that the obtaining of the new indictment was both appropriate and in good faith. Id. at 28, 275 S.E.2d at 260.
371. The court recognized the opportunity the State has to defeat the statutory speedy trial limitations by obtaining new indictments, but stated that concern regarding that possibility is "appropriately addressed to the General Assembly." Id.

As to the question of whether the charges should have been dismissed with or without prejudice, a question purposely not resolved, the court indicated that although the decision on that issue is in the discretion of the trial judge, failure to set forth findings of fact and conclusions of law indicating consideration of each factor involved would amount to an abuse of that discretion. Id.

a superseding indictment is different from a dismissed charge followed by recharge. Nevertheless, further development in this area is likely, especially if reindictment becomes a widespread prosecutorial tactic.

In *State v. Fearing* the North Carolina Supreme Court settled an area of confusion which had been presented by the existence of the provision applicable to counties with limited court sessions. The State argued G.S. 15A-702 exempted such counties from the statute. Earlier in the year, in *State v. Berry* a court of appeals panel had held that the 120-day requirement "does not apply" to trials in counties with limited court sessions, lending support to the State's argument. Justice Copeland, writing the opinion of the court, rejected this argument, stating that G.S. 15A-702 "only addresses the situation where a defendant elects to move for a prompt trial after the applicable time period of G.S. 15A-701 has expired due to the limited terms of court in the county of venue . . . ." The Act covers counties with limited court sessions, but "justifiable delay caused by a county's number of court sessions is a period which may be excluded from the required timetable of G.S. 15A-701." In so holding, the supreme court took the position stated by Judge Wells for another court of appeals panel in *State v. Vaughan*: "No county is exempt from the speedy trial act." The burden is on the State, according to the court in *Vaughan*, to show not just that a limited number of terms of court are available, but that due to such limited number of terms of court, the time limitation of the statute could not reasonably be met. *Fearing* and *Vaughan* settle the limited court session dilemma in favor of the defendant, and serve as

---

373. This distinction is hard to accept. Perhaps the court did not consider the section due to the fact that it was not raised and argued by defendant.

In *State v. Walden*, 53 N.C. App. 196, 280 S.E.2d 505 (1981), the court of appeals did consider the applicability of this section in another context. In *Walden* the fact that two indictments contained different dates of alleged child abuse was enough to justify the court in holding that the two charges stemmed from different events. Id. at 197-98, 280 S.E.2d at 507. The court noted that had this not been the case the statutory speedy trial clock would have run from the date of the first indictment.


376. 304 N.C. at 505, 284 S.E.2d at 484.


378. Id. at 99, 275 S.E.2d at 271.

379. In *Berry* the court of appeals panel found that McDowell County is such a county. Id. In *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907 (1981), the court of appeals held that Chatham County also falls into that category, 52 N.C. App. at 394, 278 S.E.2d at 918. It appears from the decisions that any county which does not continually have regular sessions of criminal superior court could qualify for some time exclusion under the Act.

380. 304 N.C. at 505, 284 S.E.2d at 484.

381. Id.


383. 51 N.C. App. at 412, 276 S.E.2d at 520.

384. The trial court had found that Franklin County was a county with limited court sessions and that defendant's speedy trial motion to dismiss should therefore be denied. Id.
a warning to district attorneys in affected counties that they must do more than just plead limited sessions in order for time to be excluded under the statute.

In two other cases decided during the year, the North Carolina Supreme Court interpreted portions of the speedy trial act. In State v. Harren, the court, in an opinion written by Chief Justice Branch, held that the statutory exclusion of time for mental examinations from the 120-day running period of the Act includes the period of time between the date of defendant's return to jail from the hospital and the date the results of the examination become available to the parties. Noting that the rationale for the exclusion itself applies equally to the time period in question, the Chief Justice explained: "The State could not properly bring defendant to trial during this time period, for to do so would . . . deprive him of the benefit of the mental examination." This interpretation was applied in a series of subsequent cases and, in fact, inspired a statutory amendment.

In State v. Oliver defendant argued that because calendaring of motions is controlled by the state, the only time that should be excludable from speedy trial computation due to such motions is the time between the filing of the motion and the next session of court wherein the motion could be heard. In rejecting this conclusion, Justice Exum, in his opinion for the court, held that the time between the filing of the motion and its disposition is properly excluded subject to two limitations: the motion must be "heard within a reasonable time after it is filed," and the State must not "delay the hearing for the purpose of thwarting the speedy trial statute." Although no indication of what constitutes a reasonable time in this context appears in the statute or the court's opinion, it can be implied from Oliver that any purposeful delay on the part of the State in the disposition of pretrial motions will not be covered by any of the enumerated exclusions.

387. Id. at 145-46, 273 S.E.2d at 697.
388. Id.
392. The motion involved in Oliver was a motion for change of venue. Id. at 41-42, 274 S.E.2d at 192.
393. Id.
394. Id.
395. Id.
396. Id.
E. Right to Counsel

1. Standard of Competence

In State v. Misenheimer, the North Carolina Supreme Court recognized that the test of effective assistance of counsel has been expressed in at least two ways. State courts often ask whether defense counsel's performance was so ineffective that the trial was a "farce" or a "mockery of justice"; federal courts have developed a higher standard of performance, following the suggestion by the Supreme Court in McMann v. Richardson that counsel's performance should be "within the range of competence demanded of attorney's in criminal cases." The Misenheimer court refused to state definitively the test to be applied in North Carolina, finding that defendant had failed "to meet the stringent standard of proof on the question of whether an accused has been denied constitutionally effective representation."

The court intimated that its recent decisions showed a preference for the McMann standard in evaluating claims of ineffective assistance of counsel. Yet recent decisions by the court of appeals indicate that it has not perceived the movement, if any, from the "farce and mockery" standard to the McMann standard. In State v. Hughes a decision announced on the same day as Misenheimer, the court of appeals found the "general rule" to be the "farce and mockery" standard; there was no mention of McMann. One month later, the court of appeals reaffirmed its adherence to the traditional standard, without mention of the discussion in Misenheimer. Clearly, if the supreme

399. Cf. State v. Milano, 297 N.C. 485, 295-96, 256 S.E.2d 154, 160 (1979) (noting McMann and suggesting "that courts look to the ABA standards relating to the defense function as a 'reliable guide for determining the responsibilities of defense counsel'") (quoting Marzullo v. Maryland, 561 F.2d 540, 547 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)); State v. Mathis, 293 N.C. 660, 669, 239 S.E.2d 245, 251 (1977) (whether "attorney's representation is so lacking that trial has become a farce and a mockery of justice"); State v. Sneed, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974); see also State v. Richards, 294 N.C. 474, 498, 242 S.E.2d 844, 859 (1978) (the court noted that the "farce and mockery" test has been criticized and also noted the "range of competence" test).
401. Id. at 45.
405. 304 N.C. at 121, 282 S.E.2d at 800 (quoting State v. Sneed, 284 N.C. 606, 613, 201 S.E.2d 867, 871-72 (1974)). In Misenheimer defendant claimed that the trial counsel's failure to renew his motion to dismiss at the close of all the evidence and the decision not to introduce evidence in defendant's behalf afforded him ineffective assistance of counsel. The court noted that it was the defendant's own decision not to present evidence; thus, a renewal of the motion to dismiss would have been "futile." Id. at 120-21, 282 S.E.2d at 799-800.
406. Id. at 121, 282 S.E.2d at 800.
408. Id. at 123, 282 S.E.2d at 508.
court is moving to reject the “farce and mockery” standard, this should be done explicitly. With proper guidance as to which standard to employ, trial courts would be in a better position to evaluate the performance of defense counsel.

While the “farce and mockery” test is supported by a large body of case law, the standard is too imprecise to provide proper guidance: it states but a conclusion while obscuring the basis upon which that conclusion rests. The inadequacy of the standard has led Chief Judge Bazelon of the Court of Appeals for the District of Columbia to state that the “test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment.” This dissatisfaction is mirrored by the frequent use in both federal and state courts of the McMann “range of competence” test.

Adoption of the McMann test would provide a court with a wide range of criteria to employ in the evaluating counsel’s performance. The Court of Appeals for the Fourth Circuit has suggested that the trial court refer not only to precedent from state and federal courts, but also to “state bar canons, the American Bar Association Standards Relating to the Defense Function, and in some instances, expert testimony on the particular conduct at issue.” In both Misenheimer and State v. Milano the court cited with approval the determination by the Court of Appeals for the Fourth Circuit that the ABA Standards Relating to the Defense Function provide “a reliable guide for determining the responsibilities of defense counsel.” Thus, the “range of competence” test provides the trial court, as well as appellate courts, with the opportunity to evaluate counsel’s competency against objective criteria. Adoption of the McMann standard by the North Carolina Supreme Court would allow state courts to develop a substantive body of law defining the contours of this fundamental constitutional right.

416. Marzullo v. Maryland, 561 F.2d at 547.
417. But see Note, Criminal Law—Competence, Prejudice and the Right to “Effective” Assistance of Counsel, 60 N.C.L. Rev. 185, 191 (1981) (“a constitutional test based on the Standards’ specific duties would thrust a judge into an active role in the defense of criminal cases”).
2. Indigent's Right to Substitute Counsel

In *State v. Hutchins* the North Carolina Supreme Court considered the right of an indigent defendant to dismiss court-appointed counsel and have substitute counsel appointed. Defendant Hutchins was indicted on three counts of first degree murder in the deaths of two deputy sheriffs and a highway patrol officer. Defendant presented no evidence at the trial; he was found guilty of one second degree murder and two first degree murders and was sentenced to death.

On appeal defendant contended that the trial court committed prejudicial error in denying defendant's pretrial motion for removal of court-appointed counsel and appointment of substitute counsel. Defendant's attorney had also filed a motion asking for removal as defendant's counsel after defendant had "fired" him. The defense attorney's motion requesting his own removal indicated that "since the attorney's initial conference with defendant, he had met with a 'stiffening personal resistance . . . which soon thereafter involved [sic] into a personal antagonism on the part of defendant' toward the

---

419. The deaths were apparently the result of a disagreement between defendant and his daughter. On the day of the murders, defendant had become angry at his daughter for making a strong alcoholic punch in preparation for celebrating her graduation from high school, which was to take place that evening. Id. at 326, 279 S.E.2d at 792. After being beaten by her father, she fled to a neighbor's house, where she called the Rutherford County Sheriff's department. Id. at 327, 279 S.E.2d at 793. Both Deputy Sheriffs who were dispatched to the scene were fatally wounded by defendant, who fled in his auto armed with a shotgun and rifle. Id. A state trooper, who had given chase to the defendant, was later found dead near the area where defendant was eventually captured. Id. at 328, 279 S.E.2d at 794.
420. Id. at 329, 279 S.E.2d at 794.
421. Id. at 334, 279 S.E.2d at 797. Defendant also raised the issue of whether the trial court has an obligation to inform a defendant of his right to proceed pro se. Id. at 335, 279 S.E.2d at 797. Although recognizing that under *Faretta v. California*, 422 U.S. 806 (1975), a criminal defendant has the right to refuse representation and to conduct his own defense, the supreme court found that this right does not carry with it "a concurrent recognition of the right to be warned of its existence." 303 N.C. at 338, 279 S.E.2d at 799. The defendant must take the initiative and make "some form of an affirmative statement of a desire to proceed pro se." Id. (emphasis in original). Consequently, "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." Id. at 339, 279 S.E.2d at 800.

422. The court-appointed attorney had received the following letter from defendant, who was confined in the county jail: "I am fire you from my case. I'll not to court with you as my lawyer. You have to lie to my mother in other words I don't need you any more at all. That is that. Goodbye." 303 N.C. at 360, 279 S.E.2d at 811-12.
Thus, "'no meaningful communication' was possible between [counsel] and defendant." The trial court denied both motions, finding that defendant had demonstrated no legal justification for removal of his court-appointed counsel. Rather, the court found "that the only reason defendant had articulated for wishing to have his attorneys discharged was because . . . they had not visited him enough to discuss the case." 

The supreme court found no error in the denial of defendant's motion. Determining that the findings of fact by the trial court were fully supported by the evidence, the court treated the findings as conclusive. Despite the majority's opinion, Justice Exum's dissent focused upon "the gross deterioration in the attorney-client relationship" and concluded that the trial court's findings were unsupported by the record.

Although an indigent defendant has no right to replacement counsel merely because he is dissatisfied with the attorney's services or choice of trial tactics, removal and replacement of court-appointed counsel may be necessary to preserve the sixth amendment right to effective assistance of counsel. The relationship between an attorney and his client is perhaps the most critical barometer of counsel's ability to provide effective representation; an attorney who enjoys neither the trust nor confidence of his client can hardly be an effective advocate of his client's interests. Therefore, "the defendant has the right to insist that his case not be handled by an attorney in whom he has no confidence." An "irreconcilable conflict or breakdown in communication between defendant and his counsel" lends support to a claim of ineffective assistance of counsel.

Nevertheless, the Hutchins court found no sixth amendment violation, despite ample evidence of such irreconcilable conflict and lack of communication presented by both defendant and by counsel. Furthermore, the se-

423. 303 N.C. at 331, 279 S.E.2d at 795.
424. Id.
425. Id. at 334, 279 S.E.2d at 797.
426. Id. at 335, 279 S.E.2d at 797-98.
427. Id. at 365, 279 S.E.2d at 814 (Exum, J., dissenting). Justice Exum's dissent was joined by Justice Carlton.
433. 303 N.C. at 336-37, 279 S.E.2d at 797.
434. Justice Exum described defendant's relationship with his attorney as follows:

At the hearing before Judge Smith Mr. Hutchins complained that his lawyers had "promised this and promised that, and none of them have come through." He said, "We ain't talked over the case at all." "If I can't trust them now," Mr. Hutchins said, "I can't trust them anymore." Mr. Hutchins complained that his lawyers had not let him know what they were doing, had not visited him in jail, and had not kept him informed about the outcome of various pretrial proceedings.
verity of the potential punishment makes it incumbent upon the court to see that defendant's right to effective assistance is scrupulously preserved. It certainly would make "a farce and a mockery of justice" to force a defendant in a capital case to rely upon counsel who cannot be an effective advocate of his cause.

F. Jury Instructions

1. Lesser Included Offenses

In State v. Young the court of appeals addressed the question whether a jury may convict a defendant of a lesser included offense, rather than the offense charged, when the "lesser" offense carries the same penalty as the "greater" offense charged. Defendant was indicted for common law robbery. At trial, after the presentation of the evidence, the court granted defendant's motion to dismiss the charge of common law robbery based on insufficiency of the evidence, and instructed the jury that it could find defendant guilty of larceny of the person. On appeal defendant argued that his conviction of larceny was invalid because larceny of the person is not a lesser included offense of common law robbery. The thrust of defendant's argument

303 N.C. at 360, 279 S.E.2d at 812 (Exum, J., dissenting).

Mr. Fox, one of defendant's court-appointed attorneys, described why he should be relieved from the case as follows:

Mr. Hutchins and I have reached a state where we have an absolute lack of communication. That he has personal—a feeling personal against me as opposed to all other persons in his acquaintance; a lack of trust. He doesn't feel he can place trust of his situation, his case in my hands. As a result, that has put me in a position where—with the lack of communication I am unable to prepare effectively for the defense of this case. . . . On talking about potential defenses based on mental attitudes, mental status, getting inside Mr. Hutchins' mind, and I'm not able to communicate with him, whatever, it makes it, at this point, a physical impossibility, as well as a legal impossibility, in my opinion, to adequately prepare a defense on behalf of Mr. Hutchins, as his attorney, to a charge of first degree murder.

Id. at 360-61, 279 S.E.2d at 812 (Exum, J., dissenting) (emphasis by court). Mr. Blanchard, defendant's other court-appointed attorney, said:

My dealings with him are colored by the fact that he is—the animosity is great enough for Mr. Fox. He doesn't feel like he can deal with Mr. Fox. In talking with him for a few moments today, he says he doesn't feel like he can trust me. And the animosity is now getting to the place where I think it will interfere with anything Mr. Hutchins and I could accomplish. . . . I realize he does not have the right to fire and pick and choose, but we are dealing with three counts of first degree murder. In something of this nature, I think that Mr. Hutchins deserves or at least needs in his own mind counsel which he can feel comfortable with; that he can believe what they're going to say; that he has respect for their ability. It is my feeling Mr. Hutchins has none of those for Mr. Fox nor I.

Id. at 361-62, 279 S.E.2d at 812.


437. The evidence showed that defendant snatched fifty dollars from the prosecuting witness as the latter walked down a Raleigh street. Id. at 367, 283 S.E.2d at 813.

438. Conviction of an offense other than the offense charged is permitted by N.C. Gen. Stat. § 15-170 (Cum. Supp. 1981), which provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or a less degree of the same crime, or of an attempt to commit a less degree of the same crime."

Common law robbery is generally defined as larceny of the person plus the additional element of assault. 54 N.C.App. at 372, 283 S.E.2d at 81 (Becton, J., dissenting).
was that larceny of the person is not a crime of "less degree" than common law robbery because both crimes carry the same penalty. A majority of the court of appeals held that, despite the identity of penalty, larceny of the person is a lesser included offense of common law robbery. The court relied entirely upon previous holdings of North Carolina courts which had expressly stated that the former crime was a lesser included offense of the latter.

The dissent, however, argued forcefully that a lesser included offense must be both included in the offense charged (its constituent elements being a proper subset of the greater offense), and subject to lesser punishment. The argument is that a defendant should get something in return for his exposure to conviction of an offense that was not charged, especially when he is convicted of an offense that requires proof of fewer elements than the offense charged. When a defendant is exposed to the same penalty, he receives nothing in return; the state may obtain the same sentence by proving fewer elements than are included in the indicted offense. The dissent viewed this

439. Note that N.C. Gen. Stat. § 15-170 does require that the lesser included offense be one of "less degree."
441. 54 N.C. App. at 367, 283 S.E.2d at 813.
442. The court relied upon State v. Kirk, 17 N.C. App. 68, 193 S.E.2d 377 (1972) for the proposition that larceny of the person is a lesser included offense of common-law robbery. The holding in Kirk, on facts similar to those before the Young court, reached precisely that result. Interestingly, however, the cases cited by the court in Kirk as support of this proposition do not hold that larceny of the person is a lesser included offense of common-law robbery. For example, the court in State v. Bell, 228 N.C. 659, 46 S.E.2d 834, 837 (1948), held that "in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny." The other two cases cited in Kirk contain similar language. See State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971); State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959). Courts in these cases held only that common-law robbery is a lesser included offense in prosecutions for armed robbery. Unless the string of crimes listed at the end of the Bell excerpt is intended to be read in descending order, with each offense being a lesser included offense to the one preceding it, then this line of cases was misconstrued in Kirk. An intention of descending lesser included offenses is unlikely, however, because larceny of the person is certainly not a lesser included offense of the offense immediately preceding it, assault. In its most liberal interpretation, the Bell line stands only for the proposition that larceny of the person is a lesser included offense of armed robbery, which is not quite the same as saying it is a lesser included offense of common-law robbery.

Besides Kirk, one must look to the nineteenth century to find affirmative support for the view that larceny of the person is a lesser included offense of common-law robbery. The supreme court in State v. Cody, 60 N.C. 197 (1864), held that "the charge of commission of larceny is included in that of the commission of a robbery. ... [Robbery] is an aggravated species of [larceny]." Id. at 198.

444. The dissent conceded that this part of the test was met. See note 438 supra.
445. The dissent argued that this test is mandated by due process and statutory construction.
446. Id. at 373, 283 S.E.2d at 816 (Becton, J., dissenting).
situation as particularly bothersome in cases in which the jury reaches a compromise verdict, or thinks it is doing the defendant a favor by convicting him of the "lesser" charge.\textsuperscript{447}

The position taken in the dissent is supported implicitly in North Carolina cases and explicitly in the definition of lesser included offenses in federal courts. In \textit{State v. Davis}\textsuperscript{448} defendant was charged with receipt of stolen property, but was convicted of possession. In reversing the conviction the supreme court made two observations regarding the relationship between the two offenses. First, it held that the act of possession is different from the act of receiving;\textsuperscript{449} thus, possession of stolen property is not even "included" in receiving stolen property.\textsuperscript{450} Second, the court noted that the punishment for both offenses was identical.\textsuperscript{451} These factors together led the court to conclude that the legislature intended possession and receiving to be "separate crimes of equal degree rather than the former to be a lesser included offense of the latter."\textsuperscript{452} A possible interpretation of \textit{Davis} is that receiving stolen property is a crime "separate" from possession because of the varying elements of the crime, and that it is a crime of "equal degree" with possession because the prescribed punishment is the same.\textsuperscript{453} It would follow, then, that a crime of equal punishment, i.e., equal degree, is not an offense of "less degree" as contemplated by G.S. 15-170. Similarly, in federal courts a lesser included offense must be both included and lesser. Cases interpreting Rule 31(c) of the Federal Rules of Criminal Procedure\textsuperscript{454} hold that the requirements of a lesser included offense are met only when the included offense involves fewer elements than the charged greater offense and when the claimed lesser offense carries a

\textsuperscript{447} Id.
\textsuperscript{448} 302 N.C. 370, 275 S.E.2d 491 (1981). For further discussion of \textit{Davis}, see text accompanying note 257 supra.
\textsuperscript{450} 302 N.C. at 373, 275 S.E.2d at 494. The court determined that receiving stolen property is "a single, specific act occurring at a specific time," whereas possession is a "continuing offense beginning at the time of the offense and continuing until divestment." Id.
\textsuperscript{452} 302 N.C. at 374, 275 S.E.2d at 494.
\textsuperscript{453} The following language from \textit{State v. Cameron} supports the proposition that crimes of equal punishment are crimes of equal degree:

By setting out both the possession and sale as separate offenses in the statute and by prescribing the same punishment for possession and for sale, it is apparent that the General Assembly intended possession and sale to be treated as distinct crimes of equal degree, to be separately punished rather than providing that one should be a lesser included offense in the other.

283 N.C. at 202, 195 S.E.2d at 488.
\textsuperscript{454} "The defendant may be found guilty of an offense necessarily included in the offense charged or an offense necessarily included therein if the attempt is an offense." Fed. R. Crim. P. 31(c).
lighter penalty than does the greater charged offense.\[455\]

2. Court Modification of Submitted Instructions

In *State v. Puckett*\[456\] the court of appeals examined whether it was prejudicial error for the trial court to substitute its own general witness-credibility instruction for defendant's specific instruction charging the jury that one of the prosecution's witnesses had a pecuniary interest in the outcome of the case. In the course of the witness' testimony, which pertained to the deliberateness of defendant's alleged killing, the witness stated that her minor child would inherit all of the victim's estate if defendant were convicted of the voluntary manslaughter of defendant's husband.\[457\] Defendant submitted an instruction that would have charged the jury to scrutinize the testimony of this witness in light of her interest in the outcome. The court denied defendant's request and substituted its own general instruction regarding the credibility of witnesses.\[458\]

In reversing the conviction the court of appeals held that when a request is correct in law and supported by the evidence\[459\] in the case, it is error for a court to change the meaning or so qualify the requested instruction as to weaken its force.\[460\] While a court need not give even a proper request verbatim, the jury charge must be substantially the same as the requested instruction.\[461\] The substituted charge of the trial court was not substantially the same as the requested instruction because it did not specifically direct the jury to the credibility of the witness in question.\[462\]

G. Probation and Parole\[463\]

The North Carolina Supreme Court in *State v. Cooper*\[464\] upheld, as a valid condition of probation, a prohibition against defendant's operating a

---

\[455\] United States v. Cady, 495 F.2d 742, 747 (8th Cir. 1974). See also James v. United States, 238 F.2d 681 (9th Cir. 1956).


\[457\] Id. at 581, 284 S.E.2d at 329.

\[458\] Id.


\[460\] 54 N.C. App. at 581, 284 S.E.2d at 329. See also Lloyd v. Bowen, 170 N.C. 216, 86 S.E. 797 (1915); Brink v. Black, 77 N.C. 59 (1877).

\[461\] 54 N.C. App. at 581, 284 S.E.2d at 329.

\[462\] Id. In a related case, the court of appeals held that it was not prejudicial error for the trial judge to repeat a charge already given. The court observed that a trial judge has wide discretion in charging a jury. State v. Murray, 55 N.C. App. 94, 284 S.E.2d 525 (1981).

In *State v. Kinard*, 54 N.C. App. 443, 283 S.E.2d 540 (1981), the court held that the last paragraph of the pattern jury instruction N.C.P.I.-Crim. 104.90 (pertaining to identifications made after the crime) applies only to a lineup or show-up situation and not to a photograph identification. The court referred to footnote three of the instruction, which states that the last paragraph applies only to "confrontations," and held that a confrontation is "the act of setting a witness face-to-face with the prisoner," and thus does not include photographic identification. Id. at 446, 283 S.E.2d at 542 (citing State v. Behran, 114 N.C. 797, 19 S.E. 220 (1894); Black's Law Dictionary 372 (4th ed. 1951)).


motor vehicle on the streets or highways of North Carolina from 12:01 a.m.
until 5:30 a.m. during the period of probation. G.S. 15A-1343(b)(17) allows
for the imposition of any condition reasonably related to the defendant's reha-
bilitiation. Defendant in Cooper, who had been convicted of felonious posses-
ston of stolen credit cards, contended that the condition was not reasonably
related to the offenses committed or to his rehabilitation. The court disagreed
and found that the operation of a motor vehicle late at night was reasonably
related to the “reception, possession and disposition of stolen property” and
that the condition minimized defendant’s “opportunity” for contact with per-
sons engaged in criminal activities.\footnote{466}

In State v. McNei\footnote{467} the court of appeals\footnote{468} rejected a due process and
equal protection attack on a lower court judgment and commitment order
which recommended that defendant, who was convicted of felonious breaking
and entering and felonious larceny, pay \$417.50 in restitution to his victim and
\$250 for court-appointed counsel as a condition for attaining work release or
parole.\footnote{469} The last sentence of the order read: “All monies are to be paid
prior to the defendant’s consideration for parole.”\footnote{470} In addition to his constitu-
tional claims, defendant argued that the lower court usurped the power of
the North Carolina Parole Commission.\footnote{471} The court of appeals upheld the
order by interpreting the language to mean that only if the parole commission
accepted the court’s recommendation must the money be paid prior to the

\footnotetext{466}{304 N.C. at 183, 282 S.E.2d at 438. The court in Cooper also construed N.C. Gen. Stat.
§ 15A-1342(g) (Cum. Supp. 1981), which provides: “The failure of a defendant to object to a
condition of probation at the time it is imposed does not constitute a waiver of the right to object
at a later time to the condition.” Defendant Cooper had his probation revoked for a violation of
the condition but did not raise his objection to the condition until heard in the court of appeals.
The supreme court held that “[a defendant cannot re litigate the legality of a condition of probation
unless he raises the issue no later than the hearing at which his probation is revoked.” 304 N.C. at
183, 282 S.E.2d at 439. The court reviewed the statute’s commentary and found that subsection
(g) was designed to avoid the dilemma of a defendant not contesting a condition of probation
when imposed for fear that he might get an active sentence. Thus, the court concluded that “at a
later time” in the statute referred to the revocation hearing. No right to challenge the condition
for the first time at the appellate level existed. Id.
\footnotetext{467}{54 N.C. App. 454, 283 S.E.2d 565 (1981).}
jury of misdemeanor welfare fraud, which had a statutorily defined limit of \$400 at the time of
trial. Id. at 43, 280 S.E.2d at 9. The trial court imposed a suspended sentence with supervised
probation on condition that defendant make restitution of \$541 for overpayments received under
the Aid to Families with Dependent Children program. Defendant argued that restitution should
be no more than \$400 because she was convicted of misdemeanor rather than felonious welfare
fraud. The court of appeals rejected defendant’s argument holding that the condition imposed on
a suspended sentence need only be supported by the evidence, not established beyond a reason-
able doubt as is needed for a conviction, and that the State’s evidence, which defendant did not
contest, amply supported the \$541 figure. Id.
\footnotetext{469}{54 N.C. App. at 457, 283 S.E.2d at 566-67.}
\footnotetext{470}{Id.}
\footnotetext{471}{The thrust of defendant’s argument is based on N.C. Gen. Stat. § 148-57.1 (1978), which
essentially provide that when a court recommends restitution as a condition of parole, the parole
commission is authorized to impose the court’s recommendation but is not bound by such
recommendation.}
The Court of Appeals for the Fourth Circuit in *Evans v. Garrison* held invalid a condition of parole that two defendants each pay restitution of $2,500 to the North Carolina Bureau of Investigation. Defendants had pleaded guilty to drug offenses under plea bargaining agreements with the state without knowledge or reason to foresee that the restitution would be imposed as a condition for parole. The court invalidated the condition on two grounds: (1) the imposition of special conditions upon parole eligibility in a plea bargaining context without informing the defendants of that possibility rendered their guilty plea invalid under the voluntary and intelligent standard; and (2) the North Carolina statute that provides for restitution as a condition of parole upon a guilty plea when the bargained agreement provides for it only allows for restitution to victims of crime.

**H. Other Cases**

In *State v. Burney* the North Carolina Supreme Court held that the constitutional right to a public trial of a defendant charged with first degree rape was not violated when the trial judge, exercising his discretionary authority pursuant to G.S. 15-166, ordered the courtroom cleared of all “non-interested” persons during the testimony of the seven-year-old victim. 

---

472. 54 N.C. App. at 458, 283 S.E.2d at 568.
473. 657 F.2d 64 (4th Cir. 1981).
474. Id. at 67.
475. Id. at 66. For a good discussion of the voluntary and intelligent standard, see C. Whitebread, Criminal Procedure §§ 21.01-.06, at 407-28 (1980).
476. 657 F.2d at 66. N.C. Gen. Stat. § 15A-1343(d) (Cum. Supp. 1981) allows for restitution to an aggrieved party or parties which “shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, state or local.” The statute also provides, however, “that no government agency may benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs.” Id. Consequently, the North Carolina Bureau of Investigation is not a victim under the statute unless it suffers a particular loss over and above its normal operating costs. 657 F.2d at 66-67.
477. In State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1981), the North Carolina Supreme Court held that an extrajudicial statement by a co-defendant not testifying at trial can be admitted against a defendant under the spontaneous utterance exception to the hearsay rule without violating the confrontation clause of the sixth amendment, provided that the hearsay bears adequate “indicia of reliability” to guarantee its trustworthiness. 303 N.C. at 697, 281 S.E.2d at 378-38 (quoting from Ohio v. Roberts, 448 U.S. 56 (1980)). See also State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978) (dying declaration); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977) (implied admissions).
479. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.
   In the trial of cases for rape and of or a [sic] sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.
481. The trial judge ordered the courtroom cleared of all persons except the defendant, his family, his attorney, the defense witnesses, the assistant district attorney, the state's witnesses, the officers of the court, the members of the jury, and the members of the victim's family. 302 N.C. at 533-34, 276 S.E.2d at 696.
Defendant's attack on the trial judge's ruling was based on both state\(^{482}\) and federal\(^{483}\) constitutional provisions guaranteeing defendant's right to a public trial. Relying on the United States Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*,\(^{484}\) the court ruled that in the interest of the fair administration of justice, the trial judge may impose reasonable limitations upon the access of the public and the press to a criminal trial.\(^{485}\) Because of the sensitive and personal nature of sexual offenses, and especially those involving young children, the court concluded that the limited exclusion imposed by the trial judge was not unreasonable.\(^{486}\)

In *State v. Wright* the court of appeals allowed the trial judge to overrule a challenge for cause of a prospective juror, despite the fact that the juror stated she had formed an opinion about the case prior to the voir dire.\(^{487}\) Under G.S. 15A-1212(6),\(^{488}\) the defendant had a right to challenge the juror, but since the judge has the discretion to grant or to deny the challenge,\(^{489}\) he can pursue the juror's answer and determine if she can fairly assess the evidence, disregarding her pre-conceived opinion.\(^{490}\) Many jurors may hear about a case through the media, without forming an opinion, and clearly this is not grounds to remove them.\(^{491}\) The court of appeals will now allow jurors to be seated even if that information has led them to form an opinion, if the trial judge finds they can still act independently of that opinion and base a decision on the evidence.

The legislature recently enacted a statute providing for deferred probation in the place of a criminal trial for first-time offenders charged with offenses punishable by less than ten years imprisonment.\(^{492}\) This practice requires the consent of the prosecution and the defense, as well as the trial judge. Those who accept the probation will have the charges against them dropped if they serve their probation satisfactorily.\(^{493}\) A violation of proba-

---

483. See note 479 supra.
484. 448 U.S. 555 (1980).
485. 302 N.C. at 537-38, 276 S.E.2d at 698.
486. Id.
487. 52 N.C. App. 166, 278 S.E.2d 579 (1981). The prospective juror was asked several times if she had formed an opinion. Initially she replied affirmatively, then she said she "sort of" had an opinion. Later she said she had none. In response to several questions from the judge, she stated she could divorce herself from that opinion and act on the evidence. The judge then denied the challenge.
488. N.C. Gen. Stat. § 15A-1212(6) (1978). A juror may be challenged if he states he has formed an opinion about the case. He cannot be asked who that opinion favors.
489. Id. §§ 9-17, 15A-1211(b).
490. 52 N.C. App. at 172, 278 S.E.2d at 584-85.
492. N.C. Gen. Stat. § 15A-1341 (Cum. Supp. 1981). Other requirements are: notice and opportunity to be heard accorded crime victim; defendant must not have been convicted of a felony or a misdemeanor involving moral turpitude; defendant must not have been on probation previously, and he must be unlikely to commit another offense. Under N.C. Gen. Stat. § 15A-1342(a) (Cum. Supp. 1981), two years is the maximum length of probation for this deferred sentence.
tion will mean the charges will be pursued. At first blush, this statute looks like a way for young offenders from well-to-do families to be accorded special treatment and spared a criminal record. The probable effect, however, will be to provide the district attorney a chance to dispose of weak cases without having to take a dismissal.494

Another recent statute limits appeals to the supreme court by making decisions by the court of appeals final on motions for appropriate relief.495 A similar statute was repealed in 1977. Presumably, this reenactment will ease the supreme court's caseload.

In State v. Dobson496 the court of appeals declared that appeals by the state on motions to suppress evidence under G.S. 15A-979(c)497 must strictly comply with the statute. The State must certify to the trial court in its notice of appeal that the appeal is not made to delay the trial and that the evidence in question is essential to the prosecution. The burden of proof is on the State to show that it has complied with the statute, and failure to meet this burden voids the appeal.498

The supreme court handed down several decisions regarding joinder and severance of criminal charges against one defendant, the most notable being State v. Silva.499 Defendant was charged with two separate offenses linked together by a conspiracy charge.500 The only "transactional connection" required for joinder by the statute501 was the conspiracy, which was dropped at the end of the State's evidence. Defendant failed to move for severance at this point, thereby waiving his right, although the dismissal ended the connection between the cases and made severance proper. The court stated that when defendant made his motion to sever before trial, the existence of the conspiracy charge properly allowed joinder; he could be granted severance when the charge was dropped, but then only by making a new motion.502 This decision does not leave a defendant technically without remedy because he can and

494. If this assumption is correct, the threat of prosecution for failure to obey the probation officer will carry no real force.
496. 51 N.C. App. 445, 276 S.E.2d 480 (1981). The prosecution appealed the suppression of certain evidence, but the trial record showed only that notice was given. There was no indication that the State had followed the statutory provisions.
500. Defendant was charged with armed robbery, and with larceny of an automobile. The prosecution charged that the auto theft was part of a conspiracy to rob banks using stolen vehicles, because the armed robbery had been perpetrated in a different stolen vehicle. Id. at 127, 282 S.E.2d at 452.
501. N.C. Gen. Stat. § 15A-926(a) (1978). Several offenses may be joined if they are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." 304 N.C. at 126, 282 S.E.2d at 452.
502. N.C. Gen. Stat. § 15A-927(a) (1978) provides that a defendant must move for severance before trial. If his motion is denied, he may renew it "based on a ground not previously known" at the close of State's evidence. Failure to make either of these motions constitutes a waiver. This practice alleviates the problem of later evidence showing the impropriety of joinder.
should ask for severance at the close of the prosecution's case. Nevertheless, allowing conspiracy charges, regardless of how tenuous, to connect several otherwise unconnected charges will require that the trial judge balance the prejudice to the defendant against the burden of retrying all the charges on the overloaded court docket.503

The court had several other opportunities to address joinder and severance. In State v. Young the supreme court held that an escaped convict who raped a woman and stole a car within a brief period of time after his escape was properly tried for all three offenses at once.504 Two murders committed by the defendant while on a continual drunken spree separated in time by six to eight hours, were also found to be properly joined in State v. Oxendine.505 In addition, joiners were upheld by the court in State v. Parton, and in State v. Bracey. In Parton, two murders were committed almost a month apart, but the circumstances surrounding both were similar. Defendant confessed to both at the same time, and the key witness to both murders was the same man.506 State v. Bracey, however involved three separate robberies over a ten-day period in a two-block area of town; however, defendants each time used similar assaults to take petty cash from the small businesses involved.507 In none of the above cases did the defendants show any prejudice by the joinder of the offenses. Because the determination of severance motions is left to the trial judge's discretion, most joiners will be upheld. There must be some connection between the charges, however, to permit joinder.508

KAREN D. FOX
JAY MICHAEL GOFFMAN
RICHARD LAYNE MAGEE
JAMES P. NEHF
ROBERT CHARLES PORT
JULIUS A. ROUSSEAU, III
MACK SPERLING
WILLIAM R. WHITEHURST

503. N.C. Gen. Stat. § 15A-927(b)(2) (1978) requires severance during trial if it is necessary "to achieve a fair determination of the defendant's guilt or innocence of each offense." The jury must be able to distinguish fairly between the various offenses.

Granting severance requires declaring a mistrial. Id. § 15A-927(a)(4).

504. 302 N.C. 385, 275 S.E.2d 429 (1981). The court noted that even had the escape charge been severed, evidence of the defendant's escape would have been relevant and admissible in a trial for the rape and larceny.

505. 303 N.C. 55, 277 S.E.2d 410 (1981). Both murdered girls had been strangled and buried in shallow graves within one-eighth mile of each other.


508. The Official Commentary to N.C. Gen. Stat. § 15A-926 (1978) sets out the requirement under that statute that some transactional basis must exist between the charges. The old law of permitting joinder of similar crimes with no transactional connection has been dropped. See State v. Bracey, 303 N.C. at 117, 277 S.E.2d at 394.
VII. Evidence

A. Impeachment

1. Prior Acts

North Carolina has long displayed a liberal policy in its rules governing admission of evidence of prior misconduct for impeachment purposes. Contrary to the rule in many jurisdictions, a witness in North Carolina's courts may be impeached by introduction of any criminal conviction; there is no restriction to the traditional "infamous" crimes or to crimes directly related to credibility. Moreover, inquiry is not limited to criminal convictions. Examination concerning any behavior tending to reflect negatively on general moral character is permitted freely. Indeed, it was not until 1971 that North Carolina finally abandoned its minority position permitting inquiry into completely unrelated indictments and arrests.

The law in this area in North Carolina rests in part on the assumption that no prejudice occurs when there is an unequivocal denial of the act in question by the witness being impeached. Theoretically, the cross-examiner's questions are not evidence to be considered by the jury. Only the witness's answers are to be considered, and they are to be taken as given. When the witness denies the act, his credibility stands unimpeached. North Carolina law recognizes that this assumption, standing alone, is somewhat contrary to common sense and might result in enormous abuse if left unchecked. The assumption is buttressed in North Carolina by two policing doctrines. First, the trial court judge has discretionary control over the scope of cross-examination. Second, the questions must be asked in good faith.

7. Distinguish the prohibition against introducing extrinsic evidence of alleged criminal or other degrading conduct from the practice of "sifting" the witness by asking him questions about such conduct, which is permitted, subject to the court's discretion, under North Carolina law. State v. Garrison, 294 N.C. 270, 278-79, 240 S.E.2d 377, 382 (1978).
8. If defendant admits that he committed the alleged act, a limiting instruction confining consideration of this evidence to evaluation of his credibility must be given if requested. State v. Norkett, 269 N.C. 679, 153 S.E.2d 362 (1967). Although any possibility of prejudicial substantive use is theoretically controlled by a limiting instruction, the effectiveness of such instruction often has been called into question. See, e.g., Note, The Limiting Instruction—Its Effectiveness and Effect, 51 Minn. L. Rev. 264 (1966); Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 777 (1961); See also the text accompanying notes 89-107 infra.
The potential in this for unfair treatment of witnesses under North Carolina law area has been noted frequently.\textsuperscript{11} Two 1981 cases further illustrate difficulties with the rules in their present form. In \textit{State v. Dawson}\textsuperscript{12} a crucial alibi witness was questioned by the prosecuting attorney about prior acts of shoplifting. The witness, defendant's mother, consistently denied the acts throughout a series of six questions.\textsuperscript{13} The North Carolina Court of Appeals had reversed defendant's conviction because the State failed to show a good faith basis for the questions, pointing out that defendant's "whole defense was built on misidentification and alibi."\textsuperscript{14} The North Carolina Supreme Court disagreed and reversed the court of appeals, citing the established rule that good faith is presumed unless the record discloses evidence of bad faith.\textsuperscript{15} Although questioning "the propriety of the prosecutor's conduct,"\textsuperscript{16} the court concluded that "no affirmative showing of good faith by the prosecutor is required."\textsuperscript{17}

\textit{State v. Pilkington}\textsuperscript{18} also involved a situation in which credibility was crucial to the defense. Defendant was prosecuted for alleged child molestation. As the sole witness for the defense, defendant admitted to being in the area and to talking to the child, but denied attempting to molest him. On cross-examination, he was questioned about unrelated traffic violations, which he denied having committed. It was later discovered that the questions had been based erroneously on the record of another person having the same name as defendant. In upholding the convictions, the North Carolina Supreme Court noted that the prosecutor's good faith was unquestioned,\textsuperscript{19} and emphasized that defense counsel had been informed of the State's reliance on the records some weeks before trial, but had failed to correct the error.\textsuperscript{20} Justices Exum and Carlton, in dissent, found acquiescence on the part of defendant unlikely,\textsuperscript{21} pointing out that the questions were objected to and that defendant was never...

\begin{enumerate}
\item Id.
\item 302 N.C. 581, 276 S.E.2d 348 (1981).
\item Id. at 584, 276 S.E.2d at 350-51.
\item 302 N.C. at 586, 276 S.E.2d at 352.
\item Id. at 583, 276 S.E.2d at 350.
\item Id. at 586, 276 S.E.2d at 352 (emphasis in original).
\item Id. at 510, 276 S.E.2d at 393.
\item Id. at 511, 276 S.E.2d at 393.
\end{enumerate}
shown the record relied upon. The dissent argued that the cross-examination was so severely prejudicial that defendant was denied due process.\textsuperscript{22}

These cases illustrate distinct but related difficulties inherent in North Carolina law in this area. \textit{Dawson} demonstrates the near-impossible burden facing a litigant on appeal. When record evidence is inadmissible,\textsuperscript{23} and good faith is presumed in the absence of contrary evidence, demonstration of the lack of good faith on appeal is indeed a formidable task.\textsuperscript{24} The solution advocated by the court of appeals in \textit{Dawson}—a requirement that the impeaching party establish a good faith basis for questioning\textsuperscript{25}—would undoubtedly solve many of the problems in this area. This requirement, in addition to decreasing the risk of undue prejudice, probably would limit the inquiry to prior acts that have some basis in fact, thus increasing the probability that the witness' response will be relevant to his credibility.

Such a rule, however, would not have produced a different result in \textit{Pilkington}, because the good faith basis for questioning was clear. Nevertheless, a disturbing aspect of that case was the court's reluctance to look beyond rigid application of the rules and to inquire whether the result was fair. The majority appears to have given little weight to the consideration that defendant's case turned on his credibility, and that his credibility necessarily and unjustly was damaged by the prosecutor's groundless questions. To the extent that defendant acquiesced in the groundless questioning, the decision would seem to be correct. But that acquiescence, as pointed out by the dissent, was not at all clear from the facts.\textsuperscript{26} \textit{Pilkington} and \textit{Dawson} illustrate North Carolina's continued failure to recognize and remedy the dangers inherent in the use of prior acts for impeachment purposes.

\section*{2. Witness Credibility}

The majority rule in the United States is that in the absence of a direct attack upon the credibility of a witness, no evidence will be admitted to support his credibility.\textsuperscript{27} The North Carolina Supreme Court discarded this rule in \textit{State v. Lucas}.\textsuperscript{28} Although the court acknowledged that it had recognized

\begin{itemize}
  \item \textsuperscript{22} Id. at 517, 276 S.E.2d at 397.
  \item \textsuperscript{23} See \textit{State v. Monk}, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975) ("Denial of prior offenses by the witness may not be contradicted by introducing the record of his conviction.").
  \item \textsuperscript{24} The problem does not arise when the trial court makes an advance determination of the adequacy of the basis for questioning. This potential solution was suggested by the court of appeals in \textit{Dawson}, 48 N.C. App. at 105-06, 268 S.E.2d at 576 ("If it appears at all that the prosecutor had a basis for asking these questions, it appears solely from the asking, and therein lies the problem with the court's refusal to require a showing that the questions were asked in good faith."). The North Carolina Supreme Court also pointed out the availability of \textit{voir dire} in situations such as the one in \textit{Dawson}. 302 N.C. at 586 n.1, 276 S.E.2d at 352 n.1. For a discussion of the use of \textit{voir dire} in such cases see \textit{Note}, supra note 11, at 465-66.
  \item \textsuperscript{25} 48 N.C. App. at 107, 268 S.E.2d at 577.
  \item \textsuperscript{26} 302 N.C. at 515, 276 S.E.2d at 395-96 (Exum, J., dissenting).
  \item \textsuperscript{27} See 4 J. Wigmore, Evidence § 1124, at 255 (J. Chadbourne rev. 1976); C. McCormick, supra note 1, § 49, at 102. Supporting evidence can come in the form of either: (1) evidence of the general good character of the impeached witness, or (2) evidence of consistent statements made by the witness whose credibility has been attacked. Id. at 103.
  \item \textsuperscript{28} 302 N.C. 342, 275 S.E.2d 433 (1981). Defendant was convicted of first degree burglary,
the majority rule in earlier cases, it reasoned that "the necessity of impeachment as a prerequisite to corroboration would seem to be more theoretical than real." The court therefore ruled that prior consistent statements that sustain and strengthen the witness' testimony at trial are admissible for purposes of corroboration.

B. Scientific Proof

1. In General

In State v. Temple, the supreme court held that a dentist's expert testimony identifying bite marks on a murder victim's skin as those of defendant was admissible so long as that testimony was based upon established scientific methods. The Temple decision is significant because admissibility of evidence identifying an accused by his bite marks was a question of first impression in North Carolina. With the holding in Temple, North Carolina joins every jurisdiction that has addressed this issue.

The general rule in North Carolina on the admissibility of scientific methods of proof is that courts should accept such testimony when the accuracy and the reliability of the process involved has been established and recognized either by judicial notice or to the satisfaction of the court through expert testimony. In Temple the expert testified to the uniqueness of an individual's dentition, and then stated that he had made impressions of defendant's teeth and matched these impressions with the bite marks found on the victim's body. From these tests the expert gave his opinion that the defendant's teeth

second degree sexual offense and common law robbery. At trial, the victim identified defendant from the witness stand, without objection, as the man who broke into her home and assaulted her. She was then permitted to testify over objection that she previously had picked defendant out of the crowd in the courtroom at the probable cause hearing and identified him as her assailant at that time. One question on appeal was whether the testimony of the previous identification at the probable cause hearing should have been admissible to bolster the victim's in-court identification, when the victim's credibility had not been impeached. Id. at 347, 275 S.E.2d at 436.


30. 302 N.C. at 347, 275 S.E.2d at 437 (quoting I D. Stansbury, supra note 2, § 50, at 144).

31. Id. Because the only virtue of the court's rule is simplicity of application, it should be abolished. No other state has followed this example.

32. In two cases involving scientific methods of proof the court of appeals held that evidence of defendant's willingness to take polygraph and voice and stress tests properly was excluded by the trial court. State v. Makerson, 52 N.C. App. 149, 153, 277 S.E.2d 869, 872 (1981) (defendant took a voice stress test and was willing to take a polygraph test); State v. Duvall, 50 N.C. App. 684, 697, 275 S.E.2d 842, 853, disc. review denied, 302 N.C. 399, 279 S.E.2d 358 (1981) (defendant was willing to take polygraph test). The Duvall court reasoned that admitting such testimony would create the inference that the results of the test were favorable to the defendant. Id.


34. Id. at 11-12, 273 S.E.2d at 279.

35. Id. at 11, 273 S.E.2d at 279. See generally Annot., 77 A.L.R.3d 1122 (1977).


38. The supreme court rejected defendant's argument that the testimony was inadmissible because it was based on unreliable mathematical probabilities that a person has unique dentition.
had caused these bite marks.  

The supreme court held that since this evidence "was based upon established scientific methods, [such testimony] is admissible as an instrumentality which aids justice in the ascertainment of the truth. Any objection to this testimony goes to the credibility to be attributed to the evidence, not to its admissibility."

2. Experimental

Introduction of experimental evidence is an extremely useful technique that presents a variety of opportunities to the creative trial lawyer. In deciding whether to admit experimental evidence, a trial court's primary consideration is the similarity of the experimental conditions to those of the actual case. In *State v. Wright* the court of appeals delineated the requirements in North Carolina as follows: (1) the experiment must be conducted under conditions substantially similar to those prevailing at the time of the occurrence involved in the action, and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of that occurrence. The court further stated that whether an experiment was conducted under substantially similar conditions is a question of law and is reviewable by the appellate courts.

The court then discussed some of the relevant considerations that the trial judge should use in evaluating similarity of conditions. A court should consider whether the experiment can be evaluated rationally with different conditions and whether a reasonable expert in the field would rely upon it. These considerations are quite sensible and are in accordance with the modern trend of cases. Because the similarity of conditions is always relative, the central question is the experiment's probative value. If differences between the exper-

---

The court concluded that Dr. Webster had arrived at his opinion from his many years of experience in examining teeth, noting that the dentist had expressly stated that he had made no mathematical studies on this issue. 302 N.C. at 12, 273 S.E.2d at 280.

39. Id.

40. Id. at 13, 273 S.E.2d at 281. The court based this holding on Patterson v. State, 509 S.W.2d 857 (Tex. Crim. App. 1974) (evidence comparing teeth marks with defendant's teeth held admissible).

41. 1 D. Stansbury, supra note 2, § 94, at 303-05.

42. 52 N.C. App. 166, 278 S.E.2d 579 (1981). Defendant bus driver was convicted of involuntary manslaughter and failing to stop at a red light. Defendant asserted that the brakes did not respond. The State offered the testimony of a mechanic at the school bus garage concerning a test performed on the brakes of the bus one half hour after the accident. The inoperable bus was hooked up behind a wrecker and towed at approximately 5-10 miles per hour. When the brakes were applied, the bus stopped. Defendant contended that the test was not conducted under conditions that were sufficiently similar to those existing when the accident occurred. At the time of the accident, defendant had driven the bus loaded with 35 students for some time through traffic, frequently using the brake pedal.

43. Id. at 173, 278 S.E.2d at 585. Because the concept of substantial similarity is not easily defined, the decision of the trial judge should be overturned only if it constitutes an abuse of discretion. See *State v. Jones*, 287 N.C. 84, 214 S.E.2d 24 (1975).

44. 52 N.C. App. at 173-74, 278 S.E.2d at 586 (quoting *State v. Jones*, 287 N.C. at 97-98, 214 S.E.2d at 33-34 (1975)).

45. See C. McCormick, supra note 1, § 202, at 485-88.
iment and the event in question are explainable and understandable by a jury of average intelligence, the evidence should be admissible. In *Wright* the experimental evidence had probative value tending to show the normal braking capacity of a vehicle. A requirement of an exact replication of conditions existing at the time of the accident was held to be neither reasonable nor necessary, especially because the differences in the conditions were pointed out clearly to the jury.

In *Green v. Wellons, Inc.* the court of appeals discussed a significant question often raised by the use of experimental evidence, namely, the weight it should be given. After the party offering the evidence has demonstrated that an experiment has sufficient similarity to the disputed event to render it admissible, the probative value of the evidence becomes a question for the jury.

The *Green* court considered the use of an experimental deposition taken at the scene of plaintiff's injury. In an effort to establish that on the day of the accident plaintiff could have seen the objects over which she fell, defendant conducted an experiment in which plaintiff placed the objects where they were before she tripped over them, and then retraced her steps and actions on the day of the fall. During the course of the experiment-deposition, plaintiff admitted that the objects were clearly visible. In reversing the trial court, the court of appeals ruled that such an experiment, while admissible, did not automatically entitle defendant to summary judgment, because replication of conditions can never be exact. The decision not to allow the experimental result to be conclusive is sensible because plaintiff continued to insist that she did not see the rocks on the day of her fall until it was too late for her to avoid falling over them.

The court of appeals also discussed the use of scientific evidence in *State v. Mears*, expanding the 1981 holding of the state supreme court in *State v. Bass*. In *Bass* defendant's fingerprint was found at the scene of the crime. Defendant, however, presented a plausible explanation for its presence which was perfectly consistent with a finding of innocence. Absent corroboration in the form of real or circumstantial evidence of defendant's presence at the scene

---

46. 52 N.C. App. 529, 279 S.E.2d 37 (1981). Plaintiff sued a shopping center owner to recover for injuries resulting from her fall over rocks lying on the shopping center's sidewalk. During the taking of plaintiff's deposition at the shopping center under similar weather conditions, plaintiff picked out several rocks, placed them where they had been on the sidewalk when she fell, walked to her parked car and looked back. On this occasion, she was able to see the rocks. Based on the deposition, the trial judge decided that plaintiff was contributorily negligent as a matter of law and rendered summary judgment for the defendant.

47. Id. at 534, 278 S.E.2d at 41.

48. 54 N.C. App. 666, 284 S.E.2d 158 (1981). Defendant security guard was indicted for and convicted of breaking and entering and larceny. The State's evidence centered around fifty dollars taken from the vault of defendant's employer. After an earlier disappearance of cash, the sheriff's office had dusted the money in the vault with an ultraviolet powder. Defendant was on the premises when the most recent shortage was discovered. Defendant was questioned by an officer and exposed to ultraviolet light which revealed fluorescent particles on his clothing. Defendant testified that the source of the fluorescent particles on his arms and clothing was a product he had used on the day of his arrest to fix a leak in his car's air conditioning system. The $50 was found in the employee's restroom.

at the time of the crime, the court held that defendant was entitled to a nonsuit.\(^5\)

In *Mears* the evidence consisted of fluorescent particles found on defendant's body and clothing, which were not retained by the State for comparison or analysis. At both the time of questioning and at trial, defendant presented an explanation for the presence of fluorescent material on his body that was consistent with his innocence. The State presented no evidence tending to refute this explanation and no other evidence tending to place defendant at the scene of the crime. The court held that the use of such "scientific" evidence requires the State to establish materiality through proven testing procedures, and to preserve the particles for comparison by the fact finder. Because this was not done, admission of the evidence was erroneous.\(^5\)

This holding is a proper and logical extension of *State v. Bass*. Fingerprint tests arguably are more reliable as scientific evidence than are fluorescent particle tests because of the uniqueness of every fingerprint. Thus, a more stringent standard should be applied to the use of fluorescent particle tests. Here, even the standard set in *Bass* for the use of fingerprint evidence was not met.\(^5\)

### C. Hearsay

"Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."\(^5\)

The court of appeals reached an arguably incorrect decision with respect to the hearsay rule in *Fisher v. Thompson*,\(^4\) a negligence case arising from a two-car collision. The jury found plaintiff to be contributorily negligent. At trial defendant testified that a third party had said that this car was the second that plaintiff had torn up. The court held that this evidence was not objectionable because "[t]he statement was not offered to prove the truth of the matter asserted, but only for the mere purpose of showing that the statement was made."\(^5\) To conceive of any legitimate purpose that the statement could have had other than proving the truth of the matter asserted is difficult.\(^6\)

\(^{50}\) Id. at 272, 278 S.E.2d at 212-13.
\(^{51}\) 54 N.C. App. at 668, 284 S.E.2d at 159.
\(^{52}\) 303 N.C. at 271-72, 278 S.E.2d at 212.
\(^{53}\) C. McCormick, supra note 1, § 246, at 584. See also Fed. R. Evid. 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

In *State v. Cleveland*, 51 N.C. App. 159, 275 S.E.2d 284 (1981) the court held that "[t]he threat by defendant's confederate, made during their joint commission of the crime, was as competent against defendant as it would have been against the confederate." Id. at 160, 275 S.E.2d at 285. The declaration was not offered to show the truth of the matter asserted, but as "part of the totality of the circumstances in this case." Id. at 161, 275 S.E.2d at 285.

\(^{55}\) Id. at 734, 275 S.E.2d at 515.
\(^{56}\) A second arguably erroneous ruling involved a police officer's testimony for the State that
There also were several important cases in 1981 dealing with the res gestae exception to the hearsay rule, and, more particularly, with spontaneous utterances. The North Carolina Supreme Court discussed both terms in State v. Marvin. The underlying premise for the spontaneous utterance exception to the hearsay rule is that when a person responds to an unusual event before having time to reflect on that response, it is more likely to be trustworthy. This hearsay exception is a common-sense approach to the basic problem of hearsay, the removal of relevant information from the trier of fact. When safeguarded by the use of a stringent definition of spontaneous utterance, this hearsay exception becomes a valuable technique for determining the truth without infringing upon the rights of the defendant. To be a spontaneous utterance, the declaration must be (1) so spontaneous as to make reflection or fabrication unlikely; (2) made at the same time as the transaction or be so closely connected as essentially to be part of the event; and (3) relevant to the facts at issue. In Marvin the supreme court ruled that a statement, made by a participant in the robbery as he was carrying the stolen tools to the get-away vehicle, that he “had the guard on the floor,” was admissible as a spontaneous utterance. Although the court applied the res gestae test properly, it well may be time to reevaluate the usefulness of such a vague and ill-defined concept. General principles of relevancy and trustworthiness may be more useful in determining admissibility.

The supreme court decided two important cases involving the rule established in State v. Smith. Justice Huskins, speaking for the court in Smith, set forth the circumstances in which prior recorded testimony of a witness may be admitted at a subsequent trial: (1) the witness is unavailable; (2) the proceed-
ings at which the testimony was given was a former trial of the same cause, a preliminary stage of the same cause or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at the time and represented by counsel. In the first case, State v. Graham, the supreme court carefully delineated those instances in which the prior testimony of an unavailable material witness could be introduced into evidence without violating the defendant's sixth amendment right of confrontation. In order to protect the defendant's sixth amendment right to confrontation, the opportunity to cross-examine must be more than theoretical. In Graham this standard was not met for two reasons. At the first trial defendant was accused of being an accessory before the fact. He therefore had no motivation to cross-examine the witness about the elements of the crime charged in the second trial, aiding and abetting. Furthermore, even if defendant had the same motivation, any real opportunity was eliminated by the first trial judge's instruction to limit the cross-examination to the issue of the presence of defendant at the homicide. Admission of the witness' prior testimony in this situation would have been a flagrant violation of the sixth amendment.

In the second case, Munchak Corp. v. Caldwell, the supreme court reviewed a case in which the court of appeals found what it believed to be a situation not covered by Smith. The case involved a claim by plaintiff employer for reformation of an employment contract. Defendant counterclaimed for specific performance. The trial court ordered that the two issues be tried separately. The reformation issue was tried before a jury on January 3, 1977. Over two years later, defendant's counterclaim for specific performance was tried before a different judge sitting without a jury. Defendant was allowed to offer into evidence the prior transcript without laying a foundation. The court of appeals, reasoning that the two proceedings were but two parts of the same case, stated that

62. Id. at 524, 231 S.E.2d at 675.
63. 303 N.C. 521, 279 S.E.2d 588 (1981). Defendant's previous prosecution as an accessory before the fact was dismissed. Defendant subsequently was charged with aiding and abetting in the same murder. A witness refused to testify at the subsequent trial, invoking his fifth amendment right. The State attempted to offer into evidence the transcript of the witness' testimony at the previous trial. The court, properly refused to allow the testimony in as an exception to the hearsay rule.
64. "An exception to the sixth amendment right of confrontation exists where a material witness is unavailable to testify, but has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant at the prior proceeding." Id. at 522-23, 279 S.E.2d at 590. See also Mattox v. United States, 156 U.S. 237 (1895). The justification for allowing the prior testimony as substantive evidence is that defendant's right of confrontation adequately was protected by the opportunity to cross-examine at the initial proceeding. Barber v. Page, 390 U.S. 719, 722 (1968).
65. 303 N.C. at 525, 279 S.E.2d at 591.
66. 301 N.C. 689, 273 S.E.2d 281 (1981). On discretionary review, the supreme court held that the trial court erred in permitting defendant to offer into evidence the transcript of the prior proceeding without laying a proper foundation. The court, however, ruled that the error was harmless when the proceeding at which the transcript was admitted was before a judge sitting without a jury, and when, disregarding incompetent evidence, there was sufficient admissible evidence to support the court's necessary findings in its award of specific performance.
[If the claim had been heard on the same day, the parties and the judge would have been cognizant of and able to rely on evidence presented on the claim for reformation . . . . To hold otherwise would be to destroy the ability of trial judges to exercise discretion by severing complicated cases into more understandable issues.67

The supreme court disagreed:

[We are not presented here with a situation in which a case is separated into issues to be heard at different times by the same judge or jury. In the case, the evidence was heard by a jury in the action on the complaint. That prior proceeding was presided over by Judge Kivett. Some two years later, the matter of defendant's counterclaim came on for trial before Judge Mills. The transcript constituted out-of-court statements, and, assuming that it was offered to prove the truth of the matters contained therein and was therefore hearsay, we hold that . . . it was inadmissible absent the laying of a proper foundation.68

D. Prior Acts as Substantive Evidence

Evidence of a defendant's prior crimes is not admissible under North Carolina law to prove that the defendant subsequently committed another crime.69 This well-established rule is subject to the equally well-established exception that evidence of prior crimes will be admitted when relevant to some other fact logically related to guilt.70 Evidence of prior crimes may be admissible, for example, to show motive,71 intent,72 identity73 or state of mind.74 Other well-recognized exceptions allow the evidence to be admitted to show a common scheme, plan or design.75 Expansive interpretation of these exceptions at times has threatened to swallow the rule.76

68. 301 N.C. at 693, 273 S.E.2d at 284-85. See text accompanying note 61 supra for a discussion of the necessary foundation.
70. Id. One often-quoted statement of the rule is as follows: Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.
75. See, e.g., State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981). Discriminating between evidence showing a common scheme and that showing propensity (forbidden under the general rule) is often difficult. For a discussion of this distinction, see 2 J. Wigmore, supra note 27, § 304, at 202-05.
76. See, e.g., State v. May, 292 N.C. 644, 665, 235 S.E.2d 178, 191 (Exum, J., in dissent, stating: "Under the majority's holding the rule against admitting such evidence is totally abrogated.") cert. denied, 434 U.S. 928 (1977); State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973) (commented on in 1 D. Stansbury, supra note 2, § 92 n.97 (Supp. 1979)); State v. McClain, 282
Reassuringly, several 1981 cases demonstrated judicial willingness to find error in substantive misuse of evidence of prior crimes. In *State v. Taylor*, the North Carolina Supreme Court found error in the trial court's allowing use of prior crimes evidence against a defendant charged with murder, armed robbery, aggravated kidnapping and assault with a deadly weapon with intent to kill. Defendant apparently had been involved in a number of incidents over a five-day period, but the charges had not been consolidated for trial. In this trial on charges relating to the third and fourth victim, the State introduced testimony of the second victim regarding assertions made to her by defendant of prior crimes similar to those for which he later was tried. The State argued that the evidence was admissible because the acts "constitute[d] an overall plan by this defendant to steal cars and to kidnap and rape women." The prosecution pointed out that testimony about the same prior crimes was held admissible by the supreme court in a previous trial against this same defendant for crimes committed against the second victim. The supreme court held that its prior ruling of inadmissibility was inapplicable to this trial because the kidnap victim here was male, and because no rape was involved in the incident for which defendant was being tried. Thus, the evidence did not tend to establish an overall plan to kidnap this victim and therefore was inadmissible.

The North Carolina Court of Appeals found reversible error in two cases involving substantive use of evidence of prior acts. In *State v. McAdams*, defendant was found guilty of involuntary manslaughter after his gun fired while he was cleaning it, killing his wife. The State introduced testimony that the day before the shooting defendant had, in the course of cleaning his gun, pointed it toward a neighbor. The court of appeals pointed out that this evidence was relevant only to establish "a culpably negligent disposition: and was thus improperly and prejudicially admitted."

Although North Carolina courts traditionally have been liberal in admitting evidence of prior sex crimes in cases involving similar sex offenses, the

---


78. Because of the overwhelming evidence against the defendant apart from the erroneously admitted evidence, however, the error was held to be harmless beyond a reasonable doubt. Id. at 270, 283 S.E.2d at 775.

79. Examination of published opinions of defendant's earlier trial suggests that the sequence of events was as follows: defendant kidnapped, raped and stole the car of a female (State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980)); following his release, he kidnapped, raped, and stole the car of a second female, murdered a third female and kidnapped, shot, and stole the car of a male, all occurring between August 28 and September 1, 1978. The trial that was the subject of the 1981 opinion did not include charges relating to the first two victims.

80. 304 N.C. at 269, 283 S.E.2d at 775.

81. Id. at 270, 283 S.E.2d at 775.


83. Id. at 143, 275 S.E.2d at 502. While a series of such incidents might be admissible as habit, see 1 D. Stansbury, supra note 2, § 95, at 306 n.23, one such incident clearly falls short.

84. E.g., State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); 1 D. Stansbury, supra note 2, § 92, at 299.
court of appeals found reversible error in such admission in State v. Pace. In that case defendant, charged with rape, relied upon a consent defense. The State called a witness who testified that she had been raped by defendant some months before. Defendant admitted intercourse with the witness but alleged consent. In reversing the trial court's refusal to exclude the State's evidence of prior acts, the court of appeals pointed out that the evidence could not come in under the identity exception because identity was not at issue in the case, nor were there sufficient similarities in the alleged acts to invoke the common scheme or modus operandi exceptions. Because the evidence was relevant only to show a disposition on the part of defendant to commit sex crimes, and because the defense relied to such a great extent on defendant's credibility, the court of appeals reversed the conviction.

These decisions are entirely consistent with the policies underlying the prohibition against substantive use of prior act evidence. The analysis in all three cases is clear, and should provide substantial guidance to members of the legal profession. In particular, the court's decision in Pace serves notice that even the court's oft-noted leniency in admitting such evidence in sex-crime cases is not without bounds.

E. Cautionary Instructions

The cautionary instruction is a means of controlling the evidence considered by the jury. It may be used to restrict the use of evidence admitted for a limited purpose or to exclude entirely from the jury's consideration evidence that, although inadmissible, nevertheless found its way to the jury. The rules in North Carolina regarding the use of the cautionary instruction are for the most part fairly clear. The instruction may be given upon the motion of counsel, or the court may act ex mero motu. The time at which the instruction is given is discretionary; the court may act immediately, or it may wait until its final charge to the jury. It is presumed that the jury disregards evidence removed from its consideration by instruction, but this presumption may be overcome by a showing that the nature of the evidence or its manner of presentation rendered implausible the jury's ability to comply with the instruc-

86. Id. at 83-84, 275 S.E.2d at 256.
87. Id.
88. For an excellent discussion of the policies underlying the general rule see State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954).
89. See I J. Wigmore, supra note 27, §§ 13, 19.
93. Id. If given promptly, the instruction need not be repeated at the end of trial in the absence of counsel's request for repetition. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).
tion. Failure to make an affirmative request for a cautionary instruction constitutes waiver of the right to have the jury so instructed. Therefore, absent unusual circumstances, failure to instruct will not result in appellate reversal when no request was made by counsel.

Two significant 1981 cases questioned the sufficiency of protection against prejudicial use of inadmissible evidence provided by cautionary instructions. In *State v. Silva* the jury in a criminal trial was informed of the results of a search subsequently held to have been illegal. A curative instruction was delivered by the court following belated *voir dire* on the legality of the search. The North Carolina Supreme Court held that the instruction provided insufficient protection against prejudice to the defendant.

Cautionary instructions received different treatment from the North Carolina Court of Appeals in *Fidelity Bank v. Garner*, an action to collect the balance due on a note from an accommodation endorser. In closing argument, plaintiff's counsel stated that defendant previously had been convicted of perjury. Because this was the first mention of any such conviction, there was no supporting evidence in the record. The court promptly instructed the jury to disregard the statement, denying defendant's motion for a mistrial. The court of appeals, relying on the rule that the jury is presumed to disregard evidence when instructed to do so, upheld the trial court's action. In a strong dissent Judge Becton argued that the jury could not help but be influenced by the attorney's statement, despite the cautionary instruction.

When a motion to strike is granted, the better practice is immediately to instruct the jury to disregard the witness' answer. Vandiver v. Vandiver, 50 N.C. App. 319, 323, 274 S.E.2d 243, 246, disc. review denied, 302 N.C. 634, 280 S.E.2d 449 (1981). Failure to do so, however, is unlikely to amount to prejudicial error; the court will assume that the trial judge's sustaining of counsel's motions to strike alerted the jury that the evidence was inadmissible. Id. at 133, 282 S.E.2d at 456.

While the general rule is that an instruction that evidence is not to be considered cures any error in its admission, the rule is inapplicable when the error admitting the evidence is of constitutional dimension. In such a case, prejudice is presumed, and the burden is on the State to prove otherwise.


97. *See, e.g.*, *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978). In *Locklear* the prosecuting attorney said to a defense witness, "[Y]ou are lying through your teeth and you know you are playing with a perjury count; don't you?" Id. at 214, 241 S.E.2d at 68. Although no timely objection was made, the trial court's failure to suppress the comments *ex mero motu* was held reversible error. The supreme court stated that the trial court has a duty to intervene in cases of "flagrant and prejudicial misconduct of counsel." Id. at 218, 241 S.E.2d at 70. But cf. *State v. Jordan*, 49 N.C. App. 560, 272 S.E.2d 405 (1980) (prosecutor's statement to defense witness that "[y]ou know that is a lie don't you?" not so improper as to invoke exception to general waiver rule).


99. While the general rule is that an instruction that evidence is not to be considered cures any error in its admission, the rule is inapplicable when the error admitting the evidence is of constitutional dimension. In a such a case, prejudice is presumed, and the burden is on the State to prove otherwise.

100. 52 N.C. App. 60, 277 S.E.2d 811 (1981).

101. There was, however, evidence of a different conviction (for insurance fraud) for which the defendant had received a full pardon. Id. at 64-65, 277 S.E.2d at 814.

102. Id. at 65, 277 S.E.2d at 814.

103. The dissent quoted extensively from *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), stating that the principles set forth in that case should control. *Britt* involved a criminal trial in which a prosecutor introduced inadmissible evidence in the course of cross-examination of a defendant being tried for murder. Defendant previously had been sentenced to death for the identical offense, but was being retried following reversal of his conviction by the North Carolina
The solution to the problem presented in *Fidelity Bank* is not as clear as was the case in *Silva* or *State v. Britt*. Those cases involved criminal trials, in which the juries repeatedly were exposed to inadmissible and prejudicial evidence. *Fidelity Bank*, on the other hand, involved a civil action that had proceeded without serious incident until closing arguments, at which point a single reference to inadmissible evidence occurred. The trial court's refusal to grant a mistrial, and the court of appeals' refusal to reverse, are thus not without logical support. Nevertheless, as the dissent pointed out, it is virtually impossible to believe that the jury could have been unaffected by information having such apparent and devastating relevance. Furthermore, as also was suggested by the dissent in *Fidelity Bank*, the majority decision provides little incentive to attorneys to avoid making such arguments, for they may be secure in the knowledge that a cautionary instruction will protect them.

**F. Opinion**

North Carolina courts decided several cases involving opinion evidence. In *Combs v. Woodie* the court of appeals held that the trial court committed error sufficient to require a new trial by allowing surveyors to state their opinions of the location of the true boundary lines between two parties' properties.

In North Carolina a surveyor may give his opinion about whether a mark or an object is a boundary of some tract of land, but the surveyor may not give

---

Supreme Court. The court explained this to the jury in a cautionary instruction necessitated by the prosecutor's reference to the events leading up to the trial. The prosecutor's improper conduct in this and several other instances led the North Carolina Supreme Court to reverse defendant's conviction yet again. The court stated, "[S]ome transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors." Id. at 713, 220 S.E.2d at 292. The dissent in *Fidelity Bank* rested its argument on this statement and others like it in *Britt*. 52 N.C. App. at 66-69, 277 S.E.2d at 214-16 (Becton, J., dissenting).


105. A cautionary instruction is, of course, less likely to be effective if exposure is repeated. Duke Power v. Winebarger, 300 N.C. 57, 263 S.E.2d 227 (1980). In *State v. Jones*, 54 N.C. App. 482, 283 S.E.2d 546 (1981), the court dealt with this problem in an interesting fashion. In that case, a court reporter, acting at the jury's request, read back testimony of an expert witness, including portions that had been stricken at trial. Because the reporter had read back the cautionary instruction as well, the court held that the error was non-prejudicial.

106. "It is hard to imagine a more damaging and damning statement. It is folly to believe that all twelve jurors were able completely and totally to erase the . . . statement from their minds." 52 N.C. App. at 67, 277 S.E.2d at 815.

107. "This court should not sanction the type of argument in this case and should not 'open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach.'" Id. at 68, 277 S.E.2d at 816 (quoting *State v. Miller*, 271 N.C. 646, 660, 157 S.E.2d 355, 346 (1967)) (Becton, J., dissenting).

108. In *State v. Wells*, 52 N.C. App. 311, 278 S.E.2d 527 (1981), the court of appeals held that the trial court's admission of the investigating officer's opinion of the location of the impact in an automobile collision was error. Id. at 314, 278 S.E.2d at 529. The court said that although the officer was competent to testify on the condition and position of the vehicles and other physical factors observed by him at the scene, testimony of his conclusions about the traffic lane in which he believed the accident occurred was incompetent because it invaded the province of the jury. Id.


110. Id. at 790, 281 S.E.2d at 706.
his opinion of the boundary's location (relative to a specific tract of land), because this is a simple question of fact, not a question of science or skill. The surveyor is limited to relating facts within his knowledge when giving evidence on the boundaries of land. The effect of the North Carolina rule is to refuse to recognize both that a surveyor is an expert and that the location of property boundaries is a proper subject for expert testimony.

The North Carolina rule has been criticized for this very reason. Indeed, this rule appears to be a deviation from the typical rule structure concerning expert opinions. Clearly, if the dispositive question is whether the issue "is one on which the witness can be helpful to the jury because of his superior knowledge," there is no persuasive rationale for the consistent refusal by the North Carolina courts to allow surveyors to give their opinions about the location of a boundary. "However, the rule is firmly ensconced in the law in this State, and the Supreme Court has not seen fit to change it."

When next presented with this issue, the supreme court should seize the opportunity to eliminate this antiquated rule of law.

In State v. Loren the supreme court upheld the trial court's admission of testimony by the arresting officer in a first degree rape case that defendant was acting as if he was trying to hide something. The court reasoned that this testimony constituted a shorthand statement of fact, since it was impracticable for the officer to so describe defendant's actions as to allow the jury to draw the conclusion.

In In re Peirce a social worker testified on an issue that required an expert opinion. Defendant objected but was overruled by the trial court. The court of appeals held that by overruling the defendant's objection the trial
judge implicitly found that the witness was qualified as an expert.122

In State v. Boone,123 a prosecution for armed robbery and kidnapping, the supreme court affirmed the well-settled principle in North Carolina that lay opinion may be received concerning the mental capacity of a defendant in a criminal case.124 The court also held that it was error for the trial court to exclude the testimony of a deputy sheriff who, after observing the defendant set fire to the bed in his cell, testified that defendant was “totally unaware of what he was doing.”125 North Carolina allows opinion evidence by non-experts concerning the irrational acts of an accused that occur proximately to the time of the alleged offense.126

G. Testimony127

In State v. Miller128 a professor of pathology and regional pathologist in the Chief Medical Examiner’s office was offered as an expert witness to give testimony of the size, or gauge, of a murder weapon.129 The supreme court held that the witness was properly qualified as an expert forensic pathologist

---

122. Id. The witness had four years of experience as a social worker. See also State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977), and 1 D. Stansbury, supra note 2, § 133, at 428-32, for discussion regarding the qualifications of expert witnesses.
124. Id. at 565, 276 S.E.2d at 357. Defendant’s father was asked on cross-examination whether defendant knew right from wrong. See State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976). See generally 1 D. Stansbury, supra note 2, § 127.
125. 302 N.C. at 565, 276 S.E.2d at 357. This error, however, was found to be non-prejudicial.
126. Id.
127. In State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, disc. review denied, 302 N.C. 399, 279 S.E.2d 358 (1981), the court of appeals held that an expert psychiatrist’s opinion whether defendant had suffered panic upon discovery of the victim’s body was properly excluded. Because the psychiatrist had met with defendant only once, for the purpose of preparing for trial, the conversation with defendant therefore lacked inherent reliability. Id. at 698-99, 275 S.E.2d at 853-54. For a discussion of the inherent reliability standard, see Survey of Developments in North Carolina Law, 1980—Evidence, 59 N.C.L. Rev. 1182-86 (1980).
129. Id. at 580, 276 S.E.2d at 421-22.
whose skills included determining the nature of the instrumentality causing an injury.130

In State v. Puckett,131 however, the court of appeals upheld the trial court's refusal to allow a witness qualified as an expert in the field of pathology to testify about the results of a toxicologic analysis of a murder victim's body. The court of appeals reasoned that the witness qualified as an expert only in the field of pathology, and noted that the toxicologic examination was completed by someone not under the pathologist's supervision.132

In Cochran v. City of Charlotte133 the trial court allowed expert testimony as to the adverse effect on plaintiff's properties caused by the extension of an airport runway.134 The court of appeals held that the witnesses were qualified as experts due to their experience and knowledge of the value of property in the airport area, even though the witnesses' familiarity with the history of the effect of the airport upon the value of surrounding properties was not established.135 In another aspect of this case, the court of appeals upheld the trial court's refusal to admit the testimony of a witness stipulated to be "an expert Mechanical and Aerospace Engineer, specializing in the field of Acoustics in Noise and Vibration Control."136 The witness was called to testify on the effect of noise on humans, but there was nothing in the record that established a special expertise by the witness in the field of the effect of noise on humans.137

In 1981 the General Assembly enacted a statute eliminating the requirement that expert testimony be given only in response to hypothetical questions and establishing the conditions under which an expert must disclose the underlying facts or data upon which his opinion is based.138 The new law promises to simplify the introduction of expert testimony and will have a decided impact on the conduct of trials in this state.

H. Statutory Developments

1. Privilege for Records of Medical Review Committees

The General Assembly enacted a statute in 1981 restricting the admissibility of records, proceedings and other materials of medical review committees in civil actions against providers of health services.139 In essence, the

130. Id.
132. Id. at 580, 284 S.E.2d at 328. The court noted that exclusion of such testimony was within the discretion of the trial court. Id.
134. Id. at 398, 281 S.E.2d at 186. The experts were real estate appraisers.
135. Id. at 398-99, 281 S.E.2d at 186-87.
136. Id. at 403, 281 S.E.2d at 189.
137. Id.
The proceedings of, records and materials produced by, and the materials considered by a committee are not subject to discovery or introduction into evidence in any civil action...
NORTH CAROLINA LAW REVIEW [Vol. 60

statute grants a limited privilege to hospitals in medical malpractice cases. The policy underlying the statute is to allow physicians and other health care personnel to discuss more openly all of the factors in a given case and thus ultimately to produce better medical care for society. From the point of view of the patient injured by negligent medical care, however, the statute may deny access to valuable and often essential information necessary if the patient is to bring a claim for relief.

2. Spousal Competency

At common law, husbands and wives were incompetent to testify either for or against each other in both civil and criminal cases. Today, the common-law rule in civil actions has been widely abrogated by statute. With certain exceptions, a husband or wife now may testify for or against the other in criminal actions without interference by the old common-law bar.

One aspect of the common law of spousal competency that did not change was the so-called "Mansfield rule." Under this rule a husband or wife was not permitted to testify to the husband's non-access to his wife during the period in which conception occurred. As it was colorfully put, neither spouse was allowed to "bastardize the issue."

In 1981 the Mansfield rule was abolished by the enactment of G.S. 8-57.2, which permits either a husband or wife to testify on "any relevant matter" in cases in which paternity is an issue. The reasons for the old rule have been

---

140. C. McCormick, supra note 1, § 66, at 144-46.
143. Application of the Mansfield rule in North Carolina is discussed in 1 D. Stansbury, supra note 2, § 61. For cases applying the rule, see, e.g., Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Wake County Child Support Enforcement ex rel. Bailey v. Matthews, 36 N.C. App. 316, 244 S.E.2d 191 (1978).
144. Goodright v. Moss, Cwmp. 591 (1777), quoted in 1 D. Stansbury, supra note 2, § 61, at 194.

Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which
long unclear; although not serving as a bar to the admission of other evidence of paternity, it served to render inaccessible what was arguably the best evidence on the point. The new law should significantly simplify proceedings in an area in which proof is often difficult to produce.

3. Photographs

In 1981 the North Carolina General Assembly enacted a statute allowing the introduction of photographs and photographic representations as substantive evidence. The statute provides as follows:

Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.146

The legislature thus eliminated the irrational distinction that has prevailed in North Carolina since 1929 between photographs as substantive evidence and photographs as illustrative evidence.147

Prior to enactment of G.S. 8-97, the general rule in North Carolina was that photographs and similar representations were admissible only for the limited purpose of illustrating the testimony of a witness.148 Although the rule was criticized severely,149 the North Carolina courts consistently refused to eliminate the illustrative-substantive distinction,150 choosing instead to make exceptions to the rule.151

In eliminating this distinction, G.S. 8-97 places North Carolina in line with other jurisdictions that have ignored the illustrative-substantive distinction.152 Once a proper foundation has been established, photographs and similar representations will now be admissible either as substantive evidence or as illustrative evidence. The nature of the authentication required for the intro-

---


149. See, e.g., 1 D. Stansbury, supra note 2, § 34, at 98-100; C. McCormick, supra note 1, § 214, at 530-34; 3 J. Wigmore, supra note 27, § 790; Survey of Developments in North Carolina Law, 1979—Evidence, 58 N.C.L. Rev. 1456-59 (1979).


duction of photographs introduced for substantive purposes is the same as that for photographs introduced solely for illustrative purposes, except that a witness need not first describe the scene.\textsuperscript{153} For photographic representations such as X-rays and hidden cameras a different foundation probably will be required. Pictures such as these may be authenticated by showing that, in general, the process by which such a picture is made is accurate and reliable and that the particular photograph sought to be admitted was properly made.\textsuperscript{154}

With the enactment of G.S. 8-97, North Carolina finally recognizes that technological developments have made photographic evidence an accurate and reliable evidentiary form. By eliminating the unnecessary illustrative-substantive distinction, the legislature has authorized the use of a properly authenticated photograph as a "silent witness,"\textsuperscript{155} and not merely as an illustration of the testimony of a witness.

JAY MICHAEL GOFFMAN
MARTIN L. HOLTON, III
DONA LEWANDOWSKI

\textsuperscript{153} Interview with Kenneth Broun, Dean of the University of North Carolina School of Law and contributing author of C. McCormick's Handbook of the Law of Evidence (2d ed. 1972), in Chapel Hill, N.C. (February 10, 1982). For a discussion of the requirements for authenticating photographs under the old rule, see 1 D. Stansbury, supra note 2, \S\ 34.

\textsuperscript{154} See Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950); 3 J. Wigmore, supra note 27, \S\ 795, at 244.

\textsuperscript{155} See 3 J. Wigmore, supra note 27, \S\ 790, at 220.
VIII. FAMILY LAW

A. The Parent-Child Relationship

1. Establishing Paternity

In 1981 the North Carolina General Assembly amended G.S. 49-14 to eliminate the statute of limitations in civil actions to establish paternity. The former version of the statute had allowed these actions only when brought within either a) "three years next after the birth of the child," or b) "three years next after the date of the last payment by the putative father for the support of the child, whether such last payment was made within three years of the birth of such child or thereafter." The amended statute permits a suit to establish paternity to be commenced at any time prior to the death of the putative father.

This amendment places the statute in compliance with the 1980 decision in County of Lenoir ex rel. Cogdell v. Johnson. In Cogdell the court of appeals held G.S. 49-14(c)(1) to be violative of the equal protection clause of the fourteenth amendment of the United States Constitution. The General Assembly obviously realized that G.S. 49-14(c)(2) was equally defective and eliminated both subdivisions.

In another action relating to paternity, the General Assembly added a
new section, G.S. 8-57.2, which enables the presumed father or mother of a child to testify in any action (civil or criminal) in which paternity is at issue. This section expressly overrules the common-law rule in North Carolina that neither spouse can "bastardize" a child by testifying to the husband's nonaccess to the wife at the time of conception.

Before G.S. 8-57.2 was ratified, the court of appeals had already judicially repudiated the common-law rule of parental incompetency. In *Wake County ex rel. Manning v. Green* the court held that the rule had outlived its purpose of protecting a child from "illegitimacy" that would deprive the child of legal and property rights. According to the court, such deprivations have been largely ameliorated by the United States Supreme Court in recent years. The *Manning* court concluded that spousal testimony was the best evidence on the issue of access and should be admissible.

The *Manning* court also dealt with the presumption of the legitimacy of a child born within marriage. The court was required to define the standard of proof necessary to rebut this presumption in a civil suit. Some North Carolina courts in the past had required proof that the husband "could not have had access" to the mother (in other words, impossibility of access); other courts had found proof that the husband "did not have access" sufficient to rebut the presumption of legitimacy. The court of appeals in *Manning* held that the "did not have access" standard was sufficient. As the court pointed out, in today's mobile society if the father was required to negate every possibility of access the presumption would become a conclusive one.

2. Termination of Parental Rights

G.S. 7A-289.23 was amended in 1981 to provide indigent parents the right to appointed counsel in a proceeding to terminate parental rights. The stat-

---
   Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which may otherwise apply.
10. See Ray v. Ray, 219 N.C. 217, 220, 13 S.E.2d 224, 226 (1941). This rule is commonly referred to as "Lord Mansfield's Rule"; apparently it originated in dictum by Lord Mansfield in a 1777 ejectment case.
12. Id. at 31, 279 S.E.2d at 904.
13. Id.
17. 53 N.C. App. at 30, 279 S.E.2d at 904.
18. Id.
ute, as amended, directs the Administrative Office of the Courts to bear the fees of appointed counsel. Prior to amendment, G.S. 7A-289.23 only provided for the appointment of a guardian ad litem, who was to be an attorney, to represent minor parents in termination hearings. Indigent parents are now entitled to appointed counsel and, in addition, are entitled to an appointed guardian ad litem if 1) "it is alleged that a parent's rights should be terminated pursuant to G.S. 7A-289.32(7);" or 2) "the parent is under the age of 18 years."

The legislature amended G.S. 7A-289.23 after the United States Supreme Court had decided that appointment of counsel was not constitutionally required in all termination proceedings. In *Lassiter v. Department of Social Services* the petitioner, a mother whose rights had been terminated by a district court in Durham County, North Carolina, appealed the termination on the ground that the due process clause of the fourteenth amendment entitled her, as an indigent, to an appointed attorney. In a 5-4 decision the Supreme Court rejected this argument and held that the Constitution does not require the appointment of counsel for indigent parents in every parental status termination hearing. Ms. Lassiter, the court decided, had not been denied due process as she had faced no chance of incarceration, her case had not presented any troublesome points of law and an attorney could not have made a difference in the determination of her case. Although it is conceivable that *Lassiter* could be viewed as a conclusion by the United States Supreme Court that indigent parents do not need or deserve legal representation in parental termination hearings, the North Carolina Legislature should be commended for amend-

Gen. Stat. § 7A-289.23 (1981). This act amended three other sections of Articles 24B and 36, also dealing with the appointment of counsel in such cases:


2. At the time of the termination hearing the court shall determine whether the parents are indigent; if they are, counsel shall be appointed to represent them. Parents are also entitled to an extension of time following this appointment. Id. § 3, at 1492 (codified at N.C. Gen. Stat. § 7A-289.30 (1981)).

3. "An action to terminate indigent parent's rights" is now included among the listed actions entitling indigents to counsel. Id. § 4, at 1492 (codified at N.C. Gen. Stat. § 7A-451(a) (1981)).


23. Id. § 7A-289.23(2).


25. 452 U.S. at 31.

26. Id. at 33.

27. Recognizing this possibility, Justice Stewart took pains to note that:
The issue of the right to a trial by jury in parental status termination proceedings was addressed by the North Carolina Court of Appeals in *In re Ferguson.* In *Ferguson* petitioner mother appealed the denial of her motion for a jury trial in her termination proceeding. The court in *Ferguson* held that petitioner was not entitled to a trial by jury. The court noted that the termination statutes expressly provide for trial by judge; therefore, the court concluded, the petitioner would only be entitled to a jury trial if there was a constitutional right to a jury in this proceeding. The constitutional right would exist only "where the perogative existed at common law or by statute at the time the Constitution was adopted . . . . Proceedings to terminate parental rights were unknown at the common law . . . . The statute establishing these proceedings was first adopted by the legislature in 1969." For these reasons the Ferguson court held that the natural mother had no right to a trial by jury in these proceedings.

The constitutionality of North Carolina's termination proceedings was attacked again in *In re Biggers.* The respondent in *Biggers* argued that the termination statute was unconstitutional in that all the grounds for termination in G.S. 7A-289.32 were void for vagueness. The court of appeals rejected this argument, finding the statute sufficiently specific to overcome the vagueness definition.

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under our Constitution. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

452 U.S. at 33-34. See also Besharov, supra note 24, at 219-21.

28. The issue of the appointment of counsel for indigent parents in termination proceedings was addressed in August of 1981 by the North Carolina Supreme Court. In *In re Clark,* 303 N.C. 592, 281 S.E.2d 47 (1981), the petitioner argued that G.S. 7A-289.23 (at that time unamended) was violative of the North Carolina Constitution. In *Clark* the court, following *Lassiter,* held that the "failure of the Act, (prior to recent amendment), to require appointment of counsel for indigent parents or the minor child in all cases did not make the act unconstitutionally defective under the Constitution of North Carolina." 303 N.C. at 600, 281 S.E.2d at 53.

30. Id. at 684, 274 S.E.2d at 880.
33. 50 N.C. App. at 683, 274 S.E.2d at 880.
34. The court in *Clark* also held that there "exists no constitutional right to trial by jury in proceedings to terminate parental rights." 303 N.C. at 607, 281 S.E.2d at 57.
37. The *Biggers* court noted that similar statutes are increasingly being attacked on vagueness grounds. These attacks, the court stated, have been almost uniformly rejected. 50 N.C. App. at 341-42, 274 S.E.2d at 242. See Comment, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, 1980 Duke L.J. 336.
38. 50 N.C. App. at 341-42, 274 S.E.2d at 242. In *Clark* the petitioner also argued that G.S. 7A-289.32 was void for vagueness. The North Carolina Supreme Court rejected this argument, making reference to *Biggers.* 303 N.C. at 605, 281 S.E.2d at 56.
The trial judge had determined that the Biggers' child was a neglected child under G.S. 7A-278(4)\(^{39}\) and had terminated parental rights pursuant to G.S. 7A-289.32(2).\(^{40}\) The court of appeals, therefore, was required to determine whether G.S. 7A-278(4)'s definition of a 'neglected child' rendered the termination statute unconstitutionally vague. The court determined that G.S. 7A-289.32(2) was not vague because "the terms used in 7A-278(4) are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and parents are, therefore, given sufficient notice of the types of conduct that constitute child neglect in this State."\(^{41}\)

The respondent in *Biggers* also attacked the constitutionality of G.S. 7A-289.32 on equal protection grounds. This statute provides seven grounds for termination of parental rights. Two of these, G.S. 7A-289.32(2) and (4), were identified by the trial judge as grounds for termination in the *Biggers* case. The court of appeals considered only whether subdivision (4) was subject to attack on equal protection grounds.\(^{42}\) Subdivision (4) permits termination when the child has been placed in foster care and the parent fails, for six months, to pay reasonable costs of support.\(^{43}\) The basis for an equal protection claim would be that this subdivision discriminates against parents according to their financial circumstances. The court of appeals concluded that this claim could not be sustained: "G.S. 7A-289.32(4) requires parents to pay a reasonable portion of the child's foster care costs, and this requirement applies to all parents irrespective of their wealth or poverty . . . . [The ability of the parents to pay is the] controlling characteristic of what is a reasonable amount for them to pay."\(^{44}\)

As the court pointed out, all parents have a duty to support their children, within their means. According to the *Biggers* court, G.S. 7A-289.32(4) represents the legislature's conclusion "that a child's best interest is served by a termination of parental rights when his parents cannot provide reasonable support."\(^{45}\)
3. Adoption

G.S. 48-25 was revised during the 1981 General Assembly to allow release to the adopting parents of non-identifying adoption information—information that will not identify a biological relative of the adoptee. The 1981 change rewrote subsection G.S. 48-25(d) and added a new subsection, (e). Prior to the change, G.S. 48-25(d) had only provided for the release of medical records or other information concerning the physical or mental health of the adopted child, and this information only upon demand. The amended subsection (d) requires that the adoptive parents be given, prior to finalization of the adoption, a number of types of information including information concerning the date of birth of the adoptee and weight at birth, the age of the biological parents, the heritage of the biological parents, the education of the biological parents, and the general physical appearance of the biological parents. This information can be withheld only if it would tend to identify a biological relative of the adoptee.

Subsection (e) of G.S. 48-25 requires that the adoptive parents also be given a complete health history of the biological parents, if available. This history shall include “any information which would have a substantial bearing on the adoptee’s mental or physical health.” The problem with this subsection is that the medical information is often inadequate; G.S. 48-25(e) only compels disclosure of a full health history “if available”. One possible solution to this problem would be to require the natural parents to answer a detailed questionnaire during the preadoption investigation. In this manner the medical information, which is often very important, would be available.

4. Child Abuse

Four bills were passed by the General Assembly in 1981 concerning child abuse. The most significant of the four bills was House Bill 243, which rewrote G.S. 7A-549. The new statute allows a medical professional who suspects that he or she is treating an abused child to retain custody of the child for twelve hours, when authorized by a chief district judge. During these twelve

---

49. Id. § 48-25(d)(2).
50. Id. § 48-25(d)(3).
51. Id. § 48-25(d)(4).
52. Id. § 48-25(d)(5).
53. Id. § 48-25(d).
54. Id. § 48-25(e).
55. Id.
56. See Speas, supra note 47, at 581.
hours the department of social services is to be notified and to begin immediate investigation.

The other three bills did not drastically change the existing law. School personnel are now under a duty to report suspected child abuse cases to the director of the area social services department.58 Appointment of a non-lawyer as guardian ad litem in abuse and neglect cases is now permitted.59 Judges may now enter consent orders on petitions charging abuse, neglect or dependency when all parties are present and represented (all but the juvenile may waive representation) and sufficient findings of fact are made by the judge.60

B. Divorce61

In *Pitts v. Pitts*62 the North Carolina Court of Appeals held that a trial court erred in failing to instruct a jury that isolated or casual acts of sexual intercourse between separated spouses toll the statutory period for divorce based on a one-year separation period.63 Although the decision applied existing law, the court, in dicta, also commented on North Carolina case law which holds that even isolated acts of intercourse constitute the resumption of marital relations64 and thereby toll the statutory separation period. The court opined that this precedent discourages reconciliation because of a fear that one act of intercourse could defeat an action for absolute divorce; it also asserted

62. 54 N.C. App. 163, 282 S.E.2d 488 (1981). In *Pitts* the wife filed an action for divorce based on a one year separation period. The husband testified that the parties had engaged in sexual relations during the one-year period, and the wife denied this allegation. After the jury returned a verdict for the wife on the issue of fulfillment of the statutory separation requirement, the district court granted the wife's divorce. The issue on appeal was whether the trial court erred in not instructing the jury that isolated acts of intercourse would toll the statutory separation period.
63. G.S. 50-6 states: "Marriages may be dissolved and the parties thereto divorced form the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year . . . ." N.C. Gen. Stat. § 50-6 (Cum. Supp. 1981).
64. In *Murphy v. Murphy* the North Carolina Supreme Court held that sexual intercourse between husband and wife after the execution of a separation agreement voids the contract, even though the resumption of sexual relations is "casual" or "isolated." 295 N.C. 390, 395, 245 S.E.2d 693, 697 (1978). Accord Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980); State v. Gossett, 203 N.C. 641, 166 S.E. 754 (1932). See also Wadlington, Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws, 63 Va. L. Rev. 249, 258-59 (1977).
that the rule may encourage manipulation of the spouse who desires reconciliation by the other, who wants to void an unfavorable separation agreement.65 "In view of such dangers," the court stated, "the dictates of public policy strongly suggest that this matter is worthy of legislative consideration."66 Pits is significant because it represents another attempt by the court of appeals to express its opposition to a harsh and destructive trend in North Carolina family law.

Responding to another developing trend in the law, the court of appeals in Crutchley v. Crutchley68 decided that divorcing spouses may submit their support disputes to arbitration.69 To resolve this issue, the court interpreted the Uniform Arbitration Act, which governs written agreements to arbitrate.70 The court based its conclusion on the statute's broad language: "[T]wo or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement. . . ."71 Because the legislation did not specifically exclude domestic disputes from the scope of the Act,72 the court reasoned that the provision in the statute encompassed the arbitration of support issues between divorcing spouses.

Also in 1981, the court of appeals addressed the issue of personal indignities as a fault ground for divorce.73

65. 54 N.C. App. at 165, 282 S.E.2d at 490.
66. Id.
68. 53 N.C. App. 732, 281 S.E.2d 744 (1981). In 1976 plaintiff wife filed an action for a divorce from bed and board, alimony pendente lite, permanent alimony, custody of the children and child support, title to the parties’ residence and two vacant lots and counsel fees. The husband answered the complaint and counterclaimed for a divorce from bed and board and for custody of the children. Thereafter, the court entered an order approving the parties’ consent to arbitration and in 1977 granted defendant’s motion for confirmation of the award, which granted plaintiff custody of the two oldest children, child support and alimony. In 1978 the wife filed a motion in the cause requesting modification of the arbitration award to increase the alimony and child support amounts. The trial court denied plaintiff’s motion, stating that the arbitrator’s award was binding on the parties. The issue before the court of appeals was whether a judically confirmed arbitrator’s award dealing with spousal support could be modified after the statutory time period for modification had expired.
69. Id. at 737, 281 S.E.2d at 747. After resolving this threshold question, the court affirmed the trial court’s decision to deny plaintiff wife’s motion to modify the arbitrator’s award on the grounds that it was binding on the parties, absent their consent to modify, after the statutory time period for modifying an award had expired. Id. at 739, 281 S.E.2d at 748.
71. Id. § 1-567.2(a) (emphasis added by the court).
72. The legislature did create two specific exemptions to the general rule of arbitrability: disputes between employers and employees or their representatives and agreements stipulating that the Act shall not apply. Id. § 1-567.2(b)(1), (2).
73. In Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981), the North Carolina Court of Appeals upheld the trial court’s grant of a divorce from bed and board to plaintiff wife. The court held that plaintiff’s evidence of her husband’s act—allowing their minor children to view “hardcore” pornographic material and making sexual advances upon the parties’ minor daughter—were sufficient to constitute “such indignities to the person . . . as to render his or her condition intolerable and life burdensome.” N.C. Gen. Stat. § 50-7(4) (1976). 50 N.C. App. at 324, 274 S.E.2d at 247.
In *Hamlin v. Hamlin* the North Carolina Supreme Court held that a trial court was justified in hearing a father's motion to modify visitation rights without the presence of the father. Upon the parties' separation in 1973, the trial court found that both plaintiff-wife and defendant-husband were fit to take custody of their son, but that it would be in the son's best interest to grant primary custody to his mother and temporary custody to his father during the summer months. Plaintiff and defendant were divorced in 1974; the custody arrangements, however, remained unchanged. In 1975 defendant took the son, without the consent of the mother, from North Carolina to Alaska where defendant was then living. After defendant returned the child to North Carolina, the parties agreed that neither of them would take their son outside North Carolina without consent of the other or permission of the court. Subsequently, defendant filed a motion asking the court to permit the son to visit defendant in Alaska for periods not to exceed forty-five days. Plaintiff appealed from this order. The court of appeals affirmed and plaintiff appealed to the supreme court.

The supreme court compared a child custody proceeding to any other civil dispute, noting that G.S. 1-11 provides that “[a] party may appear either in person or by attorney in actions or proceedings in which he is represented.” Although the court recognized that a party generally is not required to appear in a civil proceeding, it also stated that, except where “compelling circumstances . . . otherwise dictate,” a judge should require the presence of both parties in child custody matters in order better to evaluate the best interest of the child. The court found the unusual facts of this case to rise to the level of “compelling circumstances,” and therefore affirmed the

---

74. In Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981), the court of appeals evidenced its willingness to award permanent custody of a child to the father. Upon plaintiff wife's testimony that her husband had taken good care of the child since their separation, the court found no error in the trial court's award of custody to defendant-father.


76. Id. at 483, 276 S.E.2d at 385-86.

77. Id. at 478-81, 276 S.E.2d at 383-84.


79. 302 N.C. at 484, 276 S.E.2d at 386.


81. The court noted that the son was 14 years old with no apparent disabilities; that defend-
lower court’s order.

Justice Carlton, in dissent, persuasively argued that the majority had created “a dangerous precedent in the child custody law of North Carolina.” He asserted that a trial judge would find it virtually impossible to determine the best interests of the child without the presence of both the father and the mother, and therefore, a court should not find “compelling circumstances” as easily as the majority did in this instance.

Although there may be isolated instances in which a court should not require a parent to be present at a custody hearing, it is difficult to imagine such exceptions, especially given the wide discretion of the trial judge in determining the best interest of the child. It is unlikely that a trial judge could easily decide that issue if he cannot personally view the demeanor, attitudes and expressions of both parents.

The supreme court ruled on a custody matter relating to foster parents in Oxendine v. Catawba County Department of Social Services. The child was surrendered for adoptive placement to defendant in 1978; defendant thereafter placed him in plaintiffs’ home pursuant to a foster parent agreement. In 1979 plaintiffs brought an action in district court seeking permanent custody of the child. Plaintiffs’ action was ultimately dismissed due to their lack of standing to seek custody of the child, and they appealed.

The supreme court held that the court of appeals did not err in deciding that plaintiffs had no standing to bring a custody action. Plaintiffs argued that they were authorized to seek custody under G.S. 50-13.1, which states that “[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action . . . for the custody of such child . . . .” The court, however, disagreed, finding this case to be governed by G.S. 48-9.1(1), which provides that the county department of social services shall have legal custody of a child who has been surrendered for adoption until the occurrence of one of the events specified in the statute. Since the county agency retains legal custody, the court reasoned that foster parents are given only physical custody of the child; therefore, foster parents cannot bring an ant could not attend the hearing because of his job schedule in Alaska; and that defendant’s present wife and his parents were present at the hearing. 302 N.C. at 483-84, 276 S.E.2d at 586.

82. Id. at 486, 276 S.E.2d at 387 (Carlton, J., dissenting).
83. Id. at 487, 276 S.E.2d at 388. Justice Carlton argued that “[i]nconvenience, no matter how great, should rarely rise to the level of ‘compelling circumstances.’” Id.
84. As Justice Carlton stated: “If the father were ill or otherwise unable to travel, I would be more inclined to excuse his absence.” Id.
87. Id. at 700-02, 281 S.E.2d at 371-73.
89. Id. § 48-9.1(1). The four specified events are: entry of an interlocutory decree as provided in G.S. 48-17, entry of a final order of adoption, revocation of consent (of natural parents) and entry of a contrary order by a court. Id. None of those events occurred in this case.
action to gain legal custody of a foster child. The court construed G.S. 48-9.1(1) as an exception to the general grant of standing to contest custody as provided in G.S. 50-13.1.  

2. Jurisdiction in the Child Custody Area

In Lynch v. Lynch the North Carolina Supreme Court confronted a jurisdictional question in the area of child custody. Plaintiff husband brought suit in North Carolina seeking a divorce from bed and board and custody of the parties' minor child. Defendant wife appeared to ask that an Illinois judgment awarding custody of the child to the wife be given full faith and credit. The district court denied the wife's motions and awarded permanent custody to the husband. The court of appeals affirmed in part and reversed in part; subsequently, the wife's petition for discretionary review was granted by the supreme court.

The supreme court held that the wife made a general appearance in asking the trial court to enforce the Illinois judgment; therefore, the court was authorized to grant her motion for full faith and credit. The court also held that, because plaintiff had not entered a valid motion for modification of the custody decree, the court's jurisdiction over the matter terminated upon the award of full faith and credit to the Illinois judgment. Any new action for modification must reestablish jurisdiction over defendant as of the date the action was filed.

The three dissenting justices disagreed with both of the majority's points. First, the dissenters argued that defendant had not made a general appearance by appearing to ask for full faith and credit. If defendant had made a general appearance, the court would have jurisdiction over the matter until the child reached majority, and defendant could be forced to return to North Carolina to litigate any motion that plaintiff might make. The dissenters contended that if a defendant asks for enforcement of a foreign decree, a North Carolina court would acquire jurisdiction only to inquire into the jurisdiction of the foreign court and whether proper notice and an opportunity to be heard had

90. 303 N.C. at 707, 281 S.E.2d at 375. See Clark, Law of Domestic Relations § 17.6, at 596 (1968), for further discussion of the foster home arrangement.

91. Id. at 708-09, 281 S.E.2d at 376.

92. Id. at 373-74, 279 S.E.2d at 844-45.

93. Id. at 375, 279 S.E.2d at 845.

94. Id. at 378, 279 S.E.2d at 850 (Carlton, J., dissenting).
been given to all parties. Second, when a court does grant full faith and credit to a foreign decree, the plaintiff should have the opportunity to allege changed circumstances if the sister state would so allow. The court's jurisdiction should continue in order to inquire into those circumstances, rather than evaporating after the grant of full faith and credit, as the majority held.\footnote{97} 

Although a clear conflict arose in \textit{Lynch} over the law on interstate enforcement and modification of child custody orders, it is difficult to measure the actual impact of the decision because any future action by the plaintiff in \textit{Lynch}, and most other suits in this area, will be governed by the Uniform Child Custody Jurisdiction Act (UCCJA),\footnote{98} which diminishes the importance of the inquiry into issues of full faith and credit and personal jurisdiction over the parties.

Addressing another jurisdictional issue, the North Carolina Court of Appeals clearly outlined the major provisions of the UCCJA\footnote{99} in \textit{Davis v. Davis}.\footnote{100} Although the Act was passed by the General Assembly in 1979, the court stated that the sensitive issue of child custody contests still had not been squarely addressed; therefore, the court felt "a grave responsibility to interpret thoroughly the Uniform Act so as to accomplish its purposes."\footnote{101} The court enumerated in capsule form the major bases for jurisdiction of custody matters under the Act, the considerations a court must address when there are simultaneous proceedings in North Carolina and in another state, the situations in which a court may decline jurisdiction of a custody proceeding and the provisions of the Act that allow for modification of custody decrees from other jurisdictions.\footnote{102}

In \textit{Williams v. Richardson},\footnote{103} the court of appeals wrestled with the inconsistent purposes of the Act and resolved the conflict by virtually ignoring one purpose without significantly advancing the other. In \textit{Williams} plaintiff wife and defendant husband were divorced in 1977 in Virginia. Plaintiff was awarded custody of their two children. She remarried in 1978. In May, 1979 defendant filed a petition for custody in Emporia, Virginia, where plaintiff lived at the time. She and the children later moved to North Carolina. On February 7, 1980, the Virginia court "found that a change of custody would be in the best interest of the children and granted permanent custody to [defend-

\footnote{97}{Id. at 379, 279 S.E.2d at 851. See \textit{In re Marlowe}, 268 N.C. 197, 150 S.E.2d 204 (1966); \textit{Richter v. Harmon}, 243 N.C. 373, 90 S.E.2d 744 (1956).}


\footnote{99}{Id.}

\footnote{100}{53 N.C. App. 531, 281 S.E.2d 411 (1981).}

\footnote{101}{Id. at 534, 281 S.E.2d at 413. The general purposes of the Act are enumerated in N.C. Gen. Stat. § 50A-1(a) (Cum. Supp. 1981).}

\footnote{102}{53 N.C. App. at 534-39, 281 S.E.2d at 413-15. After a concise summary of the Act, the court went on to hold that when defendant-wife left her husband in North Carolina and moved to California with their four children and filed a petition for custody of the children in California after she and the children had lived there only one month, California was not the "home state" of the children for jurisdiction under the Act. Therefore, North Carolina had exclusive jurisdiction over the custody matter and could decline to enforce the California custody order.}

\footnote{103}{53 N.C. App. 663, 281 S.E.2d 777 (1981).}
Defendant then took the children to Georgia.

Shortly thereafter, plaintiff went to Georgia and removed one child from school and returned her to North Carolina. She could not locate the other child. She immediately began an action in North Carolina to obtain custody of the children. The trial court asserted jurisdiction, and awarded plaintiff primary custody and defendant visitation privileges.

Two questions arose: first, whether the North Carolina trial court should have asserted jurisdiction to consider modifying the custody dispute; and second, whether it was proper for the trial court to modify the Virginia decree once jurisdiction had been asserted. The UCCJA addresses the first of these issues as follows:

If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the Chapter . . . and (2) the court of this State has jurisdiction.105

Because the children had not lived in Virginia for the six months immediately preceding the institution of the action, Virginia did not continue to have jurisdiction over their custody.106 The court of appeals held that the North Carolina trial court could properly assert jurisdiction under G.S. 50A-3(a)(2).107 Therefore, the remaining question was whether the North Carolina trial court should have modified the Virginia custody decree.

Several factors weigh heavily against modifying the Virginia decree.108 First, the time and energy of the Virginia court that entered a decree just eighteen days before plaintiff instituted the action in North Carolina would be

104. Id. at 665, 281 S.E.2d at 778.
106. The test for Virginia's continuing jurisdiction under UCCJA is found at N.C. Gen. Stat. § 50A-3 (Cum. Supp. 1981). G.S. 50A-3(a)(1)(i) provides for jurisdiction if the state is the "home state" of the child. N.C. Gen. Stat. § 50A-5(a) (1)(i) (Cum. Supp. 1981). "Home state" is defined in G.S. 50A-2(5) as "the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months." Id. § 50A-2(5). Since Mrs. Williams moved to North Carolina on August 6, 1979, and the action was instituted on February 25, 1980, it was clear that Virginia was not the "home state."

G.S. 50A-3(a)(2) provides for assertion of jurisdiction if

[i]t is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships . . . .

The trial court found it to be in the child's best interest for North Carolina to assert jurisdiction. The court of appeals affirmed. 53 N.C. App. at 669, 281 S.E.2d at 780.
107. See note 106 supra.
108. The purposes of the UCCJA are listed in G.S. 50A-1 and include the following: avoiding jurisdiction competition; promoting the stability of the home environment; deterring abductions of children undertaken to obtain custody awards; avoiding relitigation of other states' custody decrees insofar as feasible; and facilitating the enforcement of other states' custody decrees. N.C. Gen. Stat. § 50A-1 (Cum. Supp. 1981).
wasted.\textsuperscript{109} Second, plaintiff would be rewarded for contemptuously disregarding the Virginia proceeding.\textsuperscript{110} To modify the Virginia decree is, in effect, a double slap in Virginia's judicial face. Third, plaintiff would be rewarded for abducting the child from Georgia in violation of the Virginia custody decree.\textsuperscript{111} G.S. 50-8(b) expressly commands that if a petitioner for a modification decree has wrongfully removed the child from the person entitled to custody the court may not exercise jurisdiction "[u]nless required in the interest of the child."\textsuperscript{112} The use of the word "required" seems to evidence a strong policy against exercising jurisdiction under such circumstances.\textsuperscript{113} Similarly, if the purposes of the Act to "deter abductions"\textsuperscript{114} and to "avoid re-litigation"\textsuperscript{115} are to be achieved to any extent, courts should be hesitant to condone the conduct of contemptuous and child-snatching parents. Although it is easy to say that the behavior of the parents is of secondary importance when the best interests of their children are involved,\textsuperscript{116} this attitude does little to achieve the purposes of the Uniform Child Custody Jurisdiction Act.

As an additional obstacle to modification of another state's custody decree, North Carolina requires a showing of "changed circumstances."\textsuperscript{117} "The party moving for modification assumes the burden of proving a substantial change of circumstances affecting the welfare of the child. . . . It must be shown that the circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified. . . ."\textsuperscript{118} The court of appeals in Williams remanded the case for a determination of whether there were "changed circumstances," but it is doubtful that a "sub-

\begin{itemize}
\item \textsuperscript{109} See id. § 50A-1(a)(6); note 108 supra.
\item \textsuperscript{110} After Mrs. Williams obtained a continuance on August 2, she failed to appear at any of the later hearings scheduled by the Virginia court to consider the custody issue.
\item \textsuperscript{112} Id. § 50A-8. The court of appeals remanded the case for an express determination as to whether it would be required in the interest of the child for the North Carolina court to exercise jurisdiction. 53 N.C. App. at 670, 280 S.E.2d at 781. The court noted, however, that "[i]n the vast majority of cases, such action will result in the refusal by the courts of this State to exercise jurisdiction to modify a custody decree." Id. at 669-70, 281 S.E.2d at 780.
\item If North Carolina asserts jurisdiction and modifies the Virginia decree, when it appears that the Virginia decree was not punitive and was based on substantial evidence, then the admonition contained in G.S. 50A-8(b) and the circumstances of plaintiff's contempt must carry very little or no weight at all. Compare Clark v. Clark, 67 A.D.2d 388, 416 N.Y.S.2d 330 (1979) (New York courts could properly decline jurisdiction when the mother had improperly removed the child from Virginia) with Nehra v. Uhlar, 168 N.J. Super. 187, 402 A.2d 264, cert. denied, 81 N.J. 413, 408 A.2d 807 (1979) (upholding the trial court's jurisdiction and modification of another state's custody decree because "the paramount issue before the trial court and this court is necessarily the welfare of the children rather than the tactics of the parent").
\item \textsuperscript{113} See 168 N.J. Super. at 196, 402 A.2d at 268-69.
\item \textsuperscript{115} Id. § 50A-1(a)(6). See note 108 supra.
\item \textsuperscript{116} See Nehra v. Uhlar, 168 N.J. Super. 187, 402 A.2d 264, cert. denied, 81 N.J. 413, 408 A.2d 807 (1979); see note 112 supra. At least one commentator has questioned the "capacity of a judge or any other professional to determine the best interests of a child with any degree of certainty." Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications, 65 Cal. L. Rev. 978, 983 (1977). Ms. Bodenheimer was Reporter for the drafting committee of the UCCJA.
\item \textsuperscript{118} Searl v. Searl, 34 N.C. App. 583, 587, 239 S.E.2d 305, 308 (1977) (emphasis added).
\end{itemize}
stantial change" could have occurred since the recent Virginia decree was entered.

As an exception to the "changed circumstances" rule,\textsuperscript{119} the court of appeals construed the UCCJA to allow modification of a custody decree of another state if the prior decree was "punitive."\textsuperscript{120} The court of appeals remanded the case for the additional purpose of determining whether the Virginia decree was punitive.\textsuperscript{121}

Another recent court of appeals decision interpreting the Uniform Child Custody Jurisdiction Act concerned an interesting and well-reasoned application of G.S. 50A-3(a)(2).\textsuperscript{122} In \textit{Nabors v. Farrell}\textsuperscript{123} the parents of three minor children were divorced in Massachusetts. The mother was awarded custody of the children and moved to North Carolina with them. The father was awarded visitation privileges for one month each summer at the father's parents' home. He remained in Massachusetts, and in June 1979, he sought in Massachusetts a modification of the decree in the form of a definite visitation period and a change of the location to his home. On April 30, 1980, the Massachusetts court granted the father's requested relief. On February 21, 1981, fully aware of the Massachusetts proceeding, the mother sought a modification of the original decree in North Carolina. The father sought to have that action dismissed under G.S. 50A-6(a).\textsuperscript{124}

The court of appeals ruled that under G.S.50A-3(a)(2)\textsuperscript{125} "the child and at least one contestant have a significant connection with [Massachusetts]" and "there is available in [Massachusetts] substantial evidence relevant to the child's present or future care, protection, training and personal relationships;"

\textsuperscript{119} This is more accurately an exception to G.S. 50A-13, which requires "courts of this State [to] recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with [the UCCJA]." N.C. Gen. Stat. § 50A-13 (Cum. Supp. 1981).

\textsuperscript{120} 53 N.C. App. at 673, 281 S.E.2d at 782. Although some courts still engage in the highly questionable practice of modifying custody in order to punish a parent, courts generally do not honor the punitive custody decrees of other states.

\textsuperscript{121} The Uniform Act itself does not explicitly provide an exception for punitive decrees, but the comments to the Act and its underlying policies do support such an exclusion.

\textsuperscript{122} See note 106 supra.

\textsuperscript{123} 53 N.C. App. 345, 280 S.E.2d 763 (1981).

\textsuperscript{124} G.S. 50A-6 provides as follows: "(a) [i]f at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with [the UCCJA], a court of this State shall not exercise its jurisdiction. . . ." N.C. Gen. Stat. § 50A-6 (Cum. Supp. 1981).

\textsuperscript{125} See note 106 supra.
therefore, Massachusetts had jurisdiction with respect to the limited issue of visitation. If the father had instituted a general custody modification action in Massachusetts, it is highly doubtful that the "child...[would] have a significant connection with [Massachusetts]" or that "there [would be] available in [Massachusetts] substantial evidence relevant to the child's present or future care..." But for the limited purpose of visitation it is clear that Massachusetts is the best place to litigate. Thus, the court of appeals has wisely given the Uniform Child Custody Jurisdiction Act a flexible interpretation to allow the state that is best able to decide the issue to exercise jurisdiction.\(^\text{127}\)

3. Child Support

The 1981 North Carolina Legislature enacted an amendment to G.S. 50-13.4(b) that makes both the father and mother primarily liable for the support of a minor child.\(^\text{128}\) Previously, the statute imposed the primary obligation for child support on the father, while the mother's responsibility was only secondary.\(^\text{129}\) After 1981 both parents have equal child support duties. Although many mothers cannot actually contribute equally to support their children, this amendment reflects the reality that more mothers are now financially able to share childraising responsibilities with the father.

In *Falls v. Falls*\(^\text{130}\) the court of appeals overturned a trial court order providing that monthly child support payments (by the father) should increase annually as the cost of living increased, if the children's needs grew accordingly.\(^\text{131}\) The court of appeals held that "the cost of living escalator in this case...[was] infirm because it focused exclusively on circumstances of the children and a cost of living index while ignoring the changing or unchanging ability to pay of the parents."\(^\text{132}\) The court found that an automatic increase in child support conditioned only on a rise in the children's needs violated G.S. 50-13.4(c), which requires child support to be based on several factors, including the child's needs, the accustomed standard of living of the children and the earnings of the parties.\(^\text{133}\) Further, the court noted that nothing in the record established the reliability of the Consumer Price Index used to measure the increase in the cost of living;\(^\text{134}\) this factor bolstered the court's decision to reject the automatic cost of living increases in *Falls*.

---


127. The court of appeals decided other cases under the UCCJA in 1981. See Pope v. Jacobs, 51 N.C. App. 374, 276 S.E.2d 487 (1981) (North Carolina court could decline jurisdiction under the Act when Michigan was the home state of the children, and substantial evidence relating to the care, protection and training of the children was more readily available there.).


131. Id. at 207, 278 S.E.2d at 550.

132. Id. at 219, 278 S.E.2d at 557.


134. 52 N.C. App. at 218, 278 S.E.2d at 556.
The court of appeals observed that the inclusion of automatic cost of living adjustments in child support orders is appropriate in some circumstances.\textsuperscript{135} In fact, these increases can be advantageous to both parties by preserving the original order from the effects of inflation; the increases are advantageous to the supporting parent because they ease the courtroom burden through a decrease in modification proceedings. Although the court did not sustain the cost of living increases in \textit{Falls}, it specifically asserted that its decision should not discourage other parties from making proper use of automatic adjustment mechanisms.\textsuperscript{136}

The court of appeals decided another issue concerning child support in \textit{Jones v. Jones},\textsuperscript{137} in which it held that the trial court did not abuse its discretion in allowing a father credit against his child support obligation for certain expenses he incurred for his children during their visitation with him. The court of appeals relied on \textit{Goodson v. Goodson},\textsuperscript{138} a 1977 case that first established the guidelines for determining whether credit or expenditures made on behalf of dependents should be allowed. The \textit{Goodson} court stated, “We think that the better view allows credit [only] when equitable considerations exist which would create an injustice if credit were not allowed . . . .”\textsuperscript{139}

With the \textit{Jones} decision, the court of appeals added another case to a growing list of authority in North Carolina\textsuperscript{140} that permits credit against support obligations for certain voluntary expenses incurred by the payor parent.

In addition to these cases, the North Carolina Court of Appeals decided other minor issues in the child support area in 1981, relating to the defense of laches\textsuperscript{141} and to the factors considered in determining the amount of child

\textsuperscript{135} Id.
\textsuperscript{136} Id. at 220-21, 278 S.E.2d at 557-58. The court outlined what it considered to be the minimum provisions in an annual cost of living adjustment formula:

(1) Provisions focusing on the relative abilities of the parents to pay as well as on the needs of the child;

(2) Provisions stating that if the non-custodial parent's income decreases, or increases by a lesser percentage than the percentage change in the index, the child support payments should increase or decrease by a like or lesser percentage;

(3) Provisions stating that, if the parties are unable to determine the correct adjustment, either party may request that the court determine the same;

(4) Provisions allowing either party to petition the court for modification due to a substantial and continuing change of circumstances. Id.

\textsuperscript{138} 32 N.C. App. 76, 231 S.E.2d 178 (1977).
\textsuperscript{139} Id. at 81, 231 S.E.2d at 182.
\textsuperscript{140} See also Lynn v. Lynn, 44 N.C. App. 148, 260 S.E.2d 682 (1979); Beverly v. Beverly, 43 N.C. App. 60, 257 S.E.2d 682 (1979). There is a division of authority on this question in other jurisdictions. See 47 A.L.R.3d 1031 (1979).
\textsuperscript{141} In Larsen v. Sedberry, 54 N.C. App. 166, 282 S.E.2d 551 (1981), the court of appeals held that the defense of laches would not be recognized when plaintiff wife brought an action to collect arrearages fifteen years after a divorce decree was entered ordering the husband to pay $15 per week in child support. The court found that the only bar to plaintiff's action was the applicable ten-year statute of limitations. See also Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948) (laches not recognized when wife brought an action for support seven years after separation); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (ex-wife able to sue on a support judgment more than ten years after it was entered); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977) (court refused to find laches when wife waited nine years before asserting her support rights).
D. Property Settlement and Alimony

1. The Equitable Distribution Act

In 1981 the North Carolina General Assembly enacted a major change in the state's family law by granting courts the power to distribute property of divorcing couples according to considerations other than legal title. With the passage of G.S. 50-20, "an act for equitable distribution of marital property," the legislature took North Carolina from the pure common law approach to the majority approach that permits courts to award property to divorced spouses based on a variety of considerations.143

In a state with a pure common law approach to property division, property follows title upon divorce. Thus, a dependent spouse who has contributed housekeeping, parenting, chauffeuring and cooking services to the marriage often suffers injustice if all the property investments during the marriage are placed in the income-earning spouse’s name. Likewise, a spouse who contributes all of his or her earnings for family support while the other spouse invests in property may emerge the economic loser upon divorce.144 With the elimination of recriminatory defenses to divorce, which were often used as bargaining chips by dependent spouses wishing to retain a share of marital property, those spouses whose contribution to marital property was not reflected by ownership of legal title often encountered serious financial difficulty.145

Under North Carolina’s new law the court may divide and distribute all the marital property of the parties. Marital property is defined by the statute as “all real and personal property acquired by either spouse during the course of marriage and presently owned, except property determined to be separate property.”146 Under the new act separate property means “all real and personal property acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage.”147 A gift made by one spouse to another will be considered separate property only if the intention that it remain separate is

142. In Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981), the court of appeals held that when a husband had disregarded his marital obligation to provide reasonable support for his children, an award of child support may be based on earning capacity rather than on the general measure of actual earnings. In this case, plaintiff-wife and her husband separated before their child was born. Defendant paid the mother $10 per week for the first two years of the child's life, but he had made no further support payments since 1966. Plaintiff had tried to serve defendant with process over the years, but defendant moved so often that he could not be served. The court also found that, although defendant was presently unemployed, he had no health problems or illnesses that would keep him from working, and in fact had earned $800 and $1,500 per month at his last two jobs. This course of conduct, said the court, displayed defendant's intention to ignore his parental responsibilities.


147. Id. § 50-20(b)(2).
stated in the conveyance. Any increase in value of separate property is also separate property, as is anything exchanged for separate property, regardless of title. In addition, both vested pension or retirement rights and professional or business licenses are considered separate property.\textsuperscript{148}

After the initial division of property into "marital" or "separate" categories, the court must make an equal division of the net value of the marital property unless this division is inequitable, in which case the court is directed by the statute to divide the property "equitably."\textsuperscript{149} Under the Act, the court shall take the following factors into consideration:

1. the income, property and liabilities of the parties.
2. a spouse's obligation for support arising out of a prior marriage.
3. the duration of the marriage, age and health of the parties.
4. the need of the custodial parent for the marital home or its effects.
5. vested pension and retirement rights and expectations of non-vested rights.
6. an equitable claim or interest in or a direct or indirect contribution to marital property; this may include joint efforts, expenditures, contributions or a lack thereof, such as services as a parent, spouse, wage-earner or homemaker.
7. efforts by one spouse to help educate or develop the career potential of the other spouse.
8. direct contribution during the marriage to any increase in the value of separate property.
9. the liquid or non-liquid character of the marital property.
10. the difficulty in evaluating an interest or asset in a business or profession and the desirability of retaining the interest or the asset without interference.
11. tax consequences to both parties.
12. any other factors the court finds proper.\textsuperscript{150}

It is important to note that courts are not to regard alimony or child support in the property allocation.\textsuperscript{151} After the property division, however, a party may request a modification of child support or alimony.\textsuperscript{152} If distribution of property is impractical, the court may award a distributive award as a substitute or supplement.\textsuperscript{153} The statute defines a distributive award as a lump sum payment or fixed installments, and thus does not include payments that are treated as ordinary income.\textsuperscript{154} The intent of this provision may be to

\textsuperscript{148} Id.
\textsuperscript{149} Id. § 50-20(c).
\textsuperscript{150} Id. at (1)-(12).
\textsuperscript{151} But note that obligations from former marriages of either spouse are taken into consideration. Id. § 50-20(c)(2).
\textsuperscript{152} Id. § 50-20(f).
\textsuperscript{153} Id. § 50-20(e).
\textsuperscript{154} Id. § 50-20(b)(3).
ensure that courts do not award payments that look like alimony—"periodic" payments that continue for more than ten years or until the death or remarriage of the dependent spouse. Alimony is deductible by the supporting spouse and taxable as ordinary income to the dependent spouse.155

By distinguishing these installments of a property settlement from support rights, the legislature may be trying to work an avoidance of the rule in United States v. Davis,156 in which the Supreme Court held that a transfer of property from a husband to a wife in exchange for the relinquishment of her inchoate marital rights results in the husband's realization of taxable gain. In community property states, where the property rights are vested in both spouses, the Davis rule has been held inapplicable.157 If a distributive award in this state is deemed to be a settlement of vested property rights rather than inchoate marital rights, it is perhaps arguable that the Davis rule is inapplicable.

The legislature went further in its attempt to create vested property rights with a provision158 in the Act that identifies the rights of parties to equitable distribution as a "species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action."159

Under the new statute the court may transfer legal title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.160 Before the settlement of the property, the parties may request a notice of lis pendens to be recorded with regard to marital property. If a conveyance or encumbrance of the property is recorded before the filing of lis pendens or if interest in the property was obtained by descent before the filing, the property will pass free of any equitable distribution claim. The court may cancel notice of lis pendens if the property is bonded.161

The procedure for obtaining equitable distribution of property is set out in G.S. 50-21. A party may file a cross-action in a suit for absolute divorce or file a separate action. Subsections (e) and (f) of G.S. 50-11 bar an assertion of the right to equitable distribution after a judgment of absolute divorce. An action or motion brought within six months of the date of judgment is permitted if: (a) service of process was by publication and defendant failed to appear,162 or (b) the court rendering divorce lacked jurisdiction over an absent spouse or the marital property. In such a case the validity of the divorce may be attacked in an action for equitable distribution.163

Equitable distribution will no doubt make a dramatic difference in the economics of marital dissolution in North Carolina. Its passage raises countless questions for the courts. For example, courts must establish guidelines for

156. 370 U.S. 65 (1962).
157. See H. Clark, supra note 144.
159. Id.
160. Id. § 50-20(g).
161. Id. § 50-20(h).
162. Id. § 50-11(e).
163. Id. § 50-11(f).
untangling thorny marital/separate property issues and for determining what weight should be given the provision for "equal division." Also among the areas to be fleshed out by the courts are rules for measuring contributions such as homemaking, and the effect of the Act on taxes, alimony and child support.

It is important to remember that equitable distribution will not affect the parties' rights to decide between themselves how to distribute their own property. Nevertheless, when the parties are unable to reach an agreement, courts now have much greater power to divide and distribute the property equitably.

2. Note, The Discretionary Factor in the Equitable Distribution Act†

When a North Carolina court makes an equitable distribution of marital property upon divorce, it is charged to consider eleven specific factors. In addition, the court is directed to weigh "[a]ny other factor which [it] finds to be just and proper." This catch-all "Factor 12," appended to the list like a legislative afterthought, is integral to the operation of the distribution statute.

Creation of the Discretionary Power

The basic function of Factor 12 is to empower the district court judge to exercise discretion in making a property division equitable. As in New York, from whose statute North Carolina borrowed its Factor 12 language, "[t]he new law is termed an 'equitable distribution' statute because the judge is permitted to consider '[a]ny other factor which the court shall expressly find to be just and proper.'" It is this Factor 12 equitable power that completes the legislature's abrogation of the rigid and much-criticized common-law rule of distribution by title.

The substitution of a discretionary standard for a fixed rule of law inevitably results in problems—prominently, problems of uncertainty that make for costly litigation. "We cannot," writes one commentator, "have both individual justice (or more correctly, the hope of individual justice) and predictable, fast, easy and inexpensive disposition of matters of divorce." In addition, there is the fear that the power to consider principles of equity entails the power to act arbitrarily. Upon the enactment of New York's distribution statute, "[s]ome opponents felt that the latitude given to the courts would perpetuate inequities. Although such critics claimed that judges in New Jersey were making unbalanced awards . . . , a critical examination of their evidence

† This subsection was written by Kim Wetherill.

164. Id. § 50-20(c)(1)-(11). See text accompanying note 150 supra.

165. Id. § 50-20(c)(12).


reveals allegations with few substantiating details.”

The North Carolina Act, like that of New York, provides detailed guidelines for the court to follow, and requires that the trial judge set forth in writing the basis of the distribution. The extent, however, to which the enumeration of specific equitable factors answers the criticisms expressed above depends in large part on whether and how that enumeration operates as a restraint on the Factor 12 discretionary power.

Discretion unaffected by enumerated factors is one extreme possibility. In one case, a Wyoming judge’s refusal to hear evidence of marital misconduct in making a property division, despite the statutory directive to consider “the relative merits of the parties,” was upheld: “When there are adequate assets to comfortably provide for both of the parties, the trial court does not abuse its discretion when it refuses to permit the parties to air their dirty laundry in court.” It is doubtful that such judicial disregard of legislative fiat would be tolerated in North Carolina, whose statute is considerably more detailed and emphatic in its guidelines than that of Wyoming. Indeed, the North Carolina legislature may well have intended to foreclose litigation on the first eleven factors it enumerated.

At the other extreme, the Supreme Judicial Court of Massachusetts has indicated that a trial judge’s recognition of factors not enumerated in the distribution statute would constitute an error of law. The Massachusetts statute, however, contains no Factor 12 counterpart; therefore, the Massachusetts rule is not germane to North Carolina’s situation.

The real question for North Carolina is not whether a court can refuse to consider any applicable enumerated factor, but rather what considerations apart from those specifically mandated may be considered within the exercise of...
its discretion. Commentary on the New York statute is useful in answering this question because of the similarity of that statute to the one enacted by North Carolina. Under the New York statute "[f]actor [10], as a catch-all, permits the judge to weigh and balance matters which may have been overlooked in setting up the guidelines." 174 This approach may be difficult to apply, 175 but it fits judicial discretion within the framework of legislative intent. In addition, it is appealing in its subtle insistence on the best of possible worlds: it suggests at once the "hope of individual justice" and the possibility of "predictable, fast, easy and inexpensive disposition. . . ." 176

The presumption of equal distribution created by the statute 177 should, theoretically, have a limiting effect on the exercise of judicial discretion. But the quantum of evidence on each of the twelve factors required to overcome the presumption is not spelled out. That question, too, would appear to be one for the court's discretion. 178

The enactment of an equitable distribution statute reflects the popular recognition that marriage is a partnership whose dissolution requires equitable division of assets. 179 In the determination of what factors shall govern this division, however, the partnership analogy is little more than a point of departure. 180 On one hand, the partnership comparison suggests that marriage be viewed as a joint effort toward augmenting the marital estate. Equitable distribution is thus seen as a means of proportionately reimbursing each spouse for

---


175. One issue is whether the statute is sufficiently ambiguous to permit consideration of a factor not enumerated, or whether that factor is excluded by implication. The determination, for example, whether homemaking services can be considered in any context other than that described in Factor 6 would involve just such a painstaking analysis. In conducting the analysis—in the process of discerning legislative intent—the court will effectively limit or expand its discretionary power.

176. Rheinstein, supra note 168, at 433. Of course, if the statutory guidelines were less comprehensive, the goal of predictability would not be as well served by a "legislative oversight" standard; indeed, the standard would probably not be appropriate.


178. The presumption of equal distribution may have been incorporated in the statute largely, if not solely, for tax reasons.


contributions—direct or indirect—to the marital property.\textsuperscript{181} On the other
hand, the original terms of the marriage contract—including the state-imposed
duty of support—have some bearing on the property consequences of divorce.
Of course, the question of post-marital support is usually settled in the context of
alimony.\textsuperscript{182} But the same factors that determine the amount of alimony—
needs of the dependent spouse, abilities of the supporting spouse\textsuperscript{183}—also
figure largely, if less obviously, in the equitable distribution of marital
property.\textsuperscript{184}

The tendency to blur distinctions between alimony and property division,
which results from the coexistence of these different distribution policies, has
been vehemently criticized by many commentators:

Alimony is an award for support and maintenance and has histori-
cally been based on the common law duty of the husband to support
his wife. Property division, on the other hand, is based on the joint
contribution of the spouses to the marital enterprise. . . . Since ali-
mony and property division spring from different considerations, the
courts must recognize the distinction if a uniform application of the
law is to be achieved.\textsuperscript{185}

Certainly the criticism is well-founded. Property division should effectuate a
return to each party of that which he has invested in the marital estate,
whereas alimony aims toward financially satisfying the marital expectations of
the spouses. But if alimony and property division are viewed as having the
common purpose of accomplishing a dissolution with the least possible
financial disruption, the confusion is perhaps understandable.\textsuperscript{186}

A North Carolina court’s choice of nonenumerated “just and proper” fac-
tors should reflect its apprehension of the policies underlying the statute. The
factors chosen and the weight accorded those factors may vary, depending on
whether the statute is viewed as espousing primarily a policy of repayment of
contribution or one of accommodating the needs of one party with the abilities
of the other. While these policies are not necessarily mutually exclusive,
neither are they always consistent.

1980).
\textsuperscript{184} Id. § 50-20(c)(1),(2) & (4). Compare N.Y. Dom. Rel. Law § 236(B)(5)(d) with
\textsuperscript{185} Inker, Walsh, & Perocchi, Alimony and Assignment of Property: The New Statutory
Scheme in Massachusetts, 11 Fam. L.Q. 59, 69 (1977) (reprinted with minor changes from 10
Suffolk U.L. Rev. 1 (1975)).
\textsuperscript{186} See also H. Clark, supra note 144, § 14.8, at 450-51 (1968); 2 R. Lee, supra note 182,
§ 135.1, at 145-46. A twofold policy of equitable distribution was discussed in Rothman v. Roth-
man, 65 N.J. 219, 320 A.2d 496, 501-02 (1974). On one hand, said the court, the distribution
statute protects a dependent spouse against the eventuality of the supporting spouse's death or
financial misfortune. This is a protection which an "inherently precarious" alimony award cannot
give. On the other hand, the statute acknowledges noneconomic contributions to the marital
estate. "Only if it is clearly understood that far more than economic factors are involved, will the
resulting distribution be equitable within the true intent and meaning of the statute."
Will Fault Be Considered Under Factor 12?

There is little consensus among states with equitable distribution statutes whether fault or misconduct is an appropriate factor to be weighed in making the distribution. While a number of statutes recognize fault as a factor,\(^\text{187}\) a larger number expressly preclude consideration of fault,\(^\text{188}\) and an even larger number fail to mention it at all.\(^\text{189}\) North Carolina's statute falls into the last category. If fault is to be considered under the statute, it must be under the "any other factor" language in Factor 12. Prediction of how North Carolina courts will resolve this issue requires study of the similar legislation in New York and its judicial reception.

The legislative history of New York's Section 236 indicates that the "any other factor" language was the result of compromise between those who wanted "marital fault" expressly included as a factor and those who wanted it expressly excluded.\(^\text{190}\) One can envision the same debate in the North Carolina legislature.\(^\text{191}\) Of course, if the question whether to consider fault was deliberately reserved for judicial discretion, it becomes unnecessary to speculate whether the legislature "may have overlooked" the fault factor.

The fault question has not yet been resolved by the New York Court of Appeals, and only a few lower court cases decided under the new statute have


\(^{190}\) Foster, supra note 174, at 49. See also Wels, The Role of Fault, in A Practical Guide to the New York Equitable Distribution Divorce Law 289 (Foster ed. 1980).

\(^{191}\) North Carolina has not published legislative histories. One legislator confirmed that, as in New York, the "any other factor" language was a compromise. Basically, he said, the language accommodated those who wanted marital fault included as an equitable distribution factor, those who felt that the role of fault should be restricted to the determination of alimony and the "tax experts" who argued that any fault-based property division would be a taxable event under the Davis rule. Interview with Joe Hackney, Representative of 17th District of N.C. in Chapel Hill, N.C. (Feb. 26, 1982). See also United States v. Davis, 370 U.S. 65 (1962).
addressed the question. In *Nehorayoff v. Nehorayoff*\(^{192}\) the wife was granted a divorce on cruelty grounds; the husband’s guilt, was apparently not an issue in the property division. In *Giannola v. Giannols*\(^{193}\) the court held that in appropriate circumstances, an award of *maintenance*\(^{194}\) may be precluded by marital fault. The court indicated that while fault may be considered in making an equitable distribution of property, it will not have a preclusive effect, “the theory being that each party to the marriage is entitled to take with him, that which he contributed to the marriage.”\(^{195}\) In *Kobylack v. Kobylack*\(^{196}\) the court, while acknowledging that fault *can* be considered, refused to consider the wife’s infidelities in dividing the marital property. Because the parties were childless, relatively young, healthy, self-supporting and eligible for remarriage, the court deemed it unfair to consider any factors other than economic contribution. “As a general rule, fault should not be used as a punishment but only as a consideration to tilt the balance where there are insufficient assets to make the parties economically ‘whole.’”\(^{197}\)

The *Giannola* and *Kobylack* cases are noteworthy in several respects. First, they articulate a strong policy of repayment of contribution. Further, the distinction drawn by *Giannola* emphasizes that the weight accorded the fault factor decreases as a needs/abilities policy is supplanted by one of repayment of contribution.\(^{198}\) Finally, the fairness of the rule enunciated in *Kobylack* is questionable. When marital assets are modest, the application of a fault factor to distribution may have a more severe punitive effect than when there are sufficient assets to repay fully each spouse’s contribution.\(^{199}\)

Predictably, the lower New York courts have turned for guidance to case law from New Jersey, whose statute leaves the problem of what factors shall determine an “equitable” distribution entirely to judicial discretion.\(^{200}\) *Chalmers v. Chalmers*, the leading New Jersey case, states a general rule of no-fault property division.\(^{201}\) The issue in *Chalmers* was whether an award to the wife of only twenty percent of the marital assets could be sustained on the basis of


\(^{195}\) 109 Misc. 2d at 986-87, 441 N.Y.S.2d at 343 (citing Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974)). The New York court’s reliance on the *Chalmers* decision is somewhat misplaced. In *Chalmers* the New Jersey Supreme Court espoused a theory of repayment of contribution in support of its conclusion that marital fault is not a relevant factor in equitable distribution. See discussion at text accompanying notes 201-204 infra.


\(^{197}\) Id. at 405, 442 N.Y.S.2d at 395.

\(^{198}\) It can be argued forcefully that the fault factor should have no place in a needs/abilities analysis. Because fault has traditionally played a central role in alimony determinations, however, courts are prone to associate fault with alimony regardless of the alimony policy involved. See generally Comment, 22 Cath. U.L. Rev., supra note 179, at 368-70. See also H. Clark, supra note 144, at 442; Sharp, Divorce and the Third Party: Spousal Support, Private Agreements and the State, 59 N.C.L. Rev. 819, 822-25 (1981).


her admitted adultery. In overturning the award, the court made several observations. First, the court noted that, "fault may be merely the manifestation of a sick marriage . . . . Marriage is such an intricate relationship that often it is difficult, if not impossible, to ascertain upon whom the real responsibility for the marital breakup rests."202 Second, the New Jersey statute, while expressly permitting the consideration of divorce grounds (other than separation) in a determination of alimony or maintenance, did not provide for similar consideration in the context of equitable distribution. Third, the Uniform Marriage and Divorce Act (UMDA) emphasizes that division is to be made "without regard to marital misconduct."203 Finally, the court recognized an underlying policy of contribution in which marital fault is irrelevant, "since all that is being effected is the allocation to each party of what really belongs to him or her."204

Few generalizations can be drawn from a survey of other jurisdictions with statutes that completely omit reference to fault.205 The tendency among courts that have addressed the question is toward considering fault as a factor to be balanced with other—enumerated or discretionary—factors. This has been the result in Kansas,206 Michigan,207 North Dakota,208 South Carolina209 and Texas.210 One court in Texas (a community property state) developed an interesting formula: it would consider, among other factors, "the fault in breaking up the marriage; and the benefits the innocent spouse would have received from a continuation of the marriage."211 The Maine Supreme Judicial Court has indicated that because the no-fault provision was omitted from that state's version of the UMDA, it would infer a legislative intent that fault be considered.212 On the other hand, Iowa has judicially precluded consideration of fault in equitable distribution.213 Similarly, Oregon courts take very

202. 65 N.J. at 193, 320 A.2d at 482.
204. 65 N.J. at 194, 320 A.2d at 483. Whether this strong no-fault position will admit of any exceptions is discussed further below. See text accompanying notes 205-15 infra.
213. In re Marriage of Stuart, 252 N.W.2d 464 (Iowa 1977); In re Marriage of Willcoxson, 250 N.W.2d 425 (Iowa 1977); In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).
seriously the legislative admonition that a property division should be equal.214 It is doubtful that these courts will indulge in inquiries about marital fault.

Even in jurisdictions whose statutes specify fault as a relevant consideration, there may be circumstances in which a court will decline to weigh the fault factor. For example, in Alabama, if both parties are equally at fault, their marital transgressions are in effect cancelled out and a property division is made as though both were blameless.215

In summary, despite strong policy arguments for no-fault property division, a majority of courts that have addressed the question without the assistance of a statutory guideline have concluded that fault is a relevant consideration in equitable distribution. It can be anticipated that North Carolina courts will follow the majority approach and treat fault as one—though not a controlling or preclusive—consideration in the balancing process.

Several general observations can be made about the probable relationship between fault and equal distribution. Despite the movement toward a rule of no-fault maintenance,216 North Carolina remains firmly committed to a system of fault-based alimony. In Williams v. Williams, decided in 1980, the North Carolina Supreme Court defended the statutory fault system as involving "not a question of adherence to outdated traditions in the marital relationship, but a question of 'fairness and justice to all parties.'"217 North Carolina's retention of fault-based alimony might be a reason for excluding considerations of fault from the equitable distribution of property. But the statutory enumeration of factors usually considered in an alimony determination218 may tempt the courts to indulge in the associated fault inquiry, making it logically impossible to adhere to a strict contribution theory. Moreover, even a strong policy of contribution does not always foreclose the fault inquiry.219

214. See, e.g., Glatt v. Glatt, 41 Or. App. 615, 598 P.2d 1237 (1979). For a contrasting approach, see Ford v. Ford, 616 S.W.2d 3 (Ark. 1981) (approving, under the Arkansas "equal presumption" statute, an award of 90% of the marital assets to the husband when the wife, because of depression and mental disorder, had not contributed to the marriage for some five years).

215. See, e.g., Nolen v. Nolen, 398 So. 2d 712 (Ala. Civ. App. 1981). Of course, to reach the "cancellation" point in the trial court may require days or weeks of testimony and volumes of exhibits. For example, in Dees v. Dees, 390 So. 2d 1060 (Ala. Civ. App. 1980), a determination of equal fault was reached after review of 250 pages of pleading and orders, 1650 pages of testimony and 200 exhibits.


218. See 184 and accompanying text supra.

Though theoretically the presumption of an equal distribution should restrict the scope of the court’s examination into fault, the strength of the North Carolina presumption is unclear. The language of the statute suggests that the presumption may be only a starting point in the balancing process; it thus may have only as much force as a court in its discretion decides to give it. In any event, if the proper standard is not strict equality but equality under the circumstances, fault may foreseeably come into play as a circumstance.

Finally, if fault is to be considered under Factor 12, it should be entitled to only as much weight as that accorded any one of the eleven enumerated factors. To give it controlling or preclusive effect despite its omission from the statute might well constitute an abuse of discretion.

In What Cases Is Fault a Relevant Factor?

To suppose that North Carolina courts will consider fault as a discretionary “just and proper” factor is to begin rather than to conclude the inquiry. Because North Carolina recognizes both fault and no-fault grounds for divorce, the question arises whether the grounds for divorce should be taken into account in determining what is an equitable distribution. In other words, may the court properly consider fault in making a distribution pursuant to a no-fault divorce? A survey of decisions from other courts that have entertained the question yields some interesting results.

In a number of states in which equitable distribution statutes expressly mention fault as a factor to be considered, divorce itself is granted exclusively on no-fault grounds. This is the situation in Hawaii, Missouri, Nevada and Wyoming. One Wyoming court exhibited its displeasure at this awkward legislation by simply refusing to consider fault in making an equitable distribution.

Other states with fault-based distribution statutes recognize both fault and no-fault divorce grounds. The general result among courts in these states is that fault is relevant in determining the equity of property distribution

---

221. Contrast this situation with that in South Dakota, where marital fault is not a proper consideration in equitable distribution, but divorce is available only on fault grounds. S.D. Codified Laws Ann. § 25-4-2 (1976).
even when a divorce was obtained on no-fault grounds. This response may be justified as nothing more than judicial deference to legislative mandate. But to the extent that a court has discretion to consider factors not mentioned in the distribution statute, it should give some deference to the fact that at least one of the parties decided against “airing the dirty laundry in court.”

There are arguments against this position. First, a court making an equitable distribution can consider fault only when evidence of fault is presented to it. The litigant’s decision to present such evidence may appear to override his earlier decision to avoid the fault question in the divorce action. The stakes are much higher, however, in an action for property division, and a litigant may feel compelled by the distribution statute’s inclusion of the fault factor to build a case on fault. Second, it can be argued that a court’s systematic refusal to consider the fault factor in distributions following no-fault divorces may effectively eliminate no-fault divorce, at least in cases in which marital assets are large.

Even under a fault-based distribution statute, however, fault is only one factor to be considered. Thus, it is not likely that a party will consider the fault factor in deciding whether to pursue a no-fault divorce. Furthermore, the argument that fault would be considered in the distribution of property should have little application when there is little marital property. In these cases there are fewer resources to finance protracted litigation—and it is in these cases that the fault factor would work the more serious punishment.

The argument that fault should be disregarded, or cancelled out as a factor, in a distribution following a no-fault divorce has considerably more force when the applicable distribution statute is silent on the fault question.


229. When fault grounds for divorce exist, the parties may still prefer a no-fault dissolution that spares them considerable expense and anxiety. Nevertheless, if no-fault divorce is understood to preclude fault-based property division, no-fault divorce may lose much of its appeal for an innocent spouse. When large marital assets are at stake, the value of a favorable fault-based division may well exceed the emotional and financial costs of obtaining a fault-based divorce.

230. See text accompanying note 199 supra.

Regretably, few courts have been persuaded by this contention.\textsuperscript{232} In Michigan, divorce is available only on no-fault grounds;\textsuperscript{233} nonetheless, say the courts, "[f]ault is still a consideration in matters of property division. . .\textsuperscript{234}" In Texas, where both fault and no-fault divorce grounds are provided,\textsuperscript{235} courts have studiously avoided the issue. In Young v. Young\textsuperscript{236} the court held that when a divorce is based on fault, fault may, but need not, be considered in making a property division. In the most recent reported case dealing with this question in Texas, Murff v. Murff,\textsuperscript{237} the court found fault a proper consideration when the divorce was based on both fault and no-fault grounds.\textsuperscript{238} Both the Young and Murff courts, however, did not decide whether fault would be a proper distribution factor in a case of no-fault divorce.

One praiseworthy decision comes from Georgia, where, in the absence of an equitable distribution statute, the courts have ordered the equitable apportionment of property as alimony. In Anderson v. Anderson\textsuperscript{239} the court relied on UMDA sections 307 and 308 in holding that misconduct of the parties is irrelevant in deciding issues of either property division or alimony when divorce is granted on a no-fault ground.\textsuperscript{240} The addition of a provision permitting no-fault divorce to section 30-102 of the Georgia Code, said the court, expressed a "public policy of avoiding recriminations between married persons seeking a divorce. Where these parties obtain a divorce on this ground, it follows that these same recriminations should not then be admitted on the issue of alimony.\textsuperscript{241}" Three judges joined in a dissent that cautioned, "[h]usbands beware and take heed," and went on to argue that the decision was "bad domestic relations law and bad contract law.\textsuperscript{242}" The dissenters ultimately won the day: the alimony statute was rewritten, making "adultery or desertion" a bar to an alimony award.\textsuperscript{243}

North Carolina provides for alimony exclusively on the basis of fault;\textsuperscript{244} the fact of a no-fault divorce simply has no relevance in an alimony determination.\textsuperscript{245} In fact, two forms of alimony are available without any divorce at

---

\textsuperscript{232} But see In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).


\textsuperscript{235} Tex. Fam. Code Ann. tit. 1, § 3.01-06 (Vernon 1975).

\textsuperscript{236} 609 S.W.2d 758, 762 (Tex. 1980).

\textsuperscript{237} 615 S.W.2d 696 (Tex. 1981).

\textsuperscript{238} Id. at 698.

\textsuperscript{239} 237 Ga. 886, 230 S.E.2d 272 (1976).

\textsuperscript{240} Id. at 889-92, 230 S.E.2d at 274-76.

\textsuperscript{241} Id. at 891, 230 S.E.2d at 275.

\textsuperscript{242} Id. at 893, 895, 230 S.E.2d at 276, 277. The dissenters claimed that females looking for "easy lifetime support with no . . . responsibility . . ." would move to Georgia to attempt to marry "ambitious, industrious and eligible male residents . . . ." Id. at 893, 230 S.E.2d at 276 (Ingram, J., dissenting).


\textsuperscript{245} Id.
Equitable distribution, on the other hand, cannot take place outside the context of divorce,\textsuperscript{247} raising the as yet unanswered question whether the divorce grounds will influence the distribution. In any event, when a no-fault divorce has been granted by a North Carolina court and neither party has petitioned for alimony, the court making a distribution should carefully review the situation before allowing the parties to become embroiled in a potentially messy and arguably needless fault contest.\textsuperscript{248}

What Constitutes Fault?

In general, two kinds of misconduct qualify for consideration under the various equitable distribution statutes in other states. The first, loosely denominated “marital fault,” comprises mainly that misconduct which undermines the marriage relationship. The other may be described as “property fault,” meaning such misconduct with respect to assets as might give rise to traditional equitable remedies.\textsuperscript{249}

Courts that consider marital fault face a tremendous problem in defining just what misconduct is to have property consequences. There are, unfortunately, few guiding principles. New Jersey case law suggests one possible approach. One of the earliest cases decided under the New Jersey statute, \textit{Sanders v. Sanders},\textsuperscript{250} involved a sixty-seven-year-old man who had married a woman twenty years his junior and had expended his life savings in the purchase of the marital home; his income (from Social Security) was used to support his wife and her dependent daughter. The wife made no economic contribution to the marital property and, shortly after the marriage, ceased her “wifely duties”; she finally moved out and refused further contact with her husband except to demand, after he was granted a divorce on grounds of desertion, that she be awarded one-half of the marital home. The court re-


\textsuperscript{247} Id. § 50-21.

\textsuperscript{248} It is unclear whether the North Carolina statute even permits a court to consider that alimony has not been requested. See id. §§ 50-20(c)(1), -20(l). An existing alimony order may not be considered by the court providing for an equitable distribution. Id. § 50-20(l). On the other hand, G.S. 50-20(c)(1) directs the court to consider the “income, property and liabilities of each party” and G.S. 50-20(c)(12) provides that the court shall consider any other factor it finds to be just and proper. Arguably, the absence of an alimony request should be considered under these provisions.


\textsuperscript{250} 118 N.J. Super. 327, 287 A.2d 464 (Ch. Div. 1972).
sponded to her claim by extinguishing all her right, title and interest in the home, resting its decision primarily on the wife's conduct in relation to the marriage.\textsuperscript{251}

\textit{Chalmers v. Chalmers,}\textsuperscript{252} stating a general rule of no-fault distribution for New Jersey, seemed implicitly to overrule \textit{Sanders}. After a more recent lower court case, however, the status of \textit{Sanders} is unclear. In \textit{D'Arc v. D'Arc}\textsuperscript{253} the court returned the vast bulk of the marital assets to the wife upon proof that the husband, in an attempt to secure for himself his wife's sizable estate, had attempted to solicit her murder. The court first distinguished this case from \textit{Chalmers}, pointing out that the husband in \textit{D'Arc} had contributed nothing to the marriage but had merely enjoyed enormous sums of money that had come to his wife from her father's trust fund.

Further, here we are not dealing with the usual type of "fault" where the conduct of one spouse may merely be a reaction to the faults or shortcomings of the other spouse. Here the "fault" is an attempt by Dr. D'Arc to commit one of the most heinous crimes known to mankind—murder.\textsuperscript{254}

Citing \textit{Sanders}, the court remonstrated against a mechanical application of a rigid principle when it would compel an "absurd" result.

While \textit{D'Arc} can be limited to its facts, it also points the way toward the establishment of a more general guideline for courts not similarly bound by a no-fault rule. \textit{D'Arc} yields the premise that marital misconduct "so evil and outrageous that it must shock the conscience of everyone"\textsuperscript{255} should be considered an important factor in making a distribution. But this premise will not govern most fact situations. Perhaps the more interesting aspect of \textit{D'Arc} is its suggestion, insofar as it revives the \textit{Sanders} case, that some misconduct less grievous than murder may also be relevant to the distribution decision. The difficulty lies in formulating a standard—and this difficulty increases as a court's willingness to consider marital fault increases. \textit{Sanders} may provide such a standard: marital fault that reflects the relative contributions of the parties to the marital property should be taken into account when the property is divided. Strictly speaking, this is not "property fault." Helga Sanders did not misappropriate, conceal or dissipate marital property; she simply made no contribution to it and therefore had no equitable claim to it.

While too narrow to encompass the various marital misdeeds that have actually been considered by courts making such distributions,\textsuperscript{256} this standard

\begin{quote}
\textsuperscript{251} Id. at 329-30, 287 A.2d at 466-67.
\textsuperscript{252} 65 N.J. 186, 320 A.2d 478.
\textsuperscript{254} Id. at 241, 395 A.2d at 1278.
\textsuperscript{255} Id.
\end{quote}
possesses several attractive features. It would spare a court the necessity of drawing tortuous distinctions based on degrees of culpability and would also eliminate one possibility for judicial capriciousness. Further, it seems to explain the reluctance of the Giannola and Kobylack courts in New York to weigh marital fault. Finally, it reconciles different distribution policies: if the legislative enumeration of alimony factors in the first place indicates the court’s authority to indulge in the associated fault inquiry, it is the policy of contribution that determines what kind of fault may be the subject of inquiry.

Property fault, or misconduct that directly affects the marital assets, should certainly be considered when the assets are divided. In fact, in three states where consideration of marital fault is forbidden by statute, property fault is expressly included as a distribution factor. In one of these states, California, the misconduct must amount to “deliberate misappropriation” of community assets; the courts have interpreted this statutory language very narrowly as “calculated thievery by a spouse, not the mishandling of assets.” The same is true with respect to debt: absent a showing of “gross mishandling of community financial affairs which would be tantamount to fraud,” the court will effect an equal division of community debt. Indiana’s statute focuses on misconduct in the disposition of marital property; but even when such misconduct is proved, it is only one factor for the court’s consideration. Misconduct cannot be used to enlarge the marital estate—in other words, it does not invoke any rule of tracing assets in the distribution process. Under the South Dakota statute, in contrast, the only misconduct relevant to distribution is that misconduct which affects the acquisition of marital property. Few guidelines emerge from South Dakota’s case law; it seems clear that the statutory misconduct standard does not open a “back door” for the introduction of evidence of all “faults and circumstances leading up to the divorce.”

In other states where a more general fault standard exists, courts are (perhaps a fortiori) willing to consider property fault in dividing marital assets. For example, a Texas court upheld an unequal division weighted in favor of the wife when the husband had converted a substantial amount of community property. Courts with discretion to consider the fault question—particularly courts in New York and North Carolina—may be expected to demonstrate a similar willingness to weigh property fault against the offending spouse.

257. See text accompanying notes 193-99 supra.
258. See Foster, supra note 174, at 50.
261. Id. (emphasis in original).
263. Id.
Other "Just and Proper" Factors

Fault is but one of the many factors that may command discretionary attention in the variety of fact situations likely to arise under North Carolina's distribution statute. Two particular factors that might fall within the Factor 12 discretionary mandate to the North Carolina courts under the new Act will be briefly examined below. First, when the marriage of the parties seeking an equitable distribution followed a period of cohabitation, the question is presented whether equities that may have arisen during cohabitation are entitled to be weighed in the distribution process. Analysis of the question requires exploration of North Carolina's statutory scheme.

All property acquired by either spouse prior to marriage is included within the statute's definition of "separate property."\(^{266}\) Under such an expansive definition, property acquired during premarital cohabitation, whether acquired jointly or separately, would be classified as "separate" property.\(^{267}\) Even so, the premarital accumulation of property has equitable distribution consequences. Any direct contribution made during the course of the marriage to the increase in value of the "separate" property will be weighed in dividing marital property.\(^{268}\) The statute does not mandate expressly in any of the eleven specific factors that either direct contributions made prior to the marriage, or indirect contributions to the "separate" property (for example, homemaker services) made either before or during the marriage, would be counted in determining an equitable distribution.\(^{269}\) To the extent, however, that indirect contributions made during the marriage to separate property are not implicitly excluded from consideration, it is possible that they may be taken into account under Factor 12.

Whether Factor 12 would also embrace premarital contributions, direct or indirect, is unclear.\(^{270}\) There is nothing in the distribution statute itself to preclude such treatment. Further, if a nonmarital relationship culminates in marriage, a court may view an arguably unenforceable contract as a valid antenuptial agreement. One commentator has concluded that, if the parties' written agreement was intended to govern the legal incidents of their long term relationship, including their possible marriage, it may qualify as an antenuptial contract. The fact that the parties lived together before marriage should not disqualify their agreement from being considered to be [an] antenuptial contract unless it is clear that they intended that

---

269. Id. G.S. 50-20(c)(6) applies only to marital property.
270. There are conflicting policy considerations at play in this area. See, e.g., N.C. Gen. Stat. § 14-184 (1981) (making lewd and lascivious cohabitation a misdemeanor); see also Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). But see 1 R. Lee, supra note 182, § 16.4, at 85-86 (marshaling policies in support of the principle that the validity of contracts respecting property should not turn on a couple's marital status).
their agreement apply [only] while they remained single.\textsuperscript{271} The equitable distribution statute contemplates the validity of antenuptial agreements insofar as they provide for the distribution of marital property, but only as between the parties.\textsuperscript{272} The extent to which a court can reexamine the agreement is unclear. Minimally, it would seem that the existence of such an agreement should be treated as a just and proper consideration under Factor 12. Arguably, the court should also be able to delve far enough into the agreement to ascertain premarital equities that bear on the distribution of marital property.\textsuperscript{273}

To the extent that the North Carolina statute advances a needs/abilities policy for distribution, a second relevant Factor 12 consideration is the issue of each spouse's employability and potential for future earnings. The enumerated factors indicative of a needs/abilities analysis\textsuperscript{274} look to the time a distribution is to become effective and no further. If this limitation is intentional on the part of the legislature, the courts are foreclosed from further inquiry. Several aspects of the statute suggest an intentional limitation. For example, contributions to the education or career potential of a spouse are expressly considered.\textsuperscript{275} Also, while professional and business licenses are treated as separate property,\textsuperscript{276} direct contributions to any increase in their value will be recognized.\textsuperscript{277}

Viewed in another way, the limitation that these enumerated factors appear to impose on the Factor.12 inquiry may be an unintended effect of divergent distribution policies. It is hard to imagine how such enumerated factors as the age and health of the parties\textsuperscript{278} could have any real significance were the courts required to limit their projections to the effective distribution date. The consideration of expected pension and retirement benefits\textsuperscript{279} likewise entails projection beyond the date of distribution. A discretionary examination of employability and probable future financial circumstances would not seem inconsistent.

The legislative history of the distribution statute casts the problem in a very different light. As was pointed out early in this discussion, the North Carolina statute—especially in its detailed enumeration of distribution factors—is patterned closely after that of New York. Nevertheless, New York’s

\textsuperscript{271} Foster, Agreements Between Non-Marital Partners, in A Practical Guide to the New York Equitable Distribution Divorce Law 133-34 (Foster ed. 1980).

\textsuperscript{272} N.C. Gen. Stat. § 50-20(d) (Cum. Supp. 1981). Whether this section applies only to agreements that provide exclusively for the distribution of marital property or whether it applies to agreements \textit{to the extent} that they deal with marital property is unclear. The latter interpretation seems preferable, at least when by its terms a contract is severable.

\textsuperscript{273} Unfortunately, the equitable distribution statute is inadequate to correct the unfair situation that may result when most or all of a couple’s property was acquired prior to marriage.

\textsuperscript{274} See text accompanying notes 183-84 supra.


\textsuperscript{276} Id. § 50-20(b)(2).

\textsuperscript{277} Id. § 50-20(o)(8).

\textsuperscript{278} Id. § 50-20(o)(2).

\textsuperscript{279} Id. § 50-20(o)(5).
Factor 8, "the probable future financial circumstances of each party,"\textsuperscript{280} has no statutory counterpart in North Carolina, unless North Carolina's Factors 7 and 8 (contributions to education, career potential and separate property) constitute such a counterpart. The conclusion that the legislature intended to substitute Factors 7 and 8 for New York's Factor 8 is the most feasible explanation for a noticeable difference between the enumeration schemes, identical in most other respects. The North Carolina variation is crucial in that it signals a conscious legislative restriction on the way a court can evaluate the respective earning capacities of the parties. Further, the restriction itself reflects an intentional substitution of a contribution policy for an alimony policy.

**CONCLUSION**

Factor 12 vests in a trial judge the power to determine what would be an "equitable" division of marital property in light of the circumstances. This discretionary power has great potential for individual justice. Its corresponding potential for abuse is limited by the legislative enumeration of specific guidelines, and, more fundamentally, by the policies that shape the equitable distribution statute.

Equitable distribution in North Carolina means that a spouse who has contributed directly or indirectly to marital property is entitled to a share of that property upon divorce. Thus, if a court is to weigh fault at all in balancing the various distribution factors, it should consider only that fault which affects the marital property or reflects the spouses' relative contributions to it. Similarly, premarital contributions to separate property should be recognized as relevant to a determination of an equitable distribution.

The difficulty in defining the scope of the Factor 12 power arises from the legislature's insistence that certain factors normally reserved for alimony determinations also be considered in the distribution process. When alimony and contribution considerations are at odds, the court must decide which distribution policy has priority. The language of the statute and its legislative history support the priority of a contribution policy. Only litigation, however, will finally resolve the question.

3. Other Developments

In other important legislative action in 1981, the General Assembly elimi-

nated the presumption in alimony actions that the husband is the supporting spouse. G.S. 50-16.1(3) and (4) define a dependent spouse as a spouse "whether husband or wife."281 The recently deleted portion of the statute stated that a husband is "deemed to be the supporting spouse unless the contrary is shown."282 The court of appeals had interpreted "deemed" to mean "presumed,"283 therefore requiring that proof to the contrary be shown to rebut the presumption.

As the statute now stands, "supporting spouse" in North Carolina "means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support."284 The court of appeals had already noted the "very substantial constitutional questions" arising from the gender-based discrimination in the statute as it was interpreted prior to amendment.285 The deletion of the presumption of the husband as the supporting spouse should prevent a constitutional challenge,286 although it is doubtful that many practitioners depended on the presumption even prior to the amendment.

The General Assembly also lowered a major alimony hurdle for dependent spouses in 1981 by deleting the portion of G.S. 50-11(c) that impaired the right of a dependent spouse to receive alimony if that spouse both initiated and obtained a divorce based on separation for the statutory period of one year.287 The statute retains a prohibition of an award of alimony to a dependent spouse, served with process within or without the state, who was a defendant in a divorce based on grounds of adultery. That prohibition is the only exception in subsection (c) of the statute, itself an exception to the statute's declaration that an absolute divorce bars alimony. As the statute now stands, therefore, only defendants in divorces granted on grounds of adultery are barred from obtaining decrees of alimony.

The court of appeals discussed enforceability of property settlement provisions in separation agreements in Cobb v. Cobb288 and Athey v. Athey.289 In both cases the court limited and explained rulings in prior cases. In Cobb the court of appeals held that property settlements in separation agreements incorporated into divorce decrees290 are enforceable by contempt proceedings.291

282. Id.
286. 2 R. Lee, Supra note 182, § 135.1 at 157.
290. In Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964), the supreme court distinguished between separation agreements that are merely approved by the court and those that are adopted or incorporated by reference into a divorce decree. Courts may enforce the former only in contract actions and may not modify the agreement except with the consent of both parties. Courts
In North Carolina, property settlements, as distinguished from support provisions, are generally not modifiable by the court. Defendant-husband in *Cobb* argued that since property settlements are not modifiable by the courts, they are not enforceable by contempt. Defendant cited *Bunn v. Bunn* to support his argument. Justice Sharp in that opinion stated that "[i]f the judgment can be enforced by contempt it may be modified and vice versa." Defendant *Cobb* argued, based on that statement, that if an agreement may not be modified, it may not be enforced by contempt.

The court of appeals, finding that the agreement had been incorporated into the decree, disagreed with the defendant's reasoning. Judge Vaughn argued that the "phrase 'vice versa' does not mean the negative of what was previously stated. 'Vice versa' means the order changed." The court argued that both property and support provisions were part of the court order and that since the parties requested in their pleadings that the agreement be "made subject to the orders of this court," it would "demean the court to allow defendant to successfully argue that the court cannot enforce those portions of the decree that defendant might select to ignore." The court explained the rationale for treating property and support differently with regard to modification by noting that a settlement of property rights created vested rights; support rights, because of their nature must be modifiable.

In *Athey* the court of appeals discussed the effect on a separation agreement of a reconciliation of the parties and reversed a lower court ruling for summary judgment. The husband and wife agreed in August 1978 that if the wife gave up her right of support, the husband would make payments on their car. The husband ceased making the payments in February 1979. In April 1979 the parties reconciled. In October 1979 they separated again, and the wife sued for alimony. The issue before the court was whether the reconciliation constituted a rescission of the separation agreement that barred her claim for alimony. The district court granted the defendant husband's motion for summary judgment. On appeal, husband cited *Pots v. Pots* for the rule that any provision in a separation agreement fully executed prior to reconciliation may enforce support provisions of an incorporated agreement by contempt. They may also modify the support provisions. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980).
tion is unaffected by the reconciliation. The husband in this case claimed that all the terms of his agreement with his wife except the car payments were fully executed.

The court of appeals found the wife's claim for alimony not barred by the reconciliation. This case was distinguishable from Potts, the Athey court stated, because in Potts the agreement was court-approved and fully executed. In Athey the court deemed the question whether the agreement between the parties was rescinded to be one of material fact, depending upon whether the failure to make car payments by the husband relieved the wife of her obligation not to sue for alimony.

The court of appeals also ruled in 1981 on the professional obligation of district attorneys representing out-of-state plaintiffs in Uniform Reciprocal Support Act (URESA) actions; it held that the duty should be equal to that of privately-retained counsel. In Thelen v. Thelen the court of appeals affirmed the setting aside of a judgment against a Maryland plaintiff who sought to enforce a Maryland support decree of $1,000 per month. The North Carolina defendant hired private counsel to challenge the order based on changed circumstances. The district attorney representing plaintiff failed to notify her of the Mecklenburg County hearing and presented only the written record of the case to rebut defendant's claim of changed circumstances.

In a subsequent action a district court granted plaintiff's rule 60(b) motion to set aside the judgment on grounds of mistake, inadvertance and excusable neglect on the part of her attorney. The court of appeals affirmed, finding that the actions of the district attorney did not constitute adequate representation as required by law. The court refused to set rigid rules to determine what constitutes proper representation; it noted that "[t]he statutory appointment of the 'official who prosecutes criminal actions for the State' to represent the obligee in URESA proceedings is not just an empty formality but is designed to guarantee to the complainant effective assistance of counsel.

302. 54 N.C. App. at 472, 283 S.E.2d at 569. For a general discussion of the effects of reconciliation see 2 R. Lee, supra note 182, § 200.

303. 54 N.C. App. at 472, 283 S.E.2d at 569.

304. Chapter 52A of the North Carolina General Statutes is North Carolina's codification of URESA.

It establishes a two-state procedure by which a spouse who is owed support may enforce payment by an out-of state obligor spouse without leaving the state or obtaining personal jurisdiction over the obligor. The obligor may defend in his or her own jurisdiction. The statute provides that it shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the obligee in proceedings under this chapter. N.C. Gen. Stat. § 52A-10.1 (1976). Thus, a spouse to whom support is owed files a complaint in an initiating court, which forwards the complaint to the state of the obligor. In that state a district attorney's office is charged with the responsibility of serving notice on the obligor and representing the obligee.


in this State."307

William Clyde Morris, III
Andrea Denise Smith
Kim Wetherill
Debra Leigh Whited
Carolyn Cordelia Wood

307. 53 N.C. App. at 691, 281 S.E.2d at 742.
IX. PROPERTY

A. Joint Ownership

Despite increasing attacks on the institution of tenancy by the entirety, the North Carolina Supreme Court in *In re Foreclosure of Deed of Trust* reaffirmed the judicial support historically given the concept of entirety owner-

---


   The General Assembly also statutorily approved the use of “Savings Bank,” or “Totten,” trusts, in its enactment of G.S. 54B-129, 130, passed as part of Chapter 54B (“Savings and Loan Associations”). Law of April 30, 1981, ch. 282, § 3, 1981 N.C. Sess. Laws, 1st Sess. 272, 318-19 (codified at N.C. Gen. Stat. §§ 54B-129, -130 (Cum. Supp. 1981)). The statute gives two or more people the right to hold the balance of a withdrawable savings account as joint tenants, with or without the right of survivorship, as they decide. Withdrawals from and deposits to the account may be made by either joint tenant without affecting the nature of the account.


3. For concise discussions of the characteristics of the tenancy by the entirety in North Carolina, see *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); Lee, Tenancy by the Entirety in North Carolina, 41 N.C.L. Rev. 67 (1962).


After adoption of Married Womens' Property Acts, several states that had recognized the entirety estate repealed it. North Carolina's version of this Act appears in the Constitution of 1868:

The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, and, with the written assent of husband, conveyed by her as if she were unmarried.

N.C. Const. art. X, § 6 (1868).

The North Carolina Supreme Court in *Long v. Barnes*, 87 N.C. 309 (1882), reasoned that the legislature “never had in contemplation to change the established rules of construction, or destroy or change the properties and incidents belonging to estates, or to give married women any greater
The court held that surplus proceeds arising upon the foreclosure and sale of entirety property pursuant to a power of sale contained in the deed are not capable of being held in the entirety. While the ruling does narrow the outlines of acceptable tenancies by the entirety, it operates to indicate the courts' continuing commitment to the entirety estate, although the court refused to extend the tenancy beyond its common law restriction to realty.

The general rule concerning the distribution of proceeds realized upon the conversion of entirety property into another form of estate is that the voluntary sale of entirety property by husband and wife results in the dissolution of the entirety estate. Absent a contrary intent, husband and wife then hold the proceeds as tenants in common, and the estate is severable at the request or death of either. North Carolina courts have experienced no difficulty justifying this result, and have steadfastly adhered to their position that because "there was never any estate by the entitities in personalty" at common law, the proceeds derived from such a sale are "[o]rdinarily . . . held as tenants in common."

This rule, though highly favored by the courts for its simplicity of application, was perceived as inappropriate for involuntary sales of entirety property when there was no act of severance by the tenants. Consequently, the "involuntary conversion" doctrine evolved, holding that the funds derived from conversions such as sales of entirety land for incompetent spouses or estates than are conveyed to them by the terms of the instruments under which they derive title.”

Tenancies by the entirety are currently recognized in only 22 states. For a complete listing, see Annot., 64 A.L.R.2d 8 (1959). Massachusetts and Michigan are the only other entirety states whose courts have held the estate to remain unaffected by legislative action. See Pray v. Stebbins, 141 Mass. 219, 4 N.E. 824 (1886); Morrill v. Morrill, 138 Mich. 112, 101 N.W. 209 (1904).

The North Carolina General Assembly has also consistently demonstrated its support of the entirety estate. Illustrative of this support is a statute passed in 1981 extending the tenancy by the entirety to mobile homes. The amendment broadens the common law presumption that a conveyance of real property to a husband and wife, nothing else appearing in the instrument, creates a tenancy by the entirety, to include conveyance of mobile homes. Law of June 5, 1981, ch. 507, 1981 N.C. Sess. Laws, 1st Sess. 786 (codified at N.C. Gen. Stat. 41-2.5 (Cum. Supp. 1981)).

Tenancies by the entirety are currently recognized in only 22 states. For a complete listing, see Annot., 64 A.L.R.2d 8 (1959). Massachusetts and Michigan are the only other entirety states whose courts have held the estate to remain unaffected by legislative action. See Pray v. Stebbins, 141 Mass. 219, 4 N.E. 824 (1886); Morrill v. Morrill, 138 Mich. 112, 101 N.W. 209 (1904).

6. The North Carolina General Assembly has also consistently demonstrated its support of the entirety estate. Illustrative of this support is a statute passed in 1981 extending the tenancy by the entirety to mobile homes. The amendment broadens the common law presumption that a conveyance of real property to a husband and wife, nothing else appearing in the instrument, creates a tenancy by the entirety, to include conveyance of mobile homes. Law of June 5, 1981, ch. 507, 1981 N.C. Sess. Laws, 1st Sess. 786 (codified at N.C. Gen. Stat. 41-2.5 (Cum. Supp. 1981)).

7. 303 N.C. at 516, 279 S.E.2d at 568.


9. "When property held as tenants by the entirety is sold, the proceeds derived from the sale will not be held as tenants by the entirety with the right of survivorship." Wilson v. Ervin, 227 N.C. at 399, 227 S.E.2d at 470.

10. Although the tenancy in common does not have the survivorship feature of the tenancy by the entirety, it may be added artificially. The supreme court held in Wilson that parties to a sale have the right to determine by contract what disposition shall be made of the funds, "or how they should be held." Id. at 399, 227 S.E.2d at 470.


12. 227 N.C. at 399, 227 S.E.2d at 470.

eminent domain proceedings\textsuperscript{14} retain the entirety characteristics of the reality they replace. The doctrine was consistently applied when the conversion was by its very nature forced on the entirety tenants, but a difference of opinion persisted concerning the question whether the doctrine should be applied to surplus proceeds arising after mortgage foreclosures of entirety property, because the tenants voluntarily had given the power to foreclose in the deed of trust.

A most definitive resolution to the related issue of insurance proceeds came in 1963 when New York's highest court decided \textit{Hawthorne v. Hawthorne},\textsuperscript{15} a case now regularly cited as controlling in the area of involuntary conversion.\textsuperscript{16} The court held that proceeds from a fire insurance policy on entirety property, payable to husband and wife, were to be held in common. While the court recognized the similarity of the "involuntary character of the loss of the reality"\textsuperscript{17} by fire and by condemnation, it found a critical distinction between the two situations in that the insurance policy had been voluntarily procured. "[W]hile the \textit{loss} was involuntary, the \textit{insurance proceeds were} not a substitute forced on the parties equally involuntarily,"\textsuperscript{18} but instead were the result of a "voluntary contractual act."\textsuperscript{19} Presumably, a voluntarily obtained mortgage resulting in an involuntary loss at foreclosure would also be subject to this reasoning.

North Carolina courts have consistently followed \textit{Hawthorne}. In \textit{Forsyth County v. Plemmons},\textsuperscript{20} a case presenting the identical question as \textit{Hawthorne}, the court of appeals stripped the insurance proceeds of entirety status. More recently, the North Carolina Supreme Court, in \textit{Lovell v. Rowan Mutual Fire Insurance Co.},\textsuperscript{21} relied on \textit{Hawthorne} to declare fire insurance proceeds common property, although the policy was payable to the husband alone. The court held that the wife also possessed an insured interest in the property, and therefore was entitled to her share as a tenant in common.

\textsuperscript{14} North Carolina Highway Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967). Describing the condemnation proceedings as an "involuntary transfer of title" requiring no "[v]oluntary action by the owners," the court concluded that "the compensation paid by the [State] therefore [had] the status of real property owned by husband and wife as tenants by the entirety." Id. at 262, 154 S.E.2d at 90.


\textsuperscript{17} 13 N.Y.2d at 85, 192 N.E.2d at 21, 242 N.Y.S.2d at 52.
In re Foreclosure of Deed of Trust\textsuperscript{22} is the most recent case in this line of decisions. In reversing the court of appeals, the supreme court cited Judge Vaughn's recognition in his dissent to the court of appeals decision for the proposition that a "number of voluntary choices are made by parties who sign a deed of trust conveying a power of sale."\textsuperscript{23} These choices "made by [husband and wife] in buying realty and subjecting it to a deed of trust do not provide the proper factual background for determining that sale at foreclosure was involuntary in the true sense of that word."\textsuperscript{24} The court rejected the application of the involuntary conversion doctrine and refused to "extend the reach of a common law fiction, the concept of entirety property, to include funds which, even at common law, could only be deemed personally."\textsuperscript{25}

The Plemmons and In Re Foreclosure cases indicate that the involuntary conversion doctrine may be limited to eminent domain and incompetency cases.\textsuperscript{26} This trend towards limiting the doctrine of tenancy by the entirety demonstrates the courts' increasing awareness of the frequent criticisms that the entirety estate has no place in modern society.\textsuperscript{27} Some commentators have argued that the estate is not needed because the rights of women concerning property ownership are now for the most part statutorily protected, which was not the case in common-law England where the estate originated.\textsuperscript{28} Critics also note the problems the estate creates for creditors seeking to enforce their interests against individual spouses.\textsuperscript{29} Nevertheless, the current popularity of

\begin{itemize}
\item \textsuperscript{22} 303 N.C. 514, 279 S.E.2d 566 (1981).
\item \textsuperscript{23} Id. at 518, 279 S.E.2d at 568.
\item \textsuperscript{24} Id. This holding is in direct conflict with the U.S. Bankruptcy Court's holding in In re Reaves, 3 Bankr. 605 (E.D.N.C. 1980), a case also concerning foreclosure of entirety property. After a futile struggle to locate pertinent prior decisions, the court finally satisfied itself that there were "no North Carolina decisions on whether a foreclosure sale is a voluntary or involuntary conversion of real property." Id. at 607. Free from precedential constraints, the court determined that "the foreclosure was [not] the result of any affirmative act on the part of the Bankrupt and his wife and . . . [therefore] the foreclosure was an involuntary transfer. The proceeds from the sale assume the nature of entireties' property . . . ." Id. This decision was ignored in In re Foreclosure.
\item \textsuperscript{25} 303 N.C. at 517, 279 S.E.2d at 567. Despite this seemingly favorable ruling, the appellant still came away unsatisfied, for even though the decision established its right to attach the husband's share of the surplus, the court held that this right did not arise "until the property was converted into another form of estate at the time of final sale under foreclosure." Id. at 519, 279 S.E.2d at 569. Thus, although the appellant's tax lien was originally filed prior in time to the liens of two of the seven other creditors, it became junior to each of the seven because it was the last to attach to an interest in the surplus. See 55 Am. Jur. 2d Mortgages § 931 (1971), for a discussion of priority of liens generally.
\item \textsuperscript{26} It is important to note that Lovell and In re Foreclosure specifically reject only the use of the involuntary conversion rule for the particular facts in those cases, not the overall validity of the rule; indeed, neither Myers nor Perry has been overruled, and there is no reason to believe they will be.
\item \textsuperscript{27} See C. Moynihan, The Law of Real Property 234-35 (1962). One author suggests that the chief policy reason for maintaining the entirety estate is that "[t]here is in North Carolina probably no other rule of property which does so much to solidify the marital status." Lee, supra note 3, at 70. Clearly, however, if the marriage is already unsteady, the imposition of entirety characteristics on the funds which arise following conversions by the court cannot help to "solidify" the marriage, and indeed may operate to aggravate matters.
\item \textsuperscript{28} See note 5 supra.
\item \textsuperscript{29} See 4A R. Powell, The Law of Real Property 623, 697 (P. Rohan ed. 1979); Grilliot & Yocum, Tenancy by the Entirety: An Ancient Fiction Frustrates Modern Creditors, 17 Am. Bus.
the entirety estate,\textsuperscript{30} combined with the North Carolina courts' tradition of leaving major policy changes to the legislature,\textsuperscript{31} make further judicial inroads into the scope of tenancy by the entirety uncertain at best.

B. Eminent Domain\textsuperscript{32}

North Carolina's eminent domain procedures long have been much maligned, and rightly so.\textsuperscript{33} The criticism stems mainly from the confusion generated by the presence of eighteen different statutory condemnation procedures\textsuperscript{34} plus a host of other procedures carried on local code books.\textsuperscript{35} The result of this procedural overkill is an unwieldy and often inequitable system\textsuperscript{36} that seldom is correctly applied and even more rarely understood.

In an effort to correct this situation, the General Assembly has repealed the entirety of G.S. Chapter 40 and replaced it with Chapter 40A, entitled simply "Eminent Domain."\textsuperscript{37} The revision essentially replaces the eighteen different procedures with only two, which are to be used by all private as well as public condemnors for any purpose included in the statute, thus eliminating the need to peruse several volumes to locate the applicable law. Furthermore,

\begin{itemize}
  \item L.J. 341 (1979); Ritter, A Criticism of the Estate by the Entirety, 5 U. Fla. L. Rev. 153 (1952);
  \item Wilkerson, Creditors' Rights Against Tenancies by the Entirety, 11 Tenn. L. Rev. 139, 147 (1953).
  \item Approximately 90\% of married couples in North Carolina select this form of co-ownership when home-buying. Lee, supra note 3, at 69; Porter, supra note 2, at 1008.
  \item In \textit{Turlington v. Lucas} the North Carolina Supreme Court wrote that it had "more than once suggested the abolition of the estate by the entireties to the Legislature." 186 N.C. 283, 287, 119 S.E. 366, 368 (1923).
  \item Eminent domain has been defined by the North Carolina Supreme Court as the right of the state or of a person acting for the state to use, alienate, or destroy property of a citizen for the ends of public utility. Wissler v. Yadkin River Power Co., 158 N.C. 465, 466, 74 S.E. 460, 461 (1912).
  \item As early as 1908, the supreme court wrote that "[t]he provisions of the [eminent domain] statute regarding the mode of procedure and rules of practice are indefinite and obscure." Abernathy v. S. & W. Ry., 150 N.C. 80, 84, 63 S.E. 180, 183 (1908). For an extensive analysis of the particular problems with the eminent domain statutes, see Phay, The Eminent Domain Procedure of North Carolina: The Need for Legislative Action, 45 N.C.L. Rev. 587 (1967).
  \item Indeed, many of the provisions of the new bill seem to be in direct response to some of Phay's well-supported criticisms.
  \item The reason for the exceptionally high number is, according to Phay, "largely a reflection of dissimilar judgments as to what is more important—protection of personal property or administrative expediency," a policy consideration that lies at the very heart of the concept of eminent domain. Phay, supra note 33, at 589. Arguably, it is wise for the State to demonstrate caution in this area, for inroads on the sanctity of a man's home have always been viewed with hostility by the general populace.
  \item These local laws were enacted primarily to simplify condemnation procedures authorized by the general law. Unfortunately, this duplicity can lead to conflicts between powers granted to a condemnor by the two laws. See, e.g., Town of Clinton v. Johnson, 174 N.C. 286, 93 S.E. 776 (1917).
  \item The tendency evidenced by North Carolina lawmakers has been to add new procedures without bothering to remove or even amend previously existing ones. The result is that a single condemnor may utilize any one of a number of different procedures to condemn identical types of property for identical purposes. It is not surprising, therefore, that consistency among award judgments has not been a hallmark of North Carolina eminent domain proceedings—although admittedly part of this problem is inherent in the valuation process appraisers employ to arrive at the amount awarded.
\end{itemize}
the new bill supplies guiding principles that should aid appraisers in reaching their determination of what constitutes just compensation. This change should operate to produce more uniform and predictable judgments, a situation long sought by both condemnors and condemnees.

The statute is divided into four articles. The first deals with general principles and definitions. Perhaps the most significant definition is that of "property" in G.S. 40A-2(7): "any right, title, or interest in land, including leases and options to buy or sell, . . . rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land."38 This encompassing language is characteristic of the new law's attempt to streamline condemnation proceedings by eliminating the potential for quibbling over the technical wording of its provisions.

G.S. 40A-3, titled "By whom right may be exercised," replaces G.S. 40-2, and unlike the old section, is broken down into three categories: private condemnors, local public condemnors (cities and counties), and other public condemnors. In addition, the bill expressly states the purposes for which these classes of condemnors shall have the authorized power of eminent domain.39

G.S. 40A-4 removes the procedural necessity of attempting to acquire the

38. N.C. Gen. Stat. § 40A-2(7) (Cum. Supp. 1981). This language represents a clear expansion of the definition of property recited in early North Carolina cases, where "property" and "land" were used interchangeably. See, e.g., Parks v. Board of County Comm'rs, 186 N.C. 490, 120 S.E. 46 (1923); Clifton v. Duplin Highway Comm'n, 183 N.C. 211, 111 S.E. 176 (1922).

39. The bill neither increases nor decreases the number of condemnors, nor the purposes for which condemnation may be used. The following are the authorized private condemnors and the purposes for which they are given the power of eminent domain:

1) Corporations, bodies politic or persons . . . for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, hamroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals.

2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, to obtain a pure and adequate water supply for such institution.

3) Franchised motor vehicle carriers or union bus station companies . . . for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

4) Any railroad company . . . for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission . . . . [need citation to bill].


The following are the authorized purposes for which local public condemnors are given the power of eminent domain:
desired land by purchase prior to initiating a condemnation action.\textsuperscript{40} This provision continues a trend begun in several recent municipal charters.\textsuperscript{41} Although the purpose of the “unable-to-acquire” prerequisite was to minimize condemnation suits, it is questionable whether a substantial number of suits were dismissed on that basis; indeed, the proof required to establish an inability to purchase historically has been held to be very slight.\textsuperscript{42} Thus, this section will probably not increase the number of condemnation actions, but will work to reduce the time and money required for a condemnor to initiate such a proceeding.

G.S. 40A-6 provides for the reimbursement by the condemnor of the pro rata portion of real property taxes paid by the condemnee allocable to a period

\begin{itemize}
  \item[1)] Opening, widening, extending, or improving roads, streets, alleys, and sidewalks
  \item[2)] Establishing . . . or improving any of the public enterprises listed in G.S. 160A-311 for cities, of G.S. 153A-274 for counties.
  \item[3)] Establishing, enlarging, or improving . . . recreational facilities.
  \item[4)] Establishing . . . or improving storm sewer and drainage systems and works.
  \item[5)] Establishing . . . or improving hospital facilities, cemeteries, or library facilities.
  \item[6)] Constructing . . . or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
  \item[7)] Establishing drainage programs . . .
  \item[8)] Acquiring designated historic properties . . .
  \item[9)] Opening . . . or improving public wharves.
\end{itemize}


The bill also authorizes the exercise of the power of eminent domain for “other” public condemnors:

\begin{itemize}
  \item[1)] A sanitary district board . . .
  \item[2)] The board of commissioners of a mosquito control district . . .
  \item[3)] A hospital authority . . .
  \item[4)] A watershed improvement district . . .
  \item[5)] A housing authority . . .
  \item[6)] A corporation . . .
  \item[7)] A corporation . . .
  \item[8)] [A water and sewer] authority . . .
  \item[9)] A [metropolitan water] district . . .
  \item[10)] A [metropolitan sewerage] district . . .
\end{itemize}


40. For cases in which the courts made private negotiation a prerequisite to condemnation, see Virginia Elec. & Power Co. v. King, 259 N.C. 219, 130 S.E.2d 318 (1963); Allen v. Wilmington & W.R.R., 102 N.C. 297, 9 S.E. 4 (1889).


42. Often all that was necessary was a statement by the condemnor that the owner would not sell. See, e.g., Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959). More recently, the court of appeals reached different results in two cases involving a condemnor's failure to allege his inability to obtain the land through purchase even though the cases had very similar fact patterns. Compare North Carolina Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968) (allegation of attempt to acquire property through negotiation not necessary if defendant admits plaintiff's authority to condemn) with City of Charlotte v. Robinson, 2 N.C. App. 429, 163 S.E.2d 289 (1968) (allegation of attempt to acquire property through negotiation is condition precedent to plaintiff's having authority to condemn property). This comparison highlights two problems with the requirement: first, the inconsistent weight courts have placed on this requirement; and second, the amount of extraneous appellate litigation it breeds. See Whitman, Survey of Recent Developments in the North Carolina Law of Eminent Domain, 48 N.C.L. Rev. 767, 768-69 (1970).
subsequent to vesting of title in the condemnor. G.S. 40A-7 allows a condemnor to acquire an entire parcel of land or building even when a proposed project requires only a portion thereof.\(^\text{43}\) G.S. 40A-8 allows the court in its discretion to award a property owner who successfully initiates or defends an action against a condemnor the costs incurred in the litigation and the preparation therefor, as well as any damages suffered from the inability to transfer title from the date of filing the complaint. Under G.S. 40A-13, the condemnor shall pay all court costs regardless of outcome. G.S. 40A-9 allows a property owner to remove any structure or fixture from the property providing it is not inconsistent with the purpose for which condemnation was made. If the condemnee fails to remove the structure after its value has been deducted from the compensation paid for the land, the condemnor may remove it and the cost of removal is charged against the condemnee. G.S. 40A-10 permits condemned property to be sold as surplus property if it is no longer needed for the purpose for which it was condemned. G.S. 40A-11 grants condemnors the authority to enter upon lands, but not structures, prior to the filing of the petition or complaint, for the purpose of surveys, borings, examinations and appraisals.\(^\text{44}\)

Articles 2 and 3 of Chapter 40A concern the procedural aspects of eminent domain; the former for private condemnors, the latter for local public condemnors. To commence a condemnation action by a private condemnor, a petition is filed with the clerk of the superior court of the county in which the land is located, either by the condemnor or the property owner. This petition must contain a description of the property,\(^\text{45}\) a statement of condemnor's intention in good faith\(^\text{46}\) to conduct the public business authorized by its charter, and the specific intended use of the property. As in old G.S. 40-12, a summons must be served, along with a copy of the signed and verified petition, on all persons who have an interest in the proceeding, at least ten days prior to the hearing.\(^\text{47}\)

At the hearing before the clerk of the superior court, all interested parties have the right to show cause against the granting of the petition for a condemnation.

---

\(^{43}\) This provision is only applicable when the condemnor can prove in the petition that 1) a partial taking would substantially destroy the economic value or utility of the remainder; or 2) economy in the expenditure of public funds will be promoted by taking the entire parcel; or 3) the interest of the public will best be served by acquiring the entire parcel.

\(^{44}\) This provision overturns the rule forbidding entry until the compensation for the land was paid. See, e.g., City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).


\(^{46}\) "[O]nce the public purpose is established, the necessity or expediency of the taking is a legislative, and not a judicial question." Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912 (1979). The exception to this rule is that "upon specific allegations tending to show bad faith . . . by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by a judge." City of Charlotte v. McNeely, 281 N.C. 684, 690, 190 S.E.2d 179, 185 (1972).

nation proceeding. If sufficient cause is not shown, G.S. 40A-25, as did repealed G.S. 40-16, gives the clerk authority to appoint three commissioners to control the proceeding; these commissioners must be both disinterested in the rights of and unrelated to, the parties. As before, they must be residents of the county in which the property in question lies.48

Once sworn to conduct a fair and impartial appraisal of the property, the commissioners view the premises, hear proofs and allegations of the parties, and reduce the testimony to writing. After testimony is closed, a majority of the commissioners is to award just compensation and report to the clerk within ten days.49 Significantly, the commissioners are to determine just compensation in accordance with principles established in Article 4 of the new bill;50 repealed Chapter 40 gave no indication of how the appraisal process was to be conducted, which led to wide variances among counties.

G.S. 40A-28 gives any party the right to file exceptions to the report within twenty days of its filing. The clerk shall hear these exceptions and may then direct a new appraisal, modify or confirm the report. The clerk's final judgment may be appealed by any party to the superior court within ten days. Once in one superior court, G.S. 40A-29 permits the amount of compensation to be determined by a jury, subject to waiver by all parties.

Notwithstanding the filing of exceptions or of notice of appeal, the condemnor may, by depositing the amount appraised with the clerk at the time the commissioners' report is filed, take possession of and hold the property in the manner sought by the condemnation action. If, on appeal, the judge refuses to condemn, the condemnor must surrender possession and his deposit is refunded to him.51

Condemnations by local public condemnors are regulated by Article 3 of Chapter 40A, which is similar to the provisions regulating condemnation by the State Department of Transportation contained in G.S. 136-9. This type of condemnation action is commenced by the filing of a complaint, in the superior court of the county in which the property is located, containing a “decla-

48. The wording of this section, although basically the same as G.S. 40-16, is perhaps in response to Phay's observation that some superior court clerks have followed the practice of allowing each party to name one of the three commissioners, leaving the appointment of the third to the clerk. Phay, supra note 33, at 610. This practice usually resulted in the clerk's appointee serving as an arbitrator between the other two. The new statute should alleviate this problem, by expressly requiring the commissioners to be not merely disinterested, but disinterested "in every way," as well as being "unrelated," a requirement not appearing in the old statute.

49. The form of the report is dictated by G.S. 40A-27.

50. See text accompanying notes 58-60 infra.

51. The remainder of Article 2 contains no major changes from prior law. G.S. 40A-30, allowing for the appointment of a guardian or trustee for an individual lacking the power of sale (e.g., infant, inebriate) to represent that individual's interest in the condemnation proceeding, is essentially the same as G.S. 40-22. G.S. 40A-31, directing the court to determine who is entitled to the payment by the condemnor when there are adverse claims to it, basically parallels G.S. 40-23. G.S. 40A-32, which gives the court authority to appoint an attorney to represent an interested but unknown party, tracks G.S. 40-24. G.S. 40A-33, which provides that a voluntary conveyance of the property in issue has no effect on the proceedings, is essentially the same as G.S. 40-26. Finally, G.S. 40A-34, allowing a condemnor to cure a defective title in the acquisition of property, is substantially the same as G.S. 40-27.
ration of taking declaring that property therein is thereby taken for the use of the condemnor.” G.S. 40A-40 requires, however, that notice be given to the property owner at least thirty days prior to filing. In addition, a sum of money equal to the condemnor’s estimate of just compensation is to be paid into the court. In the event a public condemnor takes land without filing a complaint containing a declaration of taking, the property owner may institute an action for compensation within twenty-four months of the date of the taking.

When the condemnor’s complaint seeks to acquire property for storm sewers, drainage programs, water systems, solid waste collection and disposal systems, or road construction or improvement, title and the immediate right to possession vest in the condemnor upon the filing of the complaint. When the condemnation is for any other statutorily authorized purpose, title vests either upon the filing of any answer by the property owner that does not challenge the condemnation, or the failure of the property owner to answer within 120 days.

G.S. 40A-48 allows for either the condemnor or the property owner to request the clerk to appoint commissioners to determine just compensation. If the clerk grants such a request, he will appoint three commissioners in the same manner as in a private condemnation; the duties of these commissioners are also the same.

The final article in G.S. Chapter 40A concerns the determination of just compensation. Chapter 40 directed the commissioners to determine just compensation but provided no guidance on acceptable procedures. In general, G.S. 40A-63 provides that the amount of compensation shall reflect the value of the property immediately prior to the filing of the complaint, whether the taking is public or private. G.S. 40A-64 provides that the measure of com-

---

53. G.S. 40A-44 allows the condemnee to apply to the court for the disbursement of this money without prejudicing his rights in any further proceedings to determine just compensation; this procedure is allowed, however, only when there is no dispute as to the title.
55. This is not the case, however, if an action for injunctive relief has been filed.
56. See note 39 supra.
58. The specific date of valuation is the day of the filing of a petition or complaint. Repealed G.S. 40-17 contained no provision as to date of valuation, although the courts determined it to be the “date of taking,” a dangerously ambiguous phrase. See West Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927).

A recent case in the court of appeals, Greensboro-High Point Airport Auth. v. Irvin, 54 N.C. App. 355, 283 S.E.2d 171 (1981), provides a good example of how this vague concept can be manipulated in the courts. In this case, the petition to condemn was filed in 1975, but no money was deposited with the clerk. After five years of appeals, the date of taking was finally deemed to be the date of filing. The owners of the land appealed, and argued for higher compensation, citing the inequity of being paid in 1980 dollars when the value of the land was measured in 1975 dollars that, because of inflation, were worth more. The court agreed, and ordered a new trial.

Another recent case concerning a court’s interpretation of “date of taking” was Cochran v.
pensation is to be the fair market value of the property. Just compensation is not to include the value of any timber, buildings, or permanent fixtures the owner is allowed to remove, but the cost of removal shall be a compensable item. The determination of the fair market value of the property is not to include an increase or decrease in value before the date of valuation caused by 1) the proposed improvement or project for which the property is taken; 2) the reasonable likelihood that the property would be acquired for that improvement or project; or 3) the condemnation proceeding in which the property is taken. The use of these standardized evaluation procedures will certainly result in the increased uniformity of awards among counties, one of the primary faults of the procedures under the old law.

C. Restrictive Covenants

In 1981 there were significant legislative and judicial responses to the recent trend toward establishment of group homes for mentally handicapped

City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981). In this inverse condemnation action the date of taking was determined to be the time the defendant took a flight easement over the plaintiff's land, not the date the complaint was filed. Because compensation is to be assessed at the time of taking, the determination of that date is crucial to the action. The frequent difficulty in assessing that date is apparent in this case, in which the number of flights over the plaintiff's land increased significantly between the court determined date of taking and the commencement of the action.

Cases such as these will be eliminated by the new statute, as there is no room for flexibility in establishing the date of taking. While this may result in occasional inequities, the advantage of having a hard-and-fast rule clearly outweighs that consideration.

59. If less than the entire tract is taken, the compensation is the greater of the fair market value of the property taken, and the amount by which the fair market value of the entire tract before the taking exceeds the fair market value of the remainder after the taking. Under the approach adopted in this section, the compensation award cannot be less than the value of the property taken considered separately. This procedure eliminates the possibility of the owner receiving no award when the remainder after taking is more valuable than the entire property before taking, a situation conceivable under the conventional "before and after" approach used in several state and federal condemnation procedures. See Unif. Eminent Domain Code § 1002 Comment (1974). The method previously utilized in North Carolina was the "value plus damage" approach, in which the compensation awarded was the sum of the fair market value of the land taken, plus any damage to the remainder, reduced by any special benefits received. See Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925). The new formula takes into account the potential damage to the remainder, but eliminates the possibility that "special benefits" could be interpreted to include the situation where value is added to the remainder by severance.


61. Additional Developments: In Snug Harbor Property Owners' Ass'n v. Curran, 55 N.C. App. 199, 284 S.E.2d 752 (1981), the court held a restrictive covenant requiring a $35 annual fee for the "maintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks" to be unenforceable. The property was not described with sufficient particularity and no standard was given by which maintenance was to be judged; the covenants were, therefore, too vague to be enforced by the court. See Property Owners' Ass'n v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980).

62. This discussion is limited to group homes for mentally handicapped persons. The group home concept has been applied to other groups, such as juvenile delinquents, alcoholics, criminals on parole, and the elderly. While many of the factors used in a determination of whether these group homes violate restrictive covenants may be similar, each group presents issues distinct from those of any other group.
persons. The group home concept is an attempt to provide the “least restrictive alternative” for these persons through a family-like environment in which the residents participate in daily household chores and other activities associated with a traditional family. These persons often are afforded the opportunity to be productive by having a job in the community.

Resistance to group homes has taken various forms. Zoning ordinances that delineate usage and structural restrictions often exclude group homes from residential areas. Restrictive covenants, however, have been the primary mechanism for blocking group homes. In J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., the North Carolina Supreme Court examined the validity of these covenants. At issue was whether a group home for mentally handicapped adults was residential or institutional. The court concluded that the home was residential, and therefore did not violate restrictive covenants in the deed that limited the use of the property to “residential purposes” and limited the structure to a “single-family dwelling.”

In Hobby a city zoning ordinance permitted the establishment of a group home in a residential area. Although not a decisive factor in the immediate decision, there also existed a statute expressing the State’s policy that handicapped citizens should have the same right as other citizens to live in residential areas and group homes. The court did not reach the issue of the validity of the restrictive covenants under the statute or the zoning ordinance, but rather decided that the facts of the particular case fell outside the scope of the restrictive covenant prohibitions in the deed.

---

63. It should be noted that “mentally handicapped” includes both “mentally retarded” and “mentally disturbed.” Comment, The Constitutional Right to Treatment Services for the Noncommitted Mentally Disabled, 14 U.S.F.L. Rev. 675, 678 (1980). The mentally retarded need habilitation, while the mentally disturbed need medical treatment. Id. at 679 n.16. The right to treatment for both groups is essentially the same. Id. at 678 & n.15. See Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972). See N.C. Gen. Stat. § 168 (1976) for a definition of of “handicapped person.”


65. Browndale Int’l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973) (the home attempted to duplicate family life).


68. Id. at 74, 274 S.E.2d at 181.


70. Such an ordinance merely removes an obstacle to the establishment of a group home, but does not affirmatively create a right for such a home to exist. The home is still presumably subject to existing restrictive covenants or any other pertinent considerations that may exist. See Haskell v. Gunson, 391 Pa. 120, 137 A.2d 223 (1958).


72. 302 N.C. at 75, 274 S.E.2d at 182.
To determine whether the group home should be characterized as "residential" or "institutional," the Hobby court looked to the substance rather than the form of the home. The court decided that the home was primarily residential based on a number of factors. A major issue was whether the residents of the home merely existed as separate individuals in the same house, or whether they were living together and performing as an integrated family-type unit. When the residents' only connection with each other is that they all coincidentally happen to eat and sleep together under the same roof, as in a boarding house, courts frequently label the house "institutional." By contrast, in Hobby the residents were involved in sharing household chores such as cleaning, cooking and shopping, much like the members of a traditional family. A married couple who managed the home served as surrogate parents to the residents.

Another issue considered by the court was whether therapy or care of any nature was provided on the premises. If therapy were provided, then the presumption would be stronger that the home should be classified as institutional. In Hobby, there were no specific therapeutic, educational or vocational programs being performed at the home.

The primary motivation behind the establishment of the group home, to provide a healthy atmosphere for rehabilitation, was also a factor considered by the Hobby court, although the precise weight given to this factor is uncertain from the opinion. The court also considered the function of the admin-

---

73. In Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), two married couples lived together in a single-family residential zone. The two families shared all household tasks. An ordinance defined "family" to preclude occupancy of a single-family residential dwelling by four or more persons, unless related by blood. The court held the ordinance unconstitutional as an equal protection violation, not supported by any rational basis related to a legitimate legislative objective. See also Browndale Int'l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973), where an ordinance defined "family" as any number of blood-related people, or five or less unrelated people living together as a "single-housekeeping unit."

74. See Andrews v. Metropolitan Bldg. Co., 349 Mo. 927, 163 S.W.2d 1024 (1942); Deitrick v. Leadbetter, 175 Va. 170, 8 S.E.2d 126 (1940).

75. The Hobby court had to decide whether the home was "residential," and not whether the residents comprised a "family." For a good survey of possible definitions of "family," see Sullivan v. Walburn, 9 N.J. Misc. 280, 154 A. 617 (1931).

76. See Browndale Int'l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973), involving a "therapeutic home" for emotionally disturbed children. Psychiatric and medical care were provided on the premises. The court held that the home was not a single-family dwelling. See also Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980), involving a home for retarded adults. No "care" or "therapy" was provided at the home. In holding that the home did not violate the covenant, the court noted that such a home, when used for care, treatment or therapy, is not considered to be used primarily for residential living purposes; if such conditions existed, the home would violate the restrictive covenant.

77. Courts are concerned with the use made by the owner of the premises, and not with the use made by the residents. Andrews v. Metropolitan Bldg. Co., 349 Mo. 927, 163 S.W.2d 1024 (1942). The "residence" of people in a boarding house is to be distinguished from whether the house is used for "residential purposes." Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972).

78. The court at one point in its decision denied that the economic basis upon which the home was established was a factor influencing the decision, 302 N.C. at 72, 274 S.E.2d at 180, but later discussed the importance of whether compensation for services was a primary or incidental motivation, 302 N.C. at 73, 274 S.E.2d at 180. But cf. Crowley v. Knapp, 94 Wis. 2d 421, 288
istrators of the home in its effort to characterize the home as either residential or institutional. In *Hobby*, the administrators were a married couple who acted as surrogate parents. They were the heads of the household, and worked together with the residents to perform daily household chores. Because the official title of the supervisor’s position was not controlling, the court looked at the substance of the role rather than the form.

Additional factors relevant to this determination, not explicitly considered by the *Hobby* court, have been enumerated by courts in other jurisdictions. These factors include: 1) whether or not the residents’ placement in the home was voluntary; 2) whether the residents’ stay was temporary or permanent; 3) whether the number of residents at the home was compatible with the surrounding neighborhood; and 4) whether there was an express public

N.W.2d 815 (1980) (although a home for retarded adults was run for profit, the court held that it did not violate restrictive covenants similar to those in *Hobby*).

79. See Browndale Int’l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973). In *Browndale* the court held that a “therapeutic home” for emotionally disturbed children violated an ordinance restricting the home to a single-family dwelling. Although surrogate parents worked at the home, they were not intended to act as substitutes for the children’s real parents. A few staff employees were also employed at the home. The court noted that a “therapeutic home” differs from a “foster home” in that in the latter, the surrogate parents act as substitutes for the biological parents of the children living there, and in the former, the actual parents do not live at the home.

80. When the function of the supervisor tends to be more like a manager of a commercial enterprise, rather than the head of the household, courts will probably be more likely to label the home “institutional.” Courts may tend to view the supervisor as a manager when he/she has the responsibility of supervising other employees, or when he/she has to be concerned with maintaining a profit or with other fiscal responsibilities.

81. 302 N.C. at 71, 274 S.E.2d at 179.

82. In Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980), property was purchased for the purpose of establishing a non-institutional home for retarded adults. The home was challenged on the basis of restrictive covenants very similar to those in *Hobby*. The eight mentally retarded adults were volunteer residents of the home. The Wisconsin Supreme Court held that the covenants were not violated. It appears from the decision that whether the residents were voluntarily or involuntarily placed in the home might be an important distinction; if involuntarily placed, the home would be more like an institution, and therefore would violate the covenant “for residential purposes only.”

See Browndale Int’l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973). Some children were involuntarily placed in a home for emotionally disturbed children. The court held that the home violated an ordinance because it was not a single-family dwelling.

83. In Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980), the court noted that the intention of the home was to provide a permanent residence, as distinguished from a boarding house, where there is merely temporary residence. In Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972), the California Court of Appeals held that a group home for mentally retarded people violated restrictive covenants. The owner of the house stated that no more than six such people were living at the house “at any given time.” An important factor in the decision was the transient nature of the clientele, as indicated by the “at any given time” language. See also Comment, Zoning the Mentally Retarded, supra note 66. One purpose of zoning ordinances is “keeping transients out of stable family neighborhoods.” Id. at 391-92. The author suggests that the transiency involved in many homes is not the kind of transiency intended to be prohibited by zoning ordinances. Id. at 394-95. See, e.g., City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). See also Boyd, supra note 66, at 293 (permanent or temporary placement of residents is one factor determining whether the residents qualify as a “family”).

84. Courts generally have not mentioned this consideration as a factor in their opinions because the maximum number of residents allowed in a group home has already been prescribed by a statute or ordinance. When the legislature has not set the limit, courts should be more inclined to find the home “institutional” as the number of residents increases. If a large number of rest-
policy supporting these homes.\textsuperscript{85}

In addition to considering whether the restrictive covenant limiting use to residential purposes was violated, the \textit{Hobby} court also interpreted the portion of the restrictive covenant\textsuperscript{86} that required the building on the lot to be a "single-family dwelling."\textsuperscript{87} At issue was whether the covenant was intended to be merely a structural restriction, or also a usage restriction.\textsuperscript{88} The court held that "a provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use."\textsuperscript{89}

The court observed that the covenant limited the number of stories for the building, the size of the garage and the number of outbuildings. The covenant was primarily concerned with structural restrictions, and thus did not appear to be intended to limit the use of the lot to a "single-family," particularly since a usage restriction had already been provided by the "residential purposes" covenant.\textsuperscript{90} The house had not been altered in any way to change its appearance as a typical suburban home. The court concluded that the phrase "single-family dwelling" was not intended to add meaning to the phrase "for residential purposes," but was solely concerned with structural restrictions.\textsuperscript{91}

The court suggested that "a restrictive covenant may be so clearly and unambiguously drafted that it regulates the utilization of property through a structural limitation."\textsuperscript{92} If a court were to hold that a structural restriction also was intended to impose a usage restriction, the court would then be posed with the problem of determining the intended use of a "single-family" dwelling.

On June 12, 1981, the North Carolina General Assembly enacted a stat-

---

\textsuperscript{85} Justice Huskins, in his dissent in \textit{Hobby}, took into consideration a state statute, G.S. 168-9, which supported the rights of handicapped people. However, he concluded that the restrictive covenants did not discriminate against handicapped people, and that the covenants validly prohibited the group home. See Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

\textsuperscript{86} "No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2 1/2 stories in height, a private garage for not more than three cars and outbuildings incidental to residential use . . . ." 302 N.C. at 66, 274 S.E.2d at 176.

\textsuperscript{87} See generally Schwarzschild v. Welborne, 186 Va. 1052, 45 S.E.2d 152 (1947) (court suggests that a "single-family dwelling" is more than a "dwelling").

\textsuperscript{88} See generally Annot., 155 A.L.R. 1007 (1945) (whether a structural limitation is also a use limitation).

\textsuperscript{89} 302 N.C. at 75, 274 S.E.2d at 181.

\textsuperscript{90} Id. at 65-66, 274 S.E.2d at 176.

\textsuperscript{91} Id. at 74-75, 274 S.E.2d at 181.

\textsuperscript{92} Id. at 75, 274 S.E.2d at 182.
ute\textsuperscript{93} that apparently codifies the \textit{Hobby} decision. The statute reaffirms the public policy of North Carolina in providing handicapped people with a normal residential environment\textsuperscript{94} and provides that "[a] family care home\textsuperscript{95} shall be deemed a residential use of property for zoning purposes."\textsuperscript{96} Also, any covenant or restriction in a deed or other instrument relating to the sale, lease, use or transfer of property "which would permit residential use of property but prohibit the use of such property as a family care home shall, to the extent of such prohibition, be void as against public policy . . . ."\textsuperscript{97} The decision in \textit{Hobby} and the subsequent codification of that decision by the legislature were intended to ensure the right of handicapped people to live normal lives in residential environments. However, the statute leaves some ambiguities that must be resolved.

There may be litigation over what qualifies for the statutory protection accorded a family care home. G.S. 168-21(2) attempts to define a "family care home," but these guidelines may raise as many questions as they answer. For instance, the statute describes a family care home as "a home with support and supervisory personnel . . . in a family environment . . . ." The use of paid employees conflicts with the idea of a family environment. The courts are left to decide how many employees can be present at the home before the home loses its family-like atmosphere.

The statute also leaves unanswered the question whether a family care home is a residential use in relation to restrictive covenants. The statute expressly states that such a home is a residential use for purposes of zoning ordinances, but only implies that such a home is a residential use for purposes of restrictive covenants. The legislature may have decided not expressly to characterize the family care home as residential for purposes of restrictive covenants because it was concerned with possible challenges to the statute similar to challenges to parallel statutes in other jurisdictions: voiding existing covenants might impair private property and contractual rights in violation of the United States Constitution and the North Carolina Constitution.\textsuperscript{98}

\textsuperscript{95} A "family care home" is defined in G.S. 168-21(2).
\textsuperscript{97} Id. § 168-23.
D. Warrant of Habitability

In *Strong v. Johnson* the court of appeals held that "a person who inherits a dwelling may seek recourse for defects which his predecessor would have been entitled to pursue." The case is significant because it represents the first time a North Carolina court has extended the implied warranty of habitability in sales of new homes to a party other than the initial vendee. At the same time, however, the *Strong* court expressly refused to intimate whether implied warranty protection should be granted to subsequent purchasers of property subsequent to the original vendee.

In 1974 defendant in *Strong* conveyed a lot to plaintiff's sister and constructed a dwelling on it. Plaintiff inherited the property when his sister died in 1977. In 1978, the residence was damaged by fire, allegedly caused by faulty construction of the fireplace. Plaintiff filed suit, alleging breach of implied warranty. The trial judge, however, granted defendant's motion for summary judgment on the grounds that plaintiff was not the initial vendee of the property and therefore lacked standing.

The court of appeals reversed. After reviewing the decisions establishing the implied warranty in North Carolina and the policy reasons for recognizing this remedy, the court concluded there was no reason the warranty should not extend to one who inherits a new home from the original vendee. The court then analogized the situation in the case to other instances in which devisees are entitled to assert causes of action in place of the decedent. Finally, the

---

99. Additional developments: The 1981 General Assembly rewrote G.S. 1-50(5), which provides a six-year statute of limitations for actions to recover damages arising out of a defective or unsafe condition of an improvement to real property. The amendment provides for an outside limitation of six years from the later of the "specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(5)(a) (Cum. Supp. 1981). Within this outside limitation, G.S. 1-52(16), which provides for a three-year limitation period for actions accruing at the time a defect is or should have been discovered, continues to operate. N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1981).

Prior to this amendment, the court of appeals had found the outside limitation period to be 10 years. See *Strong v. Johnson*, 53 N.C. App. 54, 280 S.E.2d 37, 40 (1981). As authority for this statement, the court cited G.S. 1-52(16), which in addition to the three-year limitation mentioned above, 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." The 1981 amendment provides that it shall apply to the exclusion of G.S. 1-52(16). N.C. Gen. Stat. § 1-50(5)(g) (Cum. Supp. 1981).

100. 53 N.C. App. 54, 280 S.E.2d 37 (1981).

101. Id. at 58-59, 280 S.E.2d at 40. Though this language is ambiguous, it appears to extend protection both to the devisee of the initial vendee and to subsequent devisees as well.


103. 53 N.C. App. at 59, 280 S.E.2d at 40.

104. Id. at 54, 280 S.E.2d at 38.

105. Id.

106. Id. at 57, 280 S.E.2d at 40.

107. Id. at 58, 280 S.E.2d at 40. Among the situations mentioned was that in which an injury to devised property occurs after the testator's death. See Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962). The court of appeals sought to harmonize the *Strong* facts with such a situation by noting that although the injury in *Strong* occurred before the testator's death, the cause of action could not arise until afterwards, when the defect was discovered within the statutory period. Id.
court, citing the North Carolina Constitution, stated that to deny plaintiff a right of action against the builder-vendor would deny him any remedy at all.\textsuperscript{108}

The North Carolina Supreme Court adopted the implied warranty in home sales in \textit{Hartley v. Ballou}.\textsuperscript{109} As articulated in that case, the implied warranty extended only to the "initial vendee" of the property.\textsuperscript{110} Although one commentator has suggested that such a restriction is due to judicial reluctance to initiate changes in a long dormant area,\textsuperscript{111} courts generally base their refusal to extend implied warranty protection beyond the initial vendee on the lack of privity between subsequent purchasers and the builder-vendor.\textsuperscript{112} Ignoring this lack of privity is said to raise the possibility that the builder-vendor will be held liable to parties with whom he has not bargained or established any contractual expectations.\textsuperscript{113} In addition, courts distinguish the marketing of manufactured goods, a context in which the privity requirement has been substantially eroded, from the sale of homes, noting that homes are neither marketed by a number of intermediate sellers nor likely to change owners frequently.\textsuperscript{114} On the other hand, supporters of extended implied warranty protection argue that as American society becomes increasingly mobile, it is reasonable for a builder-vendor to expect the home to be resold to subsequent purchasers.\textsuperscript{115} Moreover, since the implied warranty is intended to protect an innocent vendee against latent defects—including flaws that may not become evident for some time—to deny protection merely because a plaintiff was not

\begin{itemize}
  \item \textsuperscript{108} 53 N.C. App. at 58, 280 S.E.2d at 40. The court cited N.C. Const. art. I, § 18, which provides that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." Extended to its logical conclusion, the court's reliance on this provision would completely vitiate the notion of \textit{caveat emptor}.
  \item \textsuperscript{109} 286 N.C. 51, 209 S.E.2d 776 (1974).
  \item \textsuperscript{110} [In every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to imply warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction . . . .
  \item \textsuperscript{111} See Note, The Implied Warranty of Habitability in North Carolina Revisited, 58 N.C.L. Rev. 1055, 1064 (1980).
  \item \textsuperscript{113} See Barnes v. Mac Brown & Co., 264 Ind. 227, 231-32, 342 N.E.2d 619, 622 (1976) (DeBruler, J., dissenting) (expectations of a subsequent purchaser, and presumably his willingness to sue to enforce those expectations, are shaped not by the prospective defendant—the builder-vendor—but by the intermediate seller).
  \item \textsuperscript{114} Coburn v. Lenox Homes Inc., 173 Conn. 567, 572-73, 378 A.2d 599, 601 (1977); Brown v. Fowler, 279 N.W.2d 907, 910 (S.D. 1979). Note that judges making this point are thus substantially precluded from advancing the argument that abolishing the privity requirement would subject the builder-vendor to multiple exposure.
\end{itemize}
the first purchaser would be an arbitrary distinction.\textsuperscript{116}

If \textit{Strong} is viewed as an extension of \textit{Hartley}, it will be difficult to limit the blanket of warranty protection merely to devisees. The main fear of opponents of extending the implied warranty—that it will render the builder-vendor liable to parties with whom he has not dealt—is justified whether the plaintiff is a devisee or a subsequent purchaser.\textsuperscript{117} Thus the upholding of \textit{Strong} could presage the adoption of a more inclusive warranty theory.

The North Carolina General Assembly enacted two measures of relevance to real estate vendees in 1981. The first of these is an addition to G.S. 87-1.\textsuperscript{118} That statute, which defines “general contractor,” is one of several provisions providing for licensing of contractors\textsuperscript{119} in order to protect the public from incompetent builders.\textsuperscript{120} If one defined as a general contractor is unlicensed by the state, he is barred from enforcing his construction contracts.\textsuperscript{121} The 1981 amendment provides for an exemption from the definition of general contractor for anyone who constructs a building on his own land where the building is intended for his use after completion.\textsuperscript{122} The amendment provides a statutory deterrent to the type of evasion of G.S. 87-1 recently identified in \textit{Roberts v. Heffner}.\textsuperscript{123} In that case, defendants, who were unlicensed builders, contracted to build a house for plaintiffs at a cost above the statutory limit of $30,000 beyond which the builder is defined as a general contractor.\textsuperscript{124} The house was to be built on defendants’ land and later conveyed to plaintiffs. When plaintiff subsequently barred defendants from asserting claims under the contract, defendants argued that the G.S. 87-1 prohibition should not be applied to a builder who constructs a building on his own land.\textsuperscript{125} The court of appeals disagreed, stating that “a builder, who is unable or unwilling to obtain a general contractor’s license from the State of North Carolina, should


\textsuperscript{117} Obviously there are factors that distinguish the devisee from a purchaser. The former has not paid for the property; he is more likely to be a member of the vendee's family; arguably, the class of devisees is smaller than the class of subsequent purchasers. Reliance on such factors, however, would make the implied warranty doctrine even more arbitrary regarding subsequent purchasers than it is now.

\textsuperscript{118} N.C. Gen. Stat. § 87-1 (1981) provides:

For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, shall be deemed to be a “general contractor” engaged in the business of general contracting in the State of North Carolina.


\textsuperscript{120} See Vogel v. Reed Supply Co., 277 N.C. 119, 130, 177 S.E.2d 273, 280 (1970) (judicial definition of general contractor).

\textsuperscript{121} Bryan Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968).

\textsuperscript{122} “This section shall not apply to any person or firm or corporation who constructs a building on land owned by that person, firm or corporation when such building is intended for use by that person, firm or corporation after completion.” N.C. Gen. Stat. § 87-1 (1981).

\textsuperscript{123} 51 N.C. App. 646, 277 S.E.2d 446 (1981).

\textsuperscript{124} See supra note 118.

\textsuperscript{125} 51 N.C. App. at 653, 277 S.E.2d at 450.
not be allowed to thwart the plain intent of § 87-1 by the artifice of contracting to build a residence for another on the builder's land.\textsuperscript{126} The result would be the same under the new amendment because defendants did not construct the house for their own use.

The General Assembly also enacted a substantial body of legislation providing for the licensing and regulation of the mobile home industry.\textsuperscript{127} Most importantly, the legislation creates several warranties, each lasting a minimum of twelve months.\textsuperscript{128} These warranties run from the manufacturer, the dealer, the set-up contractor and the supplier of components within the home, thus providing the purchaser with extensive protection against manufacturing defects and damages occurring during installation.\textsuperscript{129}

\textbf{E. Foreclosure}

In two 1981 decisions, the court of appeals refused to expand the applicability of North Carolina's anti-deficiency judgment statutes.\textsuperscript{130} In \textit{American Foods, Inc. v. Goodson Farms, Inc.}\textsuperscript{131} the court held that the protections provided by the statute were not available to defendants who had no record title in the property conveyed. Plaintiff had contracted to sell defendant Goodson Farms 859 acres of farmland, unharvested crops, certain machinery and inventory.\textsuperscript{132} Pursuant to the purchase agreement, defendant Goodson Farms formed a corporation known as Lewis Nursery, Inc.\textsuperscript{133} The property was then conveyed to Lewis Nursery and a note payable to plaintiff was executed by the new corporation, Goodson Farms, and by Goodson individually.\textsuperscript{134} The note was secured by a deed of trust on the real estate, and the machinery and inventory were pledged as further security.\textsuperscript{135} On the makers' subsequent default, plaintiff brought action on the note and foreclosed on the property, which it

\textsuperscript{126} Id.
\textsuperscript{130} N.C. Gen. Stat. §§ 45-21.36, -21.38 (1976). These statutes were enacted in 1933 to provide relief for mortgagors whose land was being sold at depressed prices. The statutes were intended to protect purchasers from being compelled to pay for their property's depreciated value through a deficiency judgment after having lost their property by foreclosure. See Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979). See also Currie & Lieberman, Purchase-Money Mortgages and State Liens: A Study in Conflict-of-Laws Method, 1960 Duke L.J. 1.
\textsuperscript{132} Id. at 593, 275 S.E.2d at 185.
\textsuperscript{133} How the corporation was formed is unclear from the opinion. The court noted that the purchase agreement provided for plaintiff to capitalize the corporation. Id. Later in the opinion, however, the court indicated that defendant Goodson financed the corporation. Id. at 597, 275 S.E.2d at 188. Briefs presented by both parties suggest that Goodson formed Lewis Nursery, Inc. in order to retain an exclusive right to the established operating name of the farm. See Plaintiff-Appellant's Brief at 3, Defendant-Appellant's Brief at 2.
\textsuperscript{134} 50 N.C. App. at 593, 275 S.E.2d at 186.
\textsuperscript{135} Id.
repurchased at the foreclosure sale. Defendants responded that they were protected by G.S. 45-21.38, which prohibits deficiency judgments on purchase money transactions and by G.S. 45-21.36, which attempts to defeat or offset deficiency judgments by requiring mortgagees to account for the value of property on which they foreclose and then purchase themselves.

The court rejected both arguments, distinguishing a recent case in which G.S. 45-21.38 had been held applicable. First, in American Foods the note failed to meet the statutory requirement of showing on its face that it was a purchase money instrument. Second, the collateral in this case consisted of more than just real estate. Finally, the court stressed that since the conveyance had been made to Lewis Nursery alone, defendants had no record title interest in the land plaintiff acquired by foreclosure.

The American Foods decision represents sound statutory construction. Nevertheless, the court's emphasis on the necessity for the party seeking to invoke the anti-deficiency judgment statute to have a property interest in the real estate should not preclude the court from recognizing the possibility that this requirement could be employed to circumvent the purposes of the statute. When, as in this case, the holder of record title is merely a nominal purchaser and the co-makers are actually providing the funds for the property, a court should consider extending protection. Such a course would serve the inter-

136. Id.
137. In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgage or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same; Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate . . . .


138. When any sale of real estate has been made by a mortgagee . . . at which the mortgagee . . . becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee . . . shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part . . . .

Id. § 45-21.36.

140. 50 N.C. App. at 595, 275 S.E.2d at 187.
141. 50 N.C. App. at 596, 275 S.E.2d at 187. This ruling illustrates the need for careful drafting on the part of the purchase-money mortgagor.
142. Id.
143. Id.
ests of fairness and prevent a creditor from skirting the anti-deficiency judgment statute merely by manipulating the structure of the transaction.

In *Reavis v. Ecological Dev., Inc.* the court ruled that recovery of attorney's fees by a foreclosing vendor from a defaulting purchaser did not constitute a deficiency judgment in violation of G.S. 45-21.38. The court defined a deficiency under the statute as "an indebtedness which represents the balance of the original purchase price for the real estate not recovered through foreclosure." Since attorney's fees do not fall within that definition, their recovery could not be precluded by G.S. 45-21.38. The court stressed that defendant, a corporation actively involved in land purchases, agreed to the stipulations in the purchase-money notes providing for payment of attorney's fees on default. While recognizing that such clauses have long been considered against public policy, the court noted that G.S. 6-21.2 specifically authorizes provisions in promissory notes obliging debtors to pay reasonable attorney's fees. The court found no exception in G.S. 6-21.2 for purchase-money instruments.

The court of appeals held in *Gore v. Hill* that G.S. 45-21.21, which limits the period for which a foreclosure sale may be postponed, did not provide a basis for a purchaser of property at such a sale to have the sale declared invalid. Plaintiff in *Gore* alleged that the property he bought at the foreclosure sale was described as consisting of 128 acres. When he later attempted to sell the property, it was discovered there were only 48.40 acres. Asserting that the foreclosure sale had been postponed for longer than the twenty days (excluding Sundays) authorized under G.S. 45-21.21, plaintiff sought to have the sale rendered void. The court refused to do so. The court stated that G.S. 45-21.21 was one of several provisions designed to provide procedural due process for mortgagors and not to offer protection for purchasers such as plaintiff. Rather, as purchaser at a foreclosure sale, plaintiff acted subject to the doctrine of caveat emptor.

---

(Individuals who organized the corporation which took title to property and who executed a note and deed of trust to vendor held to be "purchasers" and within protection of the anti-deficiency judgment statute). See generally Annot., 49 A.L.R.3d 554 (1973).

146. 53 N.C. App. 496, 281 S.E.2d 78 (1981).
147. Id. at 499, 281 S.E.2d at 80.
148. Id.
150. 53 N.C. App. at 499-500, 281 S.E.2d at 80.
152. Id., 279 S.E.2d at 103.
153. Id. at 620-21, 279 S.E.2d at 103.
155. 52 N.C. App. at 622, 279 S.E.2d at 104. The court cited Buckman v. Bragaw, 192 N.C. 152, 134 S.E. 422 (1926) as authority for this statement. Relief may nevertheless be granted upon a showing of fraud, mutual mistake, mistake by one party induced by fraud of another, or undue influence. See Phipps v. Wyatt, 199 N.C. 727, 155 S.E. 721 (1930).
F. Landlord/Tenant

Both the North Carolina Supreme Court and General Assembly clarified the rights of tenants and landlords when premises are repossessed for nonpayment of rent.\textsuperscript{156} The supreme court acted first, in \textit{Spinks v. Taylor},\textsuperscript{157} upholding a lessor’s right of peaceful, self-help reentry of premises forfeited for nonpayment of rent.\textsuperscript{158} The court narrowly defined peaceful reentry as an eviction to which the tenant makes no objection; when the tenant objects, the landlord must resort to the courts.\textsuperscript{159}

Shortly after the \textit{Spinks} decision, the General Assembly barred landlord self-help in residential tenancies.\textsuperscript{160} The General Statutes now require landlords to resort to summary ejectment procedures\textsuperscript{161} in all cases of eviction, dispossession, or removal from residential premises. As an aid to landlords, the General Assembly shortened the period lessors must wait before asserting a lien on personal property left by a vacating tenant to twenty-one days after expiration of the paid rental period.\textsuperscript{162} Finally, the enactment granted tenants recovery of actual damages for a lessor’s failure to follow the statutory ejectment and lien procedures, but excluded recovery of punitive damages, treble damages or damages for emotional distress.\textsuperscript{163}

In \textit{Kent v. Humphries}\textsuperscript{164} the North Carolina Supreme Court overruled longstanding precedent and adopted the majority view that entrance by a tenant under a void lease followed by the landlord’s acceptance of rent creates a periodic tenancy rather than a tenancy at will.\textsuperscript{165} In \textit{Kent} a tenant entered into possession of commercial premises on a five-year oral lease. Notwithstanding...
standing an oral covenant to the contrary, the landlord began operating his plastics and fiberglass manufacturing plant nearby, finally forcing the tenant to vacate her premises because of air pollution.\footnote{166} On appeal from a grant of summary judgment for the landlord on the plaintiff's claim for nuisance, the court of appeals ruled "with regret" that the five-year oral lease created only a tenancy at will.\footnote{167} Although the landlord had accepted monthly rents, binding precedent\footnote{168} dictated this result.\footnote{169}

The supreme court also was "troubled by the equities of this rule."\footnote{170} Calling it "patently unfair" that the plaintiff would have "only the barest of legal rights as a tenant at will"\footnote{171} under the existing rule, the court decided that the intent and expectations of the parties in such circumstances are more consistent with a periodic tenancy: "By the payment of and acceptance of such rent, the parties have given further indication of their intention to be bound by the invalid lease, and the periodic tenancy provides a measure of security to their expectations."\footnote{172} Accordingly, the court adopted the "better reasoned and more fundamentally fair" majority rule that "when a tenant enters into possession under an invalid lease and tenders rent that is accepted by the landlord, a periodic tenancy is created."\footnote{173} As a result, plaintiff tenant "clearly had a sufficient property interest to maintain a claim in nuisance."\footnote{174}

The court's decision did not place North Carolina fully within the mainstream. While it is the majority view that a periodic tenancy results from the circumstances of \textit{Kent}, the predominant view within the majority is that "an

\begin{enumerate}
\item \footnote{166}{303 N.C. at 679, 281 S.E.2d at 44-45. As the appeal was from the allowance of summary judgment for the defendant landlord, the plaintiff's allegations are stated as facts.}
\item \footnote{168}{See, e.g., Davis v. Lovick, 226 N.C. 252, 37 S.E.2d 680 (1946); Mauney v. Norvell, 179 N.C. 628, 103 S.E. 372 (1920).}
\item \footnote{169}{Notwithstanding precedent, the court of appeals ruled that the defendant landlord could not assert his common-law right to terminate the tenancy at will as a defense to the plaintiff's claim of nuisance. 50 N.C. App. at 587, 275 S.E.2d at 181-82. Applying an estoppel theory to the landlord's claim, the court determined that "[e]ven as a tenant at will, plaintiff's payment of rent in advance should secure for her a sufficient property right in the premises, at least for the period for which defendant accepted the rent, to support her nuisance claim." Id. at 587-88, 275 S.E.2d at 182. The supreme court's subsequent holding renders this creative analysis unnecessary.}
\item \footnote{170}{Id. at 678, 281 S.E.2d at 46.}
\item \footnote{171}{Id.}
\item \footnote{172}{Id. (quoting Restatement (Second) of Property, § 2.3 comment d (1977)).}
\item \footnote{173}{Id. The court expressly overruled the contrary precedent of \textit{Davis} and \textit{Mauney}, supra note 168, and \textit{Barbee} v. \textit{Lamb}, 225 N.C. 211, 34 S.E.2d 65 (1945), to the extent of any inconsistency.}
\item \footnote{174}{303 N.C. at 679. In \textit{Vernon} v. \textit{Kennedy}, 50 N.C. App. 302, 273 S.E.2d 31 (1981), another case concerning periodic tenancies, the court of appeals ruled that a tenant who had held over and been accepted by the landlord as a periodic tenant on the same terms as the former lease was not entitled to exercise an option to purchase contained in the former lease. The option in the original lease was specifically applicable to the term of that lease; the tenant sought to exercise it after a five-year periodic tenancy. The decision is consistent with North Carolina precedent and the general rule. See \textit{Atlantic Prod}. Co. v. \textit{Dunn}, 142 N.C. 471, 55 S.E. 299 (1906); Annot., 15 A.L.R.3d 470, 489-95 (1967).}
\end{enumerate}
invalid term of years automatically creates a year to year tenancy ... even though the rent is calculated on a monthly basis." The supreme court ruled that "[t]he period of the tenancy is determined by the interval between rental payments. In this case a month-to-month tenancy was created." Had the court followed the majority, landlords would have to endure significantly longer unwanted tenancies. The court left unclear whether the interval was determined with reference to the interval of actual payments or provisions of the void lease.

Kent embodies a significant development in the evolution of tenant rights in North Carolina. The decision gives tenants who have paid rent but whose tenancy could be ended by the landlord at will the protection of a definite property interest to assert against the landlord and a right to statutory notice before termination of the tenancy. The old rule of tenancy at will persists, however, when the tenant has not paid rent.


176. 303 N.C. at 679, 281 S.E.2d at 46.

177. Not only would the period of tenancy arising by operation of law be longer, but a landlord would be able to terminate the tenancy only at the end of an annual term after having given at least one month’s notice. N.C. Gen. Stat. § 42-14 (1976).

178. In light of the court’s emphasis on the equities arising from the tenant’s actual payment of rent, it is unlikely the court intended to embrace the view of some courts that the period on which rent is calculated in the void lease determines the period of the tenancy. See Restatement (Second) of Property, § 2.3 reporter’s note (1977); 49 Am. Jur. 2d Landlord and Tenant §§ 49-50 (1970). In addition, the court of appeals held, 50 N.C. App. at 584-85, 275 S.E.2d at 180, and the supreme court noted with approval, 303 N.C. at 679, 281 S.E.2d at 46, that the statute of frauds voided the oral lease completely, not just the term of duration. On the other hand, the supreme court quoted with seeming approval language of the Restatement referring to payment and acceptance of rent as indicative of the intent of the parties to be bound by the void lease and its specified payment intervals. 303 N.C. at 678, 281 S.E.2d at 46. In Kent the void oral lease, an unsigned written lease, and actual payment all were on a monthly basis. Record at 3, 8, 43, 61, 65.

179. See Note, supra note 156.

180. There is some authority in North Carolina that even a tenancy at will requires some notice or demand before the courts are open to the landlord. Carson v. Baker, 15 N.C. (4 Dev.) 220 (1833).

In *Hill v. Pinelawn Memorial Park, Inc.* the North Carolina Supreme Court prevented an unduly harsh application of North Carolina's "pure race" recording statute. *Hill* concerned an action by the first purchaser of a specific burial crypt against the seller memorial park and the second purchaser. The first purchasers never recorded their interest but began monthly installments on their contract in October 1972. In February 1974, the second purchasers entered into an installment sales contract for the same crypt and completed payment in February 1976. In February 1977, the first purchasers discovered the subsequent sale. When their tender of the balance on their installment contract and demand for a deed was rejected, the first purchasers brought an action seeking specific performance and damages against both the memorial park and the subsequent purchaser.

After service of summons, defendant purchasers discovered they had no deed. Upon request, the memorial park executed a deed to them which was recorded prior to trial. Subsequently, the trial court directed the jury that the second purchasers were not innocent purchasers for value and ordered the second purchasers to deliver a quitclaim deed to the first purchasers.

The court of appeals reversed the order on the theory that the case turned "upon when defendants acquired a protected interest in the crypt." The court of appeals determined that the second purchasers "were purchasers for value... since it is undisputed that [they] paid substantial monies as a down payment." Therefore, the second purchasers were entitled to statutory priority by having recorded a deed prior to the first purchasers; any notice they

---


186. 304 N.C. at 160-61, 282 S.E.2d at 780-81.
187. Id. at 162, 282 S.E.2d at 781. The trial court also awarded compensatory and punitive damages against the memorial park and ordered it to convey a warranty deed. Id.
189. Id. at 238, 275 S.E.2d at 842. This statement indicates that a party achieves the status of a purchaser for valuable consideration for purposes of G.S. 47-18 upon making a substantial investment, without reference to completion of the transaction. The supreme court rejected this interpretation. See text accompanying note 194 infra. It is interesting to note that the court of appeals consistently used the statutory phrase "purchasers for value" in its discussion instead of the "innocent purchasers for value" used by both the trial court and the supreme court.
may have had was immaterial under the pure race statute. Because title was in the second purchaser and protected by the statute, there was no interest in either defendant which the court could order defendants to convey to plaintiffs.

The North Carolina Supreme Court reversed, noting that "[o]ur registration statute does not protect all purchasers, but only innocent purchasers for value." The court observed that in determining whether a party claiming the benefit of the registration statute is entitled to its protection, North Carolina precedent requires the party to have no knowledge of litigation involving the disputed property: "While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status." Because defendant second purchasers clearly had actual notice of the suit prior to recording their deed, the issue was whether they had achieved status as purchasers within the meaning of G.S. 47-18 prior to service of the summons. In the court's view, "[t]he interest which the [second purchasers] wished to acquire was title to crypt 'D', so the crucial point in time is the time they acquired title." The title passed on delivery of the deed, not at the time the second purchasers entered their contract with the memorial park or even at the time they completed payment. Having been served with summons, they had actual notice of the suit prior to "the crucial point in time" of receiving their deed and could not claim to be innocent purchasers.

The decision correctly declined to apply the "race" registration statute when its purpose of protecting subsequent purchasers and lien creditors who rely on public land records conflicts with the more fundamental policy of protecting the efficacy of judgments. The supreme court refused to define an innocent purchaser as one who perfects a mere equitable claim prior to receiving notice of litigation concerning the real property. The court's determination that conveyance of title is crucial to innocent purchaser status under

190. Id.
191. Id. at 236, 238, 275 S.E.2d at 841-42.
192. 304 N.C. at 165, 282 S.E.2d at 783.
193. Id. (citing Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974)). The court also discussed the doctrine of *lis pendens* and the role of G.S. 1-118 in providing constructive notice of pending litigation to bar the operation of G.S. 47-18. G.S. 1-118 provides that a properly indexed notice of litigation pending with respect to specific real property constitutes constructive notice of the litigation to subsequent purchasers and encumbrancers of the real property. The court observed that the enactment of G.S. 1-118 with respect to constructive notice did not preclude a finding that actual notice of litigation negated innocent purchaser for value status. 304 N.C. at 165, 282 S.E.2d at 782-83.
194. Id., 282 S.E.2d at 783.
195. Id.
196. Id. at 166, 282 S.E.2d at 783.
197. Id. at 163, 282 S.E.2d at 782 (citing Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948); Grimes v. Guion, 220 N.C. 676, 18 S.E.2d 170 (1942)).
198. Id. at 163-64, 282 S.E.2d at 782 (citing Rollins v. Henry, 27 N.C. 342 (1878)). The doctrine of *lis pendens* binds a person who buys property that is the subject of an action by the results of the action if the person has actual or constructive notice of the action. If buyers could disregard such actions, parties could frustrate an opponent's claim by a simple series of "keep away" conveyances. Id.
the doctrine of *lis pendens* assures that the court, rather than the parties, will resolve the conflicting equitable claims.

**H. Easements**

In *Ward v. Sunset Beach and Twin Lakes, Inc.*\(^{199}\) the court of appeals applied traditional easement principles to an unusual fact situation to reach a fair result. Plaintiff's beach lots had been submerged by erosion that took a significant portion of Sunset Beach over the years 1955 through 1967.\(^{200}\) In 1970, the corporate successor to plaintiff's grantor filled the eroding inlet and opened a new inlet, reclaiming part of the submerged lands.\(^{201}\) Defendant conceded on appeal that plaintiff's title to the lots revived when the land was reclaimed, but asserted that the plaintiff's easement over other reclaimed lands originally dedicated and used as a road had ceased because of the submersion.\(^{202}\)

The court of appeals held that plaintiff's reclaimed land retained the ap-purtenant easement across the reclaimed lands, now beach strand, which had been Main Street.\(^{203}\) The easement had not been used while submerged, but nonuse does not constitute abandonment under North Carolina precedent.\(^{204}\) The dedication of the street by defendant's predecessor had never been withdrawn\(^{205}\) and plaintiff had relied on access to her lots when purchasing the land, so defendant was estopped from denying the existence of an easement over the location of the former street.\(^{206}\)

The decision produced a fair result on the facts of this case. Plaintiff regained her easement, but it is of little use because of its location and the destruction of the road.\(^{207}\) On the other hand, defendant, under no duty to rebuild the road or to have reclaimed plaintiff's land,\(^{208}\) remains unreimbursed for the cost of reclamation.\(^{209}\) Thus, both parties are in a position

---

200. Id. at 60, 279 S.E.2d at 890.
201. Id. at 61, 279 S.E.2d at 891.
202. Id. at 63, 279 S.E.2d at 892.
203. Id. The court relied on City of Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897), which held that land subject to a dedication as a park prior to erosion by Lake Michigan remained under the dedication when reclaimed. 53 N.C. App. at 63-65, 279 S.E.2d at 892-93.
204. Nonuse must be accompanied by such other acts and conduct clearly inconsistent with ones rights to constitute waiver or abandonment. See Miller v. Teer, 220 N.C. 605, 18 S.E.2d 173 (1942). The court added dictum that plaintiff would have an easement over the former street to the extent necessary for reasonable access even if the easement had been abandoned. 53 N.C. App. at 63 n.1, 279 S.E.2d at 892 n.1 (citing Potter v. Citation Coal Corp., 445 S.W.2d 128 (Ky. 1969)).
205. 53 N.C. App. at 62, 279 S.E.2d at 892.
206. Id. at 65-66, 279 S.E.2d at 893-94 (citing Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 787, 7 S.E.2d 13, 19 (1940); Green v. Miller, 161 N.C. 25, 30, 76 S.E. 505, 507 (1912)).
207. 53 N.C. App. at 62, 279 S.E.2d at 891-92. The court refused to grant an alternate easement by necessity. Id. at 66, 279 S.E.2d at 894.
208. Id. at 63, 279 S.E.2d at 892. The defendant had counterclaimed for $22,000 in reclamation expenses. Record at 7.
209. Record at 7.
to negotiate a settlement.

In Waters v. North Carolina Phosphate Corp.\textsuperscript{210} the court of appeals applied the doctrine of visible easements to contracts for the sale of land. The court extended precedent that a visible easement, not expressly excepted in a conveyance warranting title free from encumbrances, does not constitute breach of covenant of title.\textsuperscript{211} Defendant vendee in this action for specific performance of a contract for sale of land free of encumbrances was presumed to have known of a visible burden on the land in the form of an easement for a power line at the time of entering the contract.

I. Land Use

Two new laws of particular significance to North Carolina Indians were passed by the 1981 General Assembly, opening for the first time a formal avenue of cooperation between archaeologists and Indian communities. The two acts, the Archaeological Resources Protection Act\textsuperscript{212} and the Unmarked Human Burial and Human Skeletal Remains Protection Act,\textsuperscript{213} serve to resolve the serious ethical conflict between the need for scientific investigation through excavations and the concerns of those view such actions as a desecration of their ancestral heritage.\textsuperscript{214}

Prior to the passage of these bills, the only North Carolina law pertaining to archaeological excavation was Chapter 70 of the General Statutes, titled “Indian Antiquities,” which was not repealed by the new statute. These few provisions are patently inadequate standing alone because they do not entitle Indians to be consulted upon the discovery of Indian remains,\textsuperscript{215} do not allow professional archaeologists to examine unintentionally discovered skeletal remains,\textsuperscript{216} and do not prohibit the destruction or sale of artifacts or remains found on private lands.\textsuperscript{217} These problems were resolved in the new bills, which essentially ask Indians to permit scientific analysis, and request that archaeologists recognize Indians’ wishes to have the bones of their ancestors treated with dignity and respect.\textsuperscript{218}

\textsuperscript{210} 50 N.C. App. 252, 273 S.E.2d 517 (1981).
\textsuperscript{211} See Goodman v. Heilig, 157 N.C. 6, 72 S.E. 866 (1911); Tise v. Whitaker-Harvey Co., 144 N.C. 508, 57 S.E. 210 (1907); Ex parte Alexander, 122 N.C. 727, 30 S.E. 336 (1898).
\textsuperscript{214} Although archaeological excavations have been going on since the early 1900’s, reaction did not become heated until the number of grave desecrations reached a significant level in recent years. See H.R. Rep. No. 311, 96th Cong., 1st Sess. 7, reprinted in 1979 U.S. Code Cong. & Ad. News 1709, 1710.
\textsuperscript{215} In fact, no provision is made for the consultation of anyone.
\textsuperscript{216} Prior to the passage of the new act, unintentionally discovered remains were to be examined by a licensed funeral director pursuant to G.S. 65-13.
\textsuperscript{217} G.S. 70-1 does, however, “urge” private land owners to refrain from the destruction of Indian relics located on their property although no penalty is provided.
\textsuperscript{218} The Archaeological Resources Protection Act, N.C. Gen. Stat. §§ 70-10 to -20 (Cum. Supp. 1981), protects archaeological finds made on state owned lands by calling for an individual to obtain a permit from the State before conducting an archaeological investigation on public land. Substantial penalties are also established for the violation of this provision.

The General Assembly also initiated the Coastal Beach Access Program,219 which authorizes the State to acquire220 land situated near the ocean in an effort to provide improved public access to the beaches.221 Priority is given to acquiring lands that, due to the adverse effects of storms, flooding and erosion, are unsuitable for the placement of permanent structures. Land may not be acquired, however, from a property owner who has held it for less than two years.

J. Zoning222

In a case of first impression, the North Carolina Court of Appeals faced the issue whether a change in the type of ownership of real estate will destroy the property’s classification under a zoning ordinance as a prior nonconforming use. In Graham Court Assoc. v. Town Council223 the owners of a small apartment complex, use of which was valid under municipal zoning ordinances as a prior nonconforming use,224 wished to convert the apartments to condominiums.225 The town council denied the request of petitioner, who then sought injunctive relief. The trial court granted the injunction, finding

---


220. By its numerous references to the “purchase” of property by the state, the statute does not appear to establish any independent right of eminent domain. See N.C. Gen. Stat. § 146-24 (Cum. Supp. 1981) wherein procedures for “purchase” and for “condemnation” are separately stated.


222. In a related area, the North Carolina General Assembly and judiciary both acted to ease restrictions on the operation of family care homes for the mentally retarded. For a full discussion, see this Survey, Property Law—Restrictive Covenants, at 1430.

In Wenco Management Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981), the court of appeals held an amendment to a local zoning ordinance, effectively prohibiting restaurants with drive-in windows, unconstitutional as being an “arbitrary and unduly discriminatory interference with plaintiff’s property rights,” lacking any relation to valid police power objectives. Id. at 484, 281 S.E.2d at 76. While changes in local ordinances are permitted by G.S. 160A-383, this particular amendment was passed in direct response to the proposed construction of a drive-in window, arbitrarily singling out the plaintiff’s intended use.


224. The apartment complex was nonconforming with regard to the size of the side yards, number of parking spaces, and number of permissible units. Id. at 545, 281 S.E.2d at 419.

In another case concerning nonconforming uses, Atkins v. Zoning Bd. of Adjustment, 53 N.C. App. 723, 281 S.E.2d 756 (1981), the court of appeals held that the Board could not authorize a nonconforming use that did not exist prior to the date specified in the restrictive ordinance. See 1 R. Anderson, American Law of Zoning § 6.10 (2d ed. 1976).

that the town council lacked the authority to require the petitioner to apply for a special use permit before exercising its right to sell the property as condominiums. The court of appeals affirmed, emphasizing that zoning ordinances regulate only the use of land, not the manner in which it is owned. Clearly, a change in use would have required a special use permit; however, a change in manner of ownership is not deemed to be a change in use—that is, owner-occupation does not differ in use from tenant-occupation. As the court pointed out, after this change in ownership, “the same buildings will be on the premises in question and the use to which they are put will also remain the same.”

This decision has great import due to an ever-increasing number of lessors desiring to convert their rental units to condominiums. As a result of this decision, it is probable that any successful opposition to conversions must come from public pressure asserted by the tenants themselves, and not from zoning actions by local governments.

K. Wills, Trusts and Estates

1. Construction

In *Wachovia Bank & Trust Co. v. Livengood* the court of appeals examined a will in which testator had inconsistently provided for the corpus of his testamentary trust to be distributed to his nieces and nephews in equal shares per stirpes. Under a per capita construction, argued for by appellants, each of the six remainderman, including the appellee, would have received a one-sixth share. Under the per stirpes construction ultimately adopted by the court, the corpus was split into three stocks, with appellants each receiving a one-ninth share and appellee receiving a one-third share.

Although the court of appeals recognized substantial support for a per capita construction, the court concluded it was bound by the testator's manifestation of a contrary intent by the insertion of the “per stirpes” language.

---


227. Town councils must be careful not to be overly receptive to public pressure, however. In *Harts Book Stores, Inc. v. City of Raleigh*, 53 N.C. App. 753, 281 S.E.2d 761 (1981), the court of appeals reversed the Raleigh Board of Adjusters denial of a request for a special use permit to establish an adult book store, when the only basis for the denial was opposition by the residents of the adjoining neighborhood. If an application for a permit meets all conditions required by ordinance, to deny it based solely on public opposition is an unlawful and unconstitutional exercise of legislative power. See *Jackson v. Board of Adjustment*, 275 N.C. 155, 165, 166 S.E.2d 78, 85 (1969).

228. 54 N.C. App. 198, 282 S.E.2d 512 (1981).

229. Testator's trust provided for income to his two sisters and one sister-in-law for life. One sister left three surviving children, appellants in the action. Another left only one child, the appellee in the action. The remaining sister left two surviving children who were not parties to the suit.

230. The court noted “the proposition that if persons designated in a will stand in equal degrees of relationship to the testator, and the devise or bequest enures to the benefit of all of them, a division per capita is indicated, prima facie.” 54 N.C. App. at 200, 282 S.E.2d at 513. The will in *Livengood* contained language that could support a per capita division: the corpus was to be distributed to a class identically related to the testator and the assets were “to be paid over in equal shares.” Id.
The court refused to follow a line of cases holding that the per stirpes language merely regulates the distribution of the gift, substituting on a representative basis children of a nephew or niece who died prior to distribution. Such a construction would have permitted a per capita distribution to the remaindermen, but the court distinguished those cases by noting that they involved wills containing specific language indicating an intent to preserve the first taker's share.

Here, there was no language from which the court could infer that intention.

The court also noted that the mother in each family of nieces and nephews had received a life income interest in the trust, finding in this fact a presumption that the children of each life tenant were to take equally only that share in which the parent life tenant had an interest.

The Livengood result, though arguably inequitable, is well-founded. The court of appeals was bound to reconcile the conflicting provisions of the will and could not disregard the per stirpes language. Per stirpes indicates a division into stocks or roots; thus the court faced the not uncommon dilemma of determining where that division should take place. As a general rule, the stocks begin at the first level of takers, in this case, the parents of the nieces and nephews.

2. The Rule in Shelley's Case

Application of the four-hundred-year-old Rule in Shelley's Case was the central issue in Jones v. Stone. In that case the testator (grandfather of the litigants) had devised a life interest of one-tenth of his real property to his...
son, "the same to be divided among his heirs at law." The son devised this share to his only son excluding his two daughters. The daughters claimed an equal share in the property under the terms of their grandfather's will. Their brother claimed that the father had become vested with fee simple title to the land by operation of the Rule in Shelley's case, and that he had received this title by his father's devise. 243

After discussing the history, 244 policy justifications, 245 and criteria for application of the Rule in Shelley's Case, 246 the court of appeals reached the crux of the matter: did the added words "to be divided among" take the devise out from under the Rule? The court held that they did, ruling that the additional words resulted in a failure of one of the requirements of the Rule—that the word "heirs" be used in its technical sense, indicating an indefinite succession of persons from generation to generation. 247 The court cited with approval one commentator's view that the Rule can be evaded by "some slight contextual language in the dispositive instrument that will indicate to the court that the words: . . . 'heirs of the body' mean less than the whole body of heirs who would take in indefinite succession." 248 Apparently the words "to be divided among" provided a sufficient indication. In addition, the court noted precedent stretching back to 1848 involving similar language, when the court had held that the words "to be equally divided" barred application of the Rule. 249

Both the result and the rationale of Jones seem sound. The words "to be divided among his heirs" indicate an intent that the generation after the life tenant share in the property. 250 In effectuating that intent, the court was faced

243. Id. at 503-04, 279 S.E.2d at 14.
244. Id. at 506-07, 279 S.E.2d at 15-16.
245. The court noted that the Rule "prevents the tying up of real estate during the life of the first taker, facilitates its alienation a generation earlier, and at the same time, subjects it to the payment of the debts of the ancestor." Id. at 507, 279 S.E.2d at 16 (quoting Benton v. Baucom, 192 N.C. 630, 632, 135 S.E.2d 629, 630 (1926)). For an indictment of the acceleration of alienability argument, see Webster, supra note 241, at 21-27. Webster points out that so long as a testator avoids the rule, he is perfectly free to tie up the alienability of his land beyond the first taker.
246. Application of the Rule requires the presence of five factors:
(1) there must be an estate of freehold in the ancestor; (2) the ancestor must acquire that estate in the same instrument containing the limitation to his heirs; (3) the words "heirs" or "heirs of the body" must be used in the technical sense meaning an indefinite succession of persons, from generation to generation; (4) the two interests must be either both legal or both equitable; and (5) the limitation to the heirs must be a remainder in fee or in tail.
52 N.C. App. at 507, 279 S.E.2d at 16 (quoting White v. Lackey, 40 N.C. App. 353, 356, 253 S.E.2d 13, 15-16 (1979)).
247. Id. at 511-12, 279 S.E.2d at 18-19.
248. Webster, supra note 241, at 13.
250. The court also looked to the testator's scheme of distribution in arriving at its holding. He had used the word "equally" in every other dispositive provision of his will. This language clearly barred an application of the Rule. See text accompanying note 249 supra. Respondent argued that the deletion of this word in the clause at issue mandated an application of the Rule. The court dismissed this contention, looking instead to the intent of the testator in his use of the word "heirs." Construing the will as a whole, the court found that the word "heirs" in the questioned provision had not been used in the technical sense.
with an intent defeating doctrine—the Rule in Shelley's Case.\textsuperscript{251} By strictly construing the requirement that the word "heirs" be used in its technical sense, the court was able to place a just result within the parameters of the Rule.

One wonders, however, how long this judicial statesmanship will continue to be necessary. North Carolina remains one of the few states where the Rule continues in full force. The North Carolina Supreme Court repeatedly has indicated that it is unwilling to change the Rule by "judicial fiat," and that such a move must be made by the legislature.\textsuperscript{252} Perhaps after 401 years, it is time for the General Assembly to lay the Rule to rest.

3. Marital Property

In today's mobile society, it is not uncommon for a husband and wife who have been domiciled in a community property state to move to a jurisdiction that has a different system of allocating marital interests in property. Such a move can deprive the surviving spouse of a substantial property interest.\textsuperscript{253} In enacting legislation in 1981 aimed at protecting a surviving spouse from the loss of this preexisting property right,\textsuperscript{254} North Carolina became one of six states\textsuperscript{255} to adopt the Uniform Disposition of Community Property Rights at Death Act.\textsuperscript{256}

The Act applies to personal property, wherever situated, that was either community property under the laws of another jurisdiction, was acquired with the proceeds from that community property, or is in any way traceable to that community property.\textsuperscript{257} Real property in North Carolina is subject to the Act if it was acquired with the proceeds from, or was exchanged for, property that was community property under the laws of another jurisdiction.\textsuperscript{258} The Act also applies on a proportionate basis.\textsuperscript{259} Thus, if husband and wife sell their California condominium for $75,000 with the wife applying the proceeds to purchase a $100,000 North Carolina farm, 75% of the real property would be subject to the Act.

If property is subject to the terms of the Act, half of it passes at death by

\textsuperscript{251} For a discussion of how the Rule frustrates a grantor's intent, see Webster, supra note 241, at 7-9.
\textsuperscript{252} See, e.g., Riegel v. Lyerly, 265 N.C. 204, 209, 143 S.E.2d 65, 68 (1965), and cases cited therein. This attitude still prevails. The petition for discretionary review in Jones v. Stone was denied. 304 N.C. 195, 285 S.E.2d 99 (1981).
\textsuperscript{253} For a more complete discussion of the problem, see Lay, Migrants from Community Property States—Filling the Legislative Gap, 53 Cornell L.Q. 832 (1968); McClanahan, Property Problems of the Migrant Client—A Statutory Solution, 111 Tr. & Est. 950 (1972).
\textsuperscript{254} Both constitutional and choice of law considerations have been suggested as justifications for the proposition that property rights remain unaltered by a change in domicile. See Comment, The Uniform Disposition of Community Property Rights at Death Act, 65 Ky. L.J. 541, 546-47 (1976).
\textsuperscript{257} Id. § 31C-1(1).
\textsuperscript{258} Id. at § 31C-1(2).
\textsuperscript{259} Id. at § 31C-1.
operation of the statute to the surviving spouse and is not subject to testamentary disposition by the decedent or by distribution under the laws of intestate succession. The remaining half of the property is subject to such disposition.260

Although the Act has been criticized as an attempt to "bring in community property by the back door,"261 it actually has a very limited scope. The Act is intended to have "no effect on the rights of creditors extending credit before the death of a spouse; neither does it affect the rights of spouses or other persons prior to the death of a spouse."262 In short, the Act "is designed solely to cover dispositive rights at death."263 The Act is further limited because there is no affirmative duty upon the personal representative of the decedent to investigate whether any property of the decedent is subject to the Act. The surviving spouse must make a written demand before any burden falls on the personal representative.264

Two problem areas that may face North Carolina courts in interpreting the new Act have been identified by commentators.265 The first concerns the division of property if the community property is so commingled with the non-community property that it is indistinguishable,266 because the Act makes no provision for this situation. The second concerns the situation in which spouses hold as joint tenants with right of survivorship property that was formerly held as community property. Should a court infer that the parties have agreed to a severance of the community merely by looking to the form in which they hold title?267 Despite the problems the new Act may create, how-

260. Id. at § 31C-3.
264. N.C. Gen. Stat. § 31C-4 (Cum. Supp. 1981). This provision has been described as "startling," because "one of the principal duties of a personal representative is to identify the property of the decedent for succession and tax purposes." Bartke, supra note 261, at 1146 n.92.
265. For an excellent analysis of the Act, see Comment, supra note 254. The author also identifies a third problem—does the dower or curtesy right of the surviving spouse attach to the decedent's half of the property? As recommended by the framers of the Act, North Carolina's version specifically provides that neither the laws of intestate succession nor dower apply to that portion. N.C. Gen. Stat. § 31C-3 (Cum. Supp. 1981).
266. Three solutions have been suggested. First, the court might characterize all of the property as community property. Second, they might look solely to the form in which the property is held to determine its character. Finally, they might protect only those property interests the spouses had when they entered the state. See Comment, supra note 254, at 556-57. It seems, however, that if a court can determine what assets the couple had when they entered the state, they might just as easily trace the course of that property with no indistinguishable commingling of assets.
267. Nothing in the Act bars such an inference, but one commentator suggests that it would be wiser to "find that no severance in community interests occurs except where expressly agreed by the spouses." Comment, supra note 254, at 561.

It seems wiser to hold that the parties have chosen to sever the community. The ostensible purpose of the Act is to protect a surviving spouse from the loss of a preexisting property right. As
ever, it is a commendable step toward a solution to a very real problem.

In other action involving marital rights, the General Assembly rewrote G.S. 29-14268 of the Intestate Succession Act, which deals with the share of the surviving spouse, for the second time in three years.

The newest version provides that real and personal property should be treated separately in determining the share of the surviving spouse.269 Under the amended statute, real property is now apportioned on a straight fractional basis with the size of the share dependent on whether the intestate has left any issue or parents surviving.270 In this respect, the statute is a return to the 1959 Act. This development represents a departure from the rules of the 1979 amendments, which govern the treatment of personal property;271 under that version, the survivor was entitled to a certain specific dollar minimum, with the remainder apportioned depending on whether there were issue or parents surviving.272 The revised section does away with the “election provision” of the 1979 amendment, which allowed the spouse “to elect to take his or her share wholly in personal property, wholly in real property,” or in such proportions as he or she chose.273

The General Assembly also amended G.S. 39-13.4,274 which deals with conveyances by a spouse under a deed of separation, to provide that such a conveyance passes title free of any marital rights of the other spouse.275

4. Rights of Adoptees

The North Carolina adoption statute,276 once described as a “clear and simple rule,”277 required additional interpretation in 1981.278 In Crumpton v.
Mitchell the North Carolina Supreme Court faced the lingering question whether a child adopted out of his original family might take under an instrument granting a remainder to “issue.” The question had been decided negatively in 1976 by the court of appeals, but the supreme court had vacated that judgment as improvidently granted. After the impediments noted by the supreme court were removed, the question once again was brought before that court.

Crumpton concerned the division of a quarter share of the proceeds from a sale of land. A 1941 deed conveyed a life estate to grantor’s daughter with the remainder to her issue. Two of the life tenant’s grandchildren were adopted away from their father, the life tenant’s son, after his death. Upon the life tenant’s death, the two adopted children claimed a part of the quarter share, arguing that they were still the life tenant’s “issue.” The court of appeals held that the two adoptees were not entitled to a share, and they appealed. The supreme court held that the General Assembly:

in enacting G.S. 48-23 . . . contemplated that upon a final order of adoption a complete substitution of families would take place with the adopted child becoming the child of his adoptive parents and a member of their family, likewise, the legal relationship with the child’s natural parents and family would by virtue of the adoption order be completely severed.

Although state lawmakers did not specifically provide in G.S. 43-23 that the word “issue” does not contemplate children taken from their natural parents after they had been adopted, the court held that the legislative intent behind the statute supported that result. The court noted, however, that an adopted child still might take as “issue” of her natural family if such an intent plainly appears on the face of the instrument.

MacDougall, 28 N.C. App. 178, 220 S.E.2d 368 (1975) (the words “my issue” do not represent a clear intention to exclude adopted person).


280. The supreme court had decided the converse of this issue several years earlier in Peele v. Finch, where it held that children adopted into a family take as “issue” of that family. 284 N.C. 375, 200 S.E.2d 635 (1973).


Many events may obviate the need to determine the question answered by the . . . Court of Appeals: (1) The life tenant is still living. Respondent appellants and those claiming through them may not survive her. (2) Before her death the General Assembly may speak more specifically to the precise situation here . . . (3) . . . It is highly conceivable that appellants and appellees . . . could reach an amicable settlement before their contingent interest vests at the death of the life tenant.

Id. at 656, 227 S.E.2d at 592.

283. The life tenant, Ruth Crumpton, died in 1979. No action had been taken by the General Assembly, nor had appellants and appellees reached a settlement. See note 282 supra.

284. In Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953), the North Carolina Supreme Court defined “issue” as meaning “all persons descended from a common ancestor.” Id. at 581, 75 S.E.2d at 638.

285. That opinion was apparently not reported.


287. Id. at 665, 281 S.E.2d at 6.
The Crumpton result is consistent with the view that adopted children should not receive a double inheritance benefit because of their adoption.\textsuperscript{288} Under certain circumstances, however, a double benefit may be justified. Consider, for example, the situation in which “one parent has died, the other has remarried, and the children aged ten or twelve have been adopted by a step-parent.”\textsuperscript{289} Close familial ties most likely exist between these children and the parents of the deceased. Under these circumstances, “depriving them of participation in class gifts made by the will of a natural grandparent who knew and loved them is cruel and unfair.”\textsuperscript{290} The sweeping language of Crumpton, however, would preclude consideration of extraneous evidence of the grandparents’ intent in this situation.

Several states have recognized this problem.\textsuperscript{291} Pennsylvania, for example, has a unique statute providing that an adopted child is no longer considered the issue of his natural parents, “except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person.”\textsuperscript{292} North Carolina courts also should consider familial realities before holding as a per se rule that, absent a clear contrary intent on the face of the instrument, adopted children can no longer take as “issue” of their natural families.

5. Caveats, Attorney’s Fees and Procedure

As a result of legislative enactment, a trial court must now make a specific finding that a caveat proceeding has “substantial merit” before awarding attorneys’ fees.\textsuperscript{293} The amendment to G.S. 6-21(2) apparently was prompted by the North Carolina Supreme Court’s decision in In re Will of Ridge.\textsuperscript{294} In that case, when construing the prior statute, which required a finding that a proceeding was \textit{without} substantial merit before \textit{denying} attorney’s fees,\textsuperscript{295} the court “fail[ed] to find any statutory \textit{requirement} that a specific finding as to whether or not the case [is] without substantial merit be made . . . .”\textsuperscript{296} The \textit{Ridge} court then awarded attorney’s fees to the caveators, despite the trial court’s failure to make a specific finding of a lack of substantial merit.\textsuperscript{297}

\textsuperscript{288}. See Note, Adoption-Cutting Off the Right to Succeed to Property Given to Natural Parents’ “Children”, 41 Mo. L. Rev. 259, 266 (1976).
290. Id.
291. See, e.g., Matter of Tracy, 464 Pa. 300, 346 A.2d 750 (1975); In re Benner’s Estate, 109 Utah 172, 166 P.2d 257 (1946); In re Estate of Zastrow, 42 Wis. 2d 390, 166 N.W.2d 251 (1969).
292. 20 Pa. Cons. Stat. Ann. § 2108 (Purdon Supp. 1981). The official comment to the section notes that this “limited exception . . . recognizes that family relationships frequently continue for grandparents and others where an adoption may have occurred after the death or divorce of a parent.” Id.
295. That statute provided in pertinent part, “[I]n any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorney’s fees for the attorneys for the caveators.” N.C. Gen. Stat. § 6-21(2) (1979 Cum. Supp.) (current version at N.C. Gen. Stat. § 6-21(2) (1981)).
296. 302 N.C. at 379, 275 S.E.2d at 426 (emphasis in original).
297. The court of appeals had vacated the trial court’s award of attorney’s fees due to the
Under the amended statute, a heavier burden is imposed upon would-be chal-

lengers to a will. A borderline case such as Ridge, which might not have been entirely “without substantial merit,” almost certainly would not rise to the more stringent “having substantial merit” test. Because the awarding of attorney’s fees is a discretionary determination, the requirement of a positive finding should aid the appellate court in determining whether the trial court abused its discretion. It may also tend to discourage meritless caveats.

In a related development, the North Carolina Supreme Court held that a trial court may properly award attorney’s fees under G.S. 6-21(2) in a pro-

ceeding to establish the right to dissent under a will. In In re Estate of Kirk-

man the court found that the statute had been “enacted to ensure that parties having meritorious challenges to a will . . . would not be discouraged from pressing these claims by the spectre of incurring legal fees.” Noting that establishing the right to dissent may be a “complex, time-consuming and expensive” procedure, the court held that right to fall within the purview of G.S. 6-21(2).

In other procedural developments concerning the law of wills, trusts and estates, the North Carolina Supreme Court held that before a caveat to a will will be allowed, the will must actually be offered for probate.

The General Assembly also amended the “living will” and the self-proving will statute's failure to specifically find whether the proceeding was without “substantial merit.” The court of appeals held that “without such a finding we cannot determine whether the trial court properly exercised its discretion in awarding the counsel fees.” In re Will of Ridge, 47 N.C. App. 183, 186, 266 S.S.2d 766, 767 (1980).

298. Caveators in Ridge originally filed three challenges to the will. They later dropped their claims of lack of testamentary capacity and mistake and ultimately failed at trial on the undue influence claim. The trial judge, commenting on the merits of the action, noted, “It is . . . not obviously the strongest case, but I think it was brought in good faith . . . .” 302 N.C. at 381, 275 S.E.2d at 428. The presence or absence of good faith should not be the measure of the merit of a caveat. It it were, the most legally deficient claim might have substantial merit if brought in the right state of mind.

299. See supra note 297.

300. That statute states that the court may award attorney’s fees in “any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties thereunder . . . .” N.C. Gen. Stat. § 6-21(2) (1981).


302. Id. at 168-69, 273 S.E.2d at 716.

303. Id. at 168, 273 S.E.2d at 716.

304. In In re Will of Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981), the North Carolina Supreme Court dismissed as fatally defective a caveat to a foreign will that had not yet been offered for probate in North Carolina. After the caveators’ jurisdictional challenge to the Virginia will had failed, they filed a caveat in North Carolina, where the entire estate was apparently situated. Both the trial court and the court of appeals allowed the challenge, resting their decisions on the fact that the will had been recorded under N.C. Gen. Stat. § 31-27 (1976). In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980). The supreme court reversed, requiring actual probate of the will, not mere recordation, holding that “a caveat may not be entered to the recordation of an exemplification or authenticated copy of a will and fixed order of probate that has been allowed, filed and recorded in the office of the clerk, but can only be entered to the probate of such will.” 303 N.C. at 511, 279 S.E.2d at 787. Endorsing strict procedural compliance, the court then noted that caveators were free to offer the will for probate, and then properly enter the caveat. Id.

305. In an action only tangentially related to wills in the legal sense, the General Assembly eased requirements concerning the witnessing of a “living will,” which allows a terminally ill patient to state his desire not to have his life prolonged by artificial means. One now may be a witness so long as he does “not know or have a reasonable expectation” that he will take either
utes, and temporarily eased the validity requirements for an executor’s general notice to creditors.\textsuperscript{307}

\begin{flushright}
JAMES L. BAGWELL  
BRIAN VINCENT FRANKEL  
MACK SPERLING  
WILLIAM FOUNTAIN WINSLOW  
ALAN MITCHELL WOLPER
\end{flushright}

under the declarant’s will or by intestate succession. Unamended, the statute stated an objective test: would the witness be entitled to any part of the declarant’s estate or intestate share? If so, he was disqualified. N.C. Gen. Stat. § 90-321(c)(3) (Cum. Supp. 1981).

\textsuperscript{306} The General Assembly amended the self-proving will statute, N.C. Gen. Stat. § 31-11.6 (Cum. Supp. 1981) to remove any lingering doubts as to whether both a signed will and a signed affidavit are required to make a will self-proving. The statute had provided that “[i]n addition to the procedures for the execution of a will set out in G.S. 31-3.3 [a normal attested written will], a [will can be self-proved].” Although 1979 amendments had supposedly created a one-step method allowing a will to be “simultaneously executed, attested, and made self-proved,” this statutory language indicated to some that compliance with the requirements for an attested written will were still a prerequisite. Now the statute provides simply that “[a]ny will may be self-proved. This amendment should remove any vestige of the requirement that both the will and the affidavit be signed. N.C. Gen. Stat. § 31-11.6 (Cum. Supp. 1981). For a summary of the problems prior to the 1979 amendments, see Survey of Developments in North Carolina Law, 1979—Property, 58 N.C.L. Rev. 1509, 1528-29 (1980).

\textsuperscript{307} The 1981 General Assembly reacted to a supreme court opinion that had held an executor’s general notice to creditors under G.S. 28A-14-I fatally defective because it failed to name a day after which claims against the estate would be barred. The court in Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980), found the notice ineffective to begin the running of the six-month statute of limitations for bringing claims against the estate. The Gooding court based their decision on fairness to creditors who might have erroneously assumed that they had six months from the publication date to file their claims when they actually had six months from the date of the first notice.

The General Assembly has ameliorated the harshness of that result by an amendment validating any notice to creditors that fails to name a cut-off date under limited circumstances. The amendment applies only to notices published between October 21, 1975 and March 16, 1981. It does not affect any pending litigation. N.C. Gen. Stat. § 28A-14-I.1 (Cum. Supp. 1981). Presumably, the legislature’s intent was to protect those executors who, prior to the Gooding decision, had not dated their notices.
X. TAXATION

A. Inheritance Tax: Definition of “Debts of Decedent”

In *In re Kapoor* the supreme court defined “debts of decedent” for purposes of the state inheritance tax. A husband had agreed to maintain a $150,000 life insurance trust for his former wife as part of a separation agreement. After the husband's death, the executor of his estate sought to have the $150,000 classified as a “debt of the decedent,” which would qualify for a deduction under G.S. 105-9. The court of appeals held that the phrase included only debts accruing prior to decedent's death and concluded that, while the life insurance premiums would be a debt of decedent, they had been paid in full and therefore no debt existed. The supreme court reversed, holding that the former wife relinquished her marital rights not for premium payments but for the amount that the policy would pay upon the death of the insured.

The court reasoned that had the husband not paid the premiums, the former wife could have sued his estate for $150,000; thus the amount of the “debt” was $150,000, and the life insurance premiums were simply the vehicles used by the parties to carry out the obligation created by the separation agreement.

B. Statutory Developments

There were several statutory amendments affecting taxation during 1981.

---

1. Additional Developments in Tax Law: In Carolina-Atlantic Distribs. Inc. v. Teachy's Insulation, Inc., 51 N.C. App. 705, 277 S.E.2d 460 (1981), a seller who failed to collect North Carolina sales tax from a buyer and then paid it himself to the Department of Revenue was barred from subsequently collecting the tax from the buyer under N.C. Gen. Stat. § 105-164.7 (1979).

In Midrex Corp. v. Lynch, 50 N.C. App. 611, 274 S.E.2d 853, cert. denied on other grounds, 303 N.C. 181, 280 S.E.2d 453 (1981), the court of appeals followed generally accepted accounting principles (GAAP) in holding that in computing the state intangibles tax the term “accounts payable” does not include customer advances on construction projects. It is unclear whether North Carolina courts will continue to follow GAAP or be amenable to alternative interpretations of accounting terms. In Great Southern Media v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981), the supreme court defined “general purpose newspapers” used for publication of tax liens under N.C. Gen. Stat. §§ 1-597, 105-369(d) (1979). General purpose newspapers must have general appeal, and greater than a *de minimis* number of subscribers; subscriber residences must not be limited to a single area of the taxing unit, and the newspaper must be available to anyone wishing to subscribe. Id. at 441, 284 S.E.2d at 467.


4. 303 N.C. at 108-09, 277 S.E.2d at 408.

5. See supra note 3.


7. 303 N.C. at 109, 277 S.E.2d at 408-09.

8. Id. Justice Meyer dissented, disagreeing with the majority's conclusion that the separation agreement was a contract creating an obligation that survived the death of the husband. Id. at 112, 277 S.E.2d at 410 (Meyer, J., dissenting).
The state installment gain provisions\(^9\) were reformulated to conform to the federal Internal Revenue Code provisions as amended by the Installment Sales Revenue Act of 1980.\(^10\) The installment sales method allows payments made over a period of time greater than one year to be included in income on a proportional basis. The major changes in the new North Carolina method are elimination of the requirement that no more than thirty percent of the selling price be received in a single year and elimination of the $1000 minimum sale price for casual sales of personal property.\(^11\)

The General Assembly also passed bills creating two new allowable tax credits. State taxpayers may now take a seven percent credit on a maximum of $4000 spent on employment-related expenses for child care (a maximum of $2000 per dependent up to the $4000 limit).\(^12\) Individual and corporate tax credits are now allowed for installation of energy saving devices, including construction of photovoltaic equipment facilities, olvine facilities, methane gas facilities, wind energy devices, solar heaters and hydroelectric generators.\(^13\)

C. Property Tax

In *Appeal of McElwee*\(^14\) appellants contested the present use valuation of their 22,000 acres of forest land as determined by the Property Tax Commission.\(^15\) Proper application for present use valuation had been made.\(^16\) In North Carolina present use valuation is available for qualifying agricultural, horticultural and forest land.\(^17\) Property not exempt or excluded\(^18\) is subject to

---

15. See N.C. Gen. Stat. § 105-277.2(5) (1979), which defines the standard for present use value appraisal as follows:

   the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell, assuming that both of them have reasonable knowledge of the capability of the property to produce income in its present use and that the present use of the property is its highest and best use.

16. G.S. § 105-277.4 requires the filing of an application with the tax supervisor of the county in which the property is located showing clearly that the property comes within one of the present use classes outlined in G.S. 105-277.3. N.C. Gen. Stat. §§ 105-277.3, -277.4 (1979).
17. Id. § 105-277.3.
18. Id.
normal appraisal at market value\textsuperscript{19} under the general property tax statute.\textsuperscript{20}

The county had hired an appraisal company to reappraise all real property in the county.\textsuperscript{21} Value schedules for the appraisal of separate properties were developed by the company and were adopted by the county Board of Commissioners. Notice was published twenty-seven months before the reappraisal date. After the county appraised appellants' property at market value, appellants filed a complaint with the County Board of Equalization and Review. Subsequently, the Property Tax Commission and the court of appeals affirmed the county's action,\textsuperscript{22} but the supreme court reversed and remanded for a new determination of the present use value of appellants' property.\textsuperscript{23}

Citing \textit{In re Appeal of Amp, Inc.},\textsuperscript{24} the supreme court reiterated the grounds for appellate review of administrative agency decisions, including those of the Property Tax Commission.\textsuperscript{25} Review begins with a presumption of the correctness of tax assessments, but the presumption of correctness is rebuttable if "competent, material and substantial" evidence is produced to show: "(1) Either the county tax supervisor used an \textit{arbitrary method} of valuation; or (2) the county tax supervisor used an \textit{illegal method} of valuation; AND [sic] (3) the assessment \textit{substantially} exceeded the true value in money of the property."\textsuperscript{26}

In examining the county's action, the court noted that all property being appraised must "be actually visited"\textsuperscript{27} and proper notice of the new valuation schedules must be given.\textsuperscript{28} The court held that adequate notice was not given when notice was printed in the smallest possible print twenty-seven months before the date of revaluation.\textsuperscript{29} In addition, all property under appraisal did not receive an on-site visit. "The legislative directive is crystal clear: all prop-

\begin{itemize}
  \item \textsuperscript{19} See id. \textsection 105-283 (1979), which defines the standard for market value appraisal of property:
  \begin{quote}
  All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.
  \end{quote}

  \item \textsuperscript{20} The Machinery Act subjects all property, both real and personal, to taxation and contains provisions for the appraisal and assessment of property as well as the assessment of property taxes. Id. \textsection\textsection 105-207 to -395.

  \item \textsuperscript{21} See id. \textsection 105-286, which provides for a schedule for the general reappraisal of real property in counties throughout the state.

  \item \textsuperscript{22} 51 N.C. App. 163, 169, 275 S.E.2d 865, 869 (1981).

  \item \textsuperscript{23} 304 N.C. 68, 93, 283 S.E.2d 115, 130.

  \item \textsuperscript{24} 287 N.C. 547, 215 S.E.2d 752 (1975).

  \item \textsuperscript{25} The supreme court found N.C. Gen. Stat. \textsection 105-345.2 (1979) to be the appropriate judicial review statute for appeals from the Property Tax Commission. 304 N.C. at 74, 283 S.E.2d at 120.

  \item \textsuperscript{26} 287 N.C. at 563, 215 S.E.2d at 762 (emphasis in original).

  \item \textsuperscript{27} N.C. Gen. Stat. \textsection 105-317(b)(2) (1979).

  \item \textsuperscript{28} G.S. 105-317(c) provides the proper means for giving notice of the valuation schedules. Id. \textsection 105-317(c).

  \item \textsuperscript{29} 304 N.C. at 80, 283 S.E.2d at 123.
\end{itemize}
In a second property tax case, the court of appeals interpreted another property tax statute, which provides that once a foreign corporation establishes a business situs in the state, the tax situs for all of its property is its principal place of business. In *In re Appeal of Plushbottom & Peabody Ltd.*, the court held that the tax situs of tangible personal property of a foreign corporation is unaffected by shipment from its tax situs in the state for a finishing process to be performed outside the state. The temporary absence of the tangible property on the tax date does not affect its taxability within the state.

### D. Unemployment Tax: Church Employee Exemption

In *Begley v. Employment Security Commission* the North Carolina Court of Appeals examined the unemployment tax liability for persons employed by a church school. Plaintiff contended that the "church employee" exemption from unemployment tax liability should cover the church school employees as well. The court of appeals held that since "church officials... are responsible for the operation, administration, and employment of the schools" and church schools are part of the church, the school's employees are also church employees. The test was found to be met, and plaintiff was held not

30. Id. at 82, 283 S.E.2d at 124.
32. See id. § 105-317(a)(1), which lists factors to be considered in determining the true value of land. Factors enumerated include advantages and disadvantages as to location, zoning, water-power, water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income, probable future income, and any other factors that may affect its value.
33. See id. § 105-304(c)(2).
35. Id. at 292, 276 S.E.2d at 510. The court interpreted G.S. 105-304(f)(4), which states: "In applying the provisions... the temporary absence of tangible personal property from the place at which... property is to be listed shall not affect the application of the rules established..." N.C. Gen. Stat. § 105-304(f)(4) (1979).
36. 51 N.C. App. at 293, 276 S.E.2d at 511.
38. N.C. Gen. Stat. § 96-8(6)(k)(15) (1981). The statute provides that the term "employment" for unemployment tax purposes shall not include "services performed... in the employ of a church..."
39. 50 N.C. App. at 437, 274 S.E.2d at 374 (emphasis in original).
liable for the unemployment tax.\textsuperscript{40}

\textbf{MARIE LOUISE JOSEPH}
\textbf{H. VAUGHN RAMSEY}

\textsuperscript{40} The court also held that when plaintiff makes a payment under protest pursuant to G.S. 96-10(f) (1981), the trial court may award prejudgment interest on the amount of the protested payment. N.C. Gen. Stat. § 96-10(f) (Cum. Supp. 1981).
XI. Torts

1. Additional Developments: a. Statutes: The North Carolina General Assembly made a number of statutory changes in 1981 in the area of tort law. Law of May 5, 1981, ch. 327, § 1, 1981 N.C. Sess. Laws, 1st Sess. 369 (codified at N.C. Gen. Stat. § 24-5 (Cum. Supp. 1981)) provides for interest to be paid on compensatory damages in noncontract actions from the time the action is instituted until the time judgment is satisfied, assuming no liability insurance is present. In noncontract actions in which liability insurance covers the claim, interest will be payable from the time of the verdict until the time the judgment is paid. Id. The former version of this statute made no distinction between claims covered by liability insurance and those that were not. Further, it provided only that interest would be allowed until judgments were paid, but did not specify when interest could begin to accrue.

N.C. Gen. Stat. § 143B-480.1 to .3 (Cum. Supp. 1981), a new provision, makes available low-level aid for victims of sex offenses. Under the statute, a victim of rape or other sex offenses may apply for up to $500 in reimbursement for costs of medical examinations and treatment following an assault. The funds are not available to applicants who wait more than 72 hours to report the assault to police, however, unless there is good cause for the delay. The funds, paid by the Department of Crime Control and Public Safety, are administered by the Governor's Crime Commission and will be disbursed directly to the examining doctor or hospital. Appeals from applicants who are refused assistance will be heard by the Wake County Superior Court. Law of July 10, 1981, ch. 931, § 2, 1981 N.C. Sess. Laws, 1st Sess. 1429 (codified at N.C. Gen. Stat. § 143B-480.1 to .3 (Cum. Supp. 1981)).


b. Cases: In Noell v. Winston, 51 N.C.App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 515, 281 S.E.2d 652 (1981), the supreme court dismissed plaintiff attorney's claim that his county bar association maliciously interfered with his right to practice law by deleting his name from appointment rosters in indigent cases. Plaintiff sought to recover both on due process grounds and on a theory of actionable trespass against property rights. See N.C. Gen. Stat. § 99A-1 (1979). Neither theory was found to support a valid cause of action. 51 N.C.App. at 457, 276 S.E.2d at 768.

In Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981), the supreme court held that a store owner could be held liable for injuries resulting from the intentional criminal acts of third parties. Plaintiff was assaulted in a shopping mall parking lot, an area in which twenty-nine incidents of crime had previously been reported. The court imposed a duty to protect or warn invitees "where circumstances existed which gave the owner reason to know that there was . . . a likelihood of conduct on the part of third persons which endangered the safety" of his invitees. Id. at 638-39, 281 S.E.2d at 38 (citing Restatement (Second) of Torts § 344 comment f (1965)). For a more complete analysis of the case, see Note, Tort Law-Foster v. Winston-Salem Joint Venture: Duty of Mall Owners to Take Measures to Protect Invitees from Criminal Acts, 60 N.C.L. Rev. 1126 (1982).

The well-settled duty of a proprietor to his invitee was likewise given stringent application by the supreme court in Norwood v. Sherwin Williams Co., 303 N.C. 462, 279 S.E.2d 559 (1981). Defendant storekeepers were held liable for injuries plaintiff sustained when she stumbled over a poorly lit and awkwardly placed floor display. The display, and other "impulse" purchase items, had been placed to keep customers' attention at eye level. The court imposed a duty of care on the defendant that plaintiff was contributorily negligent in failing to keep a proper lookout, denied recovery. 48 N.C. App. 535, 269 S.E.2d 277 (1980). The supreme court reversed, explicitly disagreeing "with both the statement of the [contributory negligence] rule and its application to the evidence adduced at trial." 303 N.C. at 468, 279 S.E.2d at 563. The court held that plaintiff was contributorily negligent only if in the exercise of ordinary care she should have seen the danger. In so holding, the court delivered a clear warning to proprietors that "[w]hen a merchant entices a customer's eyes away from a hazardous condition, we do not think he should be heard to complain when his efforts succeed." Id. at 469, 279 S.E.2d at 564.
A. Products Liability

1. Dangerous Chemicals

In Ziglar v. E.I. DuPont de Nemours & Co. the North Carolina Court of Appeals discussed in detail the duty of care required of a manufacturer in producing, packaging and labeling dangerous chemicals. The court reversed the trial court’s grant of summary judgment for DuPont, holding that it was a jury question whether DuPont had been negligent in any of those three areas. Summary judgment for the retailer who sold the chemical was upheld.

In Ziglar a farm laborer died shortly after drinking insecticide manufactured by DuPont. The insecticide was in its original package, an opaque container similar to a milk carton, and was colorless, like water. A warning label appeared on the exterior of the container, along with first-aid instructions. The decedent apparently mistook the insecticide for a jar of water her employer had provided for his field workers.

After the worker consumed the insecticide, the farmer read the first aid instructions on the label and, as suggested, tried to induce vomiting by forcing the decedent to drink a mixture of salt and water. The search for salt and water took about eight minutes, and the decedent became unconscious shortly thereafter. The farmer then drove the decedent to a nearby doctor’s office. The doctor administered an antidote, also as instructed by the chemical label, but the decedent died soon afterwards in a hospital.

The court held that the plaintiff had established enough evidence to present three possible theories of liability to the jury. The court ruled that there were material issues of fact whether DuPont exercised “the utmost caution” in the production of a dangerous substance, whether the label warnings were

2. In Strickland v. Dri-Spray Div. Equip. Dev., 51 N.C. App. 57, 275 S.E.2d 503 (1981), a products liability case, the court held that when equipment design poses an obvious hazard, there is no duty to warn.
4. Id. at 150, 280 S.E.2d at 513.
5. Id. A retailer has a duty to warn a purchaser of any hazard associated with the use of a product he sells. Plaintiff must show the following in order to prove negligence by the retailer: (1) that the supplier had actual or constructive knowledge of a particular hazard, and (2) that the retailer knew or should have known that the purchaser would not recognize this danger himself. Id. at 151, 280 S.E.2d at 513. In Ziglar the purchaser was a farmer experienced in the use of toxic chemicals, including this one; the court held that the plaintiff did not establish that the retailer knew that the label warnings were inadequate. Id. at 151, 280 S.E.2d at 513, 514. This duty of the retailer is well established in North Carolina. See, e.g., Stegall v. Catawba Oil Co., 260 N.C. 459, 133 S.E.2d 138 (1963); Davis v. Siloo, Inc., 47 N.C. App. 237, 267 S.E.2d 354, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).
6. Id. at 148-49, 280 S.E.2d at 512.
7. Id.
8. Id. at 158, 280 S.E.2d at 517.
9. Id. at 149, 280 S.E.2d at 512.
10. Id. at 154, 280 S.E.2d at 515 (citing Davis v. Siloo, Inc., 47 N.C. App. 237, 267 S.E.2d 354, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980)). The court warned that the “utmost caution” standard should not be confused with strict liability, which North Carolina has not adopted in tort
adequate to reach all those who might reasonably be expected to come into contact with the chemical, and, finally, whether the product's first aid instructions were ambiguous or incomplete.

In what appears to be a case of first impression in North Carolina dealing with first aid instructions on product labels, the Ziglar court, by allowing the issue to go to the jury, indicated that a manufacturer may have a duty to provide these instructions, or at least that when the attempt is made, the instructions must be complete and clear. For instance, the court noted that the instructions may have been incomplete, because they emphasized giving victims salt water, rather than inducing vomiting quickly by whatever means available. Similarly, the instructions to physicians included only the antidote for victims of mild chemical poisoning and not the treatment for those stricken more severely.

While the manufacturer's duty in packaging and labeling dangerous chemicals recognized in Ziglar appears to follow the products liability law in other states, the case provides the first careful discussion of the duty by a North Carolina court.

---

claims. Id. at 154 n.5, 280 S.E.2d at 515 n.5. The strict liability theory was most recently rejected in Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980). See discussion of strict liability at notes 23, 24, 38-40 infra. In ruling that there was a jury issue concerning the manufacturer's alleged negligence in producing and packaging the insecticide, the court pointed out that the manufacturer had changed the design of the bottle and had tinted the insecticide brown after the accident. 53 N.C. App. at 155, 280 S.E.2d at 516. In North Carolina, evidence of repairs made after an accident are not admissible to show negligence. 2 D. Stansbury, North Carolina Evidence § 180, at 58-59 (H. Brandis rev. 1973). Evidence of later repairs may be admitted for other purposes, including showing that the alleged condition existed at the time of the accident, demonstrating that a certain person had a duty to repair, contradicting photographic evidence of conditions at the time of the accident, or contradicting evidence that the repairs were made before the accident. Id. at 59 n.12.

The Ziglar court did not make clear whether it mentioned the later repairs to show negligence of the manufacturer, or for one of the permissible reasons. Any mistake by the court appears minor. The court held that there was sufficient evidence on two other grounds to take the case to the jury, 53 N.C. App. at 160, 280 S.E.2d at 519, thus omission of the evidence of later repairs would not have resulted in a drastic change in the outcome of the decision.

11. 53 N.C. App. at 155, 280 S.E.2d at 516 (citing Corprew v. Geigy Chemical Corp., 271 N.C. 485, 157 S.E.2d 98 (1967)). See Fowler v. Gen. Elec. Co., 40 N.C. App. 301, 252 S.E.2d 862 (1979); Epstein, Products Liability: The Search for the Middle Ground, 56 N.C.L. Rev. 643, 653 (1978). The court noted that the label in Ziglar was 4/17 inches high and included a skull and crossbones symbol the same size. There was no evidence, however, that the decedent could read. 53 N.C. App. at 156, 280 S.E.2d at 516.

12. 53 N.C. App. at 158, 280 S.E.2d at 517. The court cited no North Carolina cases for the proposition that the duty to include first aid instructions is part of the manufacturer's duty to warn. Apparently this is the first time the court of appeals has dealt with the question. Likewise, while the duty of a manufacturer to label dangerous products has been the subject of a number of cases and articles, the issue of first aid instructions does not appear to have been widely discussed.


14. 53 N.C. App. at 158, 280 S.E.2d at 517.

15. Id. at 158-59, 280 S.E.2d at 518.
2. Crashworthiness

Two federal courts of appeals reached opposite conclusions in 1981 when they tried to predict whether the North Carolina Supreme Court would recognize the so-called "crashworthiness" doctrine in products liability cases. Under the crashworthiness theory, a manufacturer may be held liable for injuries in an accident caused by a defective product design, even if the defect that enhanced or caused the injury is not related to the cause of the original accident. More specifically, the issue of crashworthiness arises when a plaintiff is injured in a "second collision"—that is, when he or she comes into contact with some part of the vehicle after the initial crash between the vehicle and some other object.

In Seese v. Volkswagenwerk A.G. the Court of Appeals for the Third Circuit predicted that North Carolina would recognize the crashworthiness theory. But in a case decided soon afterwards, Wilson v. Ford Motor Co., the Court of Appeals for the Fourth Circuit reached the opposite conclusion. Seese and Wilson are the latest in a series of federal court decisions that have reached conflicting predictions about North Carolina's stance on the crashworthiness doctrine. Neither the North Carolina Supreme Court nor the North Carolina Court of Appeals has ruled on the crashworthiness doctrine.

In Seese, four of the five passengers in a Volkswagen microbus were hurt when the car was forced off the road and turned over. The four injured passengers were all thrown from the vehicle, and one of the four died from his injuries. Plaintiffs claimed that their injuries were exacerbated because of the vehicle's defectively designed window retention system, and sued on the basis of strict liability, breach of warranty and failure to design a crashworthy vehicle.

Plaintiffs succeeded in the district court on both the strict liability and crashworthiness theories. On appeal, the Seese court rejected plaintiffs' strict liability claim and the breach of warranty claim but recognized the

---

21. 648 F.2d at 835-36.
22. Id. at 836, 838.
23. Id. at 835.
24. Id. at 837. North Carolina rejected the strict liability theory of tort in Smith v. Fiber Control Corp., 300 N.C. 669, 268 S.E.2d 504 (1980). It should be noted that the Smith decision,
crashworthiness cause of action. The court noted the absence of state court rulings on the issue and the split among federal courts in the state. Because of the lack of precedent, “a prediction as to the law North Carolina would adopt can only be based on the greater persuasiveness of one of the conflicting theories, with an eye to the nationwide trend in judicial and legislative lawmaking.” Arguing that the view rejecting crashworthiness is “outdated and repudiated,” the court stated that it was “convinced that North Carolina is more likely to follow the enlightened rule . . . [and recognize the crashworthiness doctrine].”

A strong dissent argued for remand of the case to the district court to determine which damages awarded by the jury were based on the crashworthiness doctrine and which were based on strict liability, the theory disallowed by the court of appeals’ majority. The dissent noted that while the jury considered the potential liability of the defendants separately under the two theories, it awarded the damages in a single lump sum.

In Wilson v. Ford Motor Co. the Court of Appeals for the Fourth Circuit upheld a lower court decision predicting that the Supreme Court of North Carolina would not recognize the crashworthiness doctrine. The Wilson court noted the Seese decision, but concluded that it was unlikely that North Carolina would adopt the crashworthiness doctrine because of the North Carolina Supreme Court’s recent rejection of the doctrine of strict liability in tort.
The court also based its decision on the lower court’s “careful review” of the conflicting cases in the crashworthiness area. The district court decision in Wilson was apparently based on two factors. First, the court noted that at the time of the district court’s decision only one federal court had predicted North Carolina would recognize the crashworthiness theory. Second, the court emphasized that its duty is to predict North Carolina law, not to adopt a view that a majority of federal judges believe is wisest.

The court of appeals’ reliance on North Carolina’s rejection of strict liability in tort as a reason for predicting that the state would also reject the crashworthiness doctrine is confusing at best. If the court was suggesting that the doctrines of crashworthiness and strict liability are similar, and therefore any rejection of strict liability eliminates acceptance of the crashworthiness theory, the decision seems hard to justify. The imposition of strict liability represents a policy decision by the courts that a manufacturer-tortfeasor who injures another, however innocently, is better able to bear the burden of the victim’s injuries than the victim himself. Strict liability thus deals with the allocation of damages and compensation of injuries. Crashworthiness, on the other hand, deals with the question of duty. The theory provides that a manufacturer may be held liable for defectively designed products that enhance injury in a crash, even though the defect did not cause the initial collision. Courts accepting the theory have made the policy decision that a manufacturer has a duty to design a product that will be reasonably safe during a collision, but it must be determined in each case whether this duty has been breached. The two theories, crashworthiness and strict liability, thus do not seem to be so related that rejection of one necessarily entails rejection of the other. Indeed, earlier cases based on crashworthiness provided for liability of the manufacturer only for defects that were the result of design negligence.

Of course, it is possible that the Wilson court merely recognized that North Carolina has frequently lagged behind its sister states in adopting new theories in the products liability field, and therefore predicted that it was unlikely that a North Carolina court would adopt the crashworthiness doctrine—a doctrine that is less widely accepted than the strict liability theory.
The Wilson court's view of the limited role of the federal court in predicting state law is undoubtedly the correct posture for the court to take. Judging from the language of the Seese opinion, it appears that the Third Circuit Court of Appeals based its decision at least in part on the majority's view that the more liberal theory was wisest. On the other hand, it is hard to avoid the conclusion that the overwhelming trend in products liability is toward recognition of the crashworthiness theory and that it is only a matter of time before North Carolina adopts the doctrine as well. On that ground, the opinion of the court in Seese seems the better reasoned of the two.

3. Breach of Warranty and Tort

In Gillespie v. American Motors Corp. the North Carolina Court of Appeals discussed some of the differences between tort and breach of warranty actions that seem to confuse a number of courts. Plaintiffs in Gillespie had purchased a 1976 Cherokee Jeep from defendants in mid-December 1975. Within two weeks, plaintiffs noticed that excessive gas fumes collected inside the vehicle whenever they drove it. They made numerous trips to defendant's dealership to have the problem remedied, but without success. Meanwhile, plaintiffs began experiencing a variety of minor illnesses, which they eventually linked to the gas fumes. On December 18, 1979, nearly four years after they bought the car, plaintiffs filed suit, alleging negligence, strict liability and breach of warranty of merchantability.

The district court dismissed all three claims, apparently believing that a three-year tort statute of limitations governed and had run before plaintiffs filed their suit. The court of appeals reversed and remanded on several grounds. First, it held that the trial court was mistaken in its choice of the applicable statute of limitations for the tort causes of action. Second, it held onto theories with more consistency and vigor than most other states. B. Finberg & E. Hightower, Products Liability: The Law in North Carolina § 1-11, at 9 (1980) (citations omitted).

Strict liability in tort is now apparently recognized in all states but Alabama, Wyoming, North Carolina, Virginia, Utah and Michigan. Massachusetts and Ohio, while not expressly recognizing strict liability, have apparently used the breach of warranty cause of action in the same way. 2 L. Frumer & M. Friedman, Products Liability § 2 (1960 & Cum. Supp. 1981).

42. The court described the trend toward adopting the crashworthiness cause of action as more persuasive and enlightened and referred to the opposing view as "outdated and repudiated." 648 F.2d at 841.

43. 51 N.C. App. 535, 277 S.E.2d 100 (1981).

44. In addition to having difficulties distinguishing between negligence and warranty causes of action, courts also sometimes confuse the breach of warranty action with strict liability, a concept that is not recognized in North Carolina but often surfaces in tort cases in other states. 2 L. Frumer & M. Friedman, § 1[d] supra note 41, at 1; see Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980).

45. 51 N.C. App. at 536, 277 S.E.2d at 101.

46. Id. at 538, 277 S.E.2d at 102. Plaintiffs testified that they did not link their illness with the gas fumes for more than two years.

47. Id. at 536, 277 S.E.2d at 100-01.

48. Id. at 536, 277 S.E.2d at 101. Although the court of appeals' opinion is not clear on this point, the trial court apparently held that a three-year torts statute of limitations governed all three of the plaintiffs' claims.

49. The court of appeals held that N.C. Gen. Stat. § 1-15(b) (repealed 1979) applied to the
that the jury and not the court should decide when the plaintiffs should have "discovered" the defect in the car, and thus when the statute of limitations began to run.\textsuperscript{50} Third, the court noted that the statute of limitations provided in the North Carolina Sales Act\textsuperscript{51} controls in breach of warranty actions. Because the plaintiffs had filed within the four-year period provided by the Sales Act, their breach of warranty claim was not time-barred.\textsuperscript{52}

The trial court's confusion over the different standards governing tort and breach of warranty actions is common. At least part of the difficulty in distinguishing the theories arises from their common origin\textsuperscript{53} and their conjunctive use by plaintiffs in many products liability cases. There are a number of important differences between the breach of warranty and negligence claims, however, and courts and practitioners would do well to note the court of appeals' clarification of some of those differences in Gillespie.

\textbf{B. Loss of Consortium}

In June 1980 the North Carolina Supreme Court recognized in Nicholson \textit{v. Hugh Chatham Memorial Hospital, Inc.}\textsuperscript{54} that "a spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the

---

action, since that statute, although repealed effective October 1, 1979, was applicable when the plaintiffs bought the car. Under that statute a claimant had three years to file suit from the time the action accrues:

Except where otherwise provided by statute, a cause of action . . . having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs. . . .

\textsuperscript{51} N.C. App. at 538, 277 S.E.2d at 101-02 (quoting from N.C. Gen. Stat. § 1-15 (b)).

The court further held that the successor to N.C. Gen. Stat. § 1-15(b), N.C. Gen. Stat. § 1-50(6) (1979), could extend the time within which plaintiffs could assert their rights, provided their claim would not have been totally barred under N.C. Gen. Stat. § 1-15(b). 51 N.C. App. at 538, 277 S.E.2d at 101-02.

\textsuperscript{50} N.C. App. at 538, 277 S.E.2d at 102. N.C. Gen. Stat. § 1-15(b) provided that the cause of action accrues when the claimant discovered or should have discovered the defect. See note 48 supra.


(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's knowledge of the breach. A breach of warranty occurs when tender of delivery is made except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

\textsuperscript{52} N.C. App. at 539, 277 S.E.2d at 102. The court cited Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969), where it was decided that a cause of action for breach of warranty does not "accrue" at the date of sale if the seller later attempts to repair the damage or defect caused by the alleged breach. Rather, the cause accrues when the repair attempts finally cease and it becomes clear that the seller no longer intends to remedy the breach, even though the product still does not comply with the warranty.

\textsuperscript{53} "The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law. . . ." W. Prosser, supra note 16, at 634.

\textsuperscript{54} 300 N.C. 295, 266 S.E.2d 818 (1980).
other spouse may have instituted to recover for his or her personal injuries."\textsuperscript{55} The decision overruled longstanding North Carolina case law which held that no cause of action for loss of consortium existed.\textsuperscript{56} In 1981 the supreme court in Cox v. Haworth\textsuperscript{57} considered whether and to what extent the new rule allowing recovery for loss of consortium applied to claims arising prior to the Nicholson decision.

In Cox plaintiff wife filed suit alleging that defendants negligently performed a myelogram on her husband in 1978. She further alleged that the myelogram procedure left her husband permanently paralyzed and as a result she suffered the loss of his general companionship and conjugal society.\textsuperscript{58} The superior court dismissed plaintiff's action because at the time of the alleged acts of negligence no claim for loss of consortium was recognized in North Carolina.\textsuperscript{59} The supreme court certified the case for discretionary review and held that the Nicholson decision should be given retrospective application.\textsuperscript{60}

The court adopted a balancing approach in determining whether to apply its holding in Nicholson retroactively. The court adopted a presumption of retroactivity, which may be rebutted by compelling reasons against its application.\textsuperscript{61} Mindful of the interplay of countervailing interests, the court observed that "the question of retroactivity is one of judicial policy, and should be determined by a consideration of such factors as reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice."\textsuperscript{62} In this case, the arguments made by defendant physician that he justifiably relied on prior case law, that the purpose behind Nicholson could be achieved fully through prospective application and that retroactive application would be unduly burdensome on the administration of justice were found unpersuasive.\textsuperscript{63} The court placed special emphasis on the Nicholson court's overriding concern that fair compensation be made "to those injured by the wrongful conduct of others when the conduct impairs the service, society, companionship, sexual gratification and affection that is a

\textsuperscript{55} Id. at 304, 266 S.E.2d at 823.
\textsuperscript{57} 304 N.C. 571, 284 S.E.2d 322 (1981).
\textsuperscript{58} Id. at 572, 284 S.E.2d at 323.
\textsuperscript{59} Id. On direct appeal of the superior court's dismissal of plaintiff's husband's claim against defendant hospital, the court of appeals affirmed. Because the privately retained Dr. Haworth could not be considered an agent of the hospital, the doctrine of respondeat superior did not apply and defendant hospital had no duty to warn plaintiff of the nature of the medical procedure to be performed. See 54 N.C. App. 328, 283 S.E.2d 392 (1981).
\textsuperscript{60} 304 N.C. at 576, 284 S.E.2d at 326.
\textsuperscript{61} Id. at 574, 284 S.E.2d at 324.
\textsuperscript{62} Id. at 573, 284 S.E.2d at 324.
\textsuperscript{63} Id. at 575, 284 S.E.2d at 325.
vital part of the marital relationship." 64

Because the policy behind Nicholson was to compensate the loss of a legitimate interest, retroactive application was deemed necessary to protect those injured prior to the June 1980 Nicholson decision. 65 Cox thus reflects the court's full commitment to the view that those suffering loss of consortium deserve compensation, regardless of any additional burden upon underinsured defendants or possible complication of the administration of justice.

C. Mental Distress

In Dickens v. Puryear 66 the supreme court made it clear that the tort of intentional infliction of mental distress does not require a plaintiff to prove an element of physical injury, as had been suggested in the 1979 decision in Stanback v. Stanback. 67 In so holding, the Dickens court expressly disapproved dictum in Stanback that suggested a plaintiff "must show some physical injury resulting from the emotional disturbance" in order to recover under the theory of intentional infliction of mental distress. 68

Plaintiff in Dickens alleged that he was beaten to the point of semi-consciousness and threatened with death unless he left the state of North Carolina. 69 Plaintiff further alleged that he suffered severe and permanent emotional distress as a result of defendant's acts. 70 The court of appeals granted defendant's motion for summary judgment on the ground that plaintiff's claim was for assault and battery and was therefore barred by the one-year statute of limitations. 71 Carefully distinguishing the elements of assault and battery from those of intentional infliction of emotional distress, the supreme court reversed and remanded, noting that "if 'physical injury' means something more than emotional distress or damage to the nervous system, it is simply not an element of the tort of intentional infliction of mental distress.

---

64. Id. (citing Nicholson v. Hugh Chatham Memorial Hosp., 300 N.C. 295, 300, 266 S.E.2d 818, 821 (1980)).


69. 302 N.C. at 439-40, 276 S.E.2d at 327.

70. Id. at 440, 276 S.E.2d at 328.

In Stanback the court seemingly had adopted the minority view that physical injury must accompany emotional distress in order to constitute a valid claim for intentional infliction of emotional distress. The court explicitly liberalized the requirements for recovery in Dickens, however, when it observed that the dictum in Stanback “arose from our effort to conform the opinion to language in some of our earlier cases the holdings of which led ultimately to our recognition in Stanback of tort [sic] of intentional infliction of mental distress.”

Dickens thus clears the confusion created by Stanback and offers a clear outline of the elements of the tort of emotional distress. The tort consists of (1) extreme and outrageous conduct, (2) which is intended to cause and does cause, (3) severe emotional distress to another. Recovery is allowed not only for the emotional distress so caused, but also for bodily harm proximately resulting from the distress.

D. Liability Without Privity

In 1981 the court of appeals reaffirmed its recent recognition of a tort cause of action for the negligent performance of a contractual duty owed to another in the case of Alva v. Cloninger. Plaintiffs in Alva sought to recover damages for economic loss from defendant real estate appraiser on alternative theories of contract and tort. Defendant had been hired by NCNB Mortgage Corporation to appraise a house, which plaintiffs subsequently purchased. Although defendant delivered an appraisal that noted “no visible major problems” with the house, plaintiffs became aware of serious structural defects almost immediately upon moving into the house some four months after the appraisal. Because plaintiffs failed to establish that they were intended third party beneficiaries of the appraisal contract between NCNB and defendant, the court of appeals affirmed the trial court’s denial of recovery on the contract claim.

72. 302 N.C. at 448, 276 S.E.2d at 332.
73. See Restatement (Second) of Torts § 46 comment k (1965).
75. 302 N.C. at 452, 276 S.E.2d at 335. The tort may also exist where defendant’s actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Id. See also Restatement (Second) of Torts § 46 (1965).
76. 302 N.C. at 452-53, 276 S.E.2d at 335.
78. 51 N.C. App. at 603, 277 S.E.2d at 536.
79. Id.
80. Id. at 604, 277 S.E.2d at 537.
81. Id. at 608-09, 277 S.E.2d at 539. The court explicitly adopted the reasoning of the Re-
Plaintiffs found strong support in recent North Carolina case law for their alternative theory of tort recovery, and the court of appeals ruled that the trial court "erred in directing a verdict for defendant on plaintiffs' tort claim." In holding that there was evidence from which the jury could have concluded that defendant should have reasonably foreseen and expected that plaintiffs would rely on the appraisal report, the court adopted the rationale of the 1980 case of Howell v. Fisher. The Alva court firmly rejected the notion that lack of privity between plaintiffs and defendant barred plaintiffs' recovery in tort, stating that "a third party, not in privity of contract with a professional person, may recover for negligence which proximately causes a foreseeable economic injury to him."

Because recognition of this tort claim is relatively recent in North Carolina, the court was careful to limit its decision by emphasizing that plaintiffs' reliance was readily foreseeable—plaintiffs were named as "Borrowers" on defendant's work order, and had paid the fee for defendant's services. Thus, while contractual privity is clearly rejected as a prerequisite for recovery in tort, the exact scope of the class of foreseeable plaintiffs is left open by the decision.

E. Immunity

1. Parent/Child Relationship

G.S. 1-539.21 creates a cause of action for a minor child against his or her

statement (Second) of Contracts § 133 (1973), which suggests that the appropriate analysis in third party beneficiary cases is to determine "whether the parties to the contract intended to confer a benefit directly upon the person so claiming, or whether the benefit to the claimant was merely incidental." Here, the court concluded that plaintiffs' evidence did not show that they were "intended beneficiaries." 51 N.C. App. at 608, 277 S.E.2d at 539 (quoting Howell v. Fisher, 49 N.C. App. 488, 493, 272 S.E.2d 19, 23 (1980)).

82. See, e.g., Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980) (architect hired by lending agency to certify stages of construction held liable to borrower-owner of structure); Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co., 46 N.C. App. 288, 265 S.E.2d 617 (1980) (homeowner, as foreseeable ultimate purchaser, may recover from architect for faulty design or supervision of construction).

83. 51 N.C. App. at 613, 277 S.E.2d at 542.

84. 49 N.C. App. 488, 272 S.E.2d 19 (1980). In Howell, defendant geologist had been employed by a corporation to prepare mining feasibility studies. Plaintiffs relied on these studies and invested in the corporation, which became insolvent. Plaintiffs' contract claim was dismissed because the status of intended beneficiary was not proved, but the court did recognize a cause of action in tort based on defendant's negligence. Privity was held not to be a "threshold obstacle to plaintiffs' claim." Id. at 493, 272 S.E.2d at 23.

85. 51 N.C. App. at 610, 277 S.E.2d at 540 (citing Howell v. Fisher, 49 N.C. App. at 494, 272 S.E.2d at 23-24).

86. See note 82 supra.

87. 51 N.C. App. at 611, 277 S.E.2d at 540.

88. In addressing the question of damages in this case, the court indicated in dictum that the proper measure is the decrease in market value—"that is, the difference in market value of what defendant certified plaintiffs were getting and what they actually got." Id. at 613, 277 S.E.2d at 542. That difference, according to plaintiffs' expert witness, was some $16,000. Id. at 606, 277 S.E.2d at 538.

89. Additional Developments: Developments in statutory immunity in 1981 included N.C. Gen Stat. § 7A-550 (1981), which expanded the grant of civil and criminal immunity to "[a]nyone who . . . cooperates with the county department of social services . . . in the [screening of
parent, notwithstanding the parent-child relationship, for damages caused by the parent's operation of a motor vehicle.\footnote{90} In \textit{Snow v. Nixon}\footnote{91} the North Carolina Court of Appeals clearly articulated the scope of this statutory authorization and its effect on the common-law doctrine of parent-child immunity. In \textit{Snow} plaintiff sued through her mother and guardian ad litem to recover for injuries allegedly suffered when she was struck by defendant's car immediately after having been dropped off from her mother's car.\footnote{92} Defendant brought a third party complaint for contribution against plaintiff's mother, alleging that plaintiff's injuries resulted from the mother's negligent supervision of plaintiff while operating a motor vehicle.\footnote{93} Because G.S. 1-539.21 partially abolished parent-child immunity in North Carolina,\footnote{94} the sole issue on appeal was whether plaintiff's mother owed plaintiff a duty, that is, whether injury "arose out of her mother's operation of a motor vehicle so as to fall within the scope of N.C. Gen. Stat. §1-539.21.\footnote{95}

The court of appeals found no North Carolina cases that defined the "scope of the exception to the parent-child immunity doctrine found in [the statute].\footnote{96} Therefore, the court employed a traditionally strict statutory con-
struction, "taking the words in their natural and ordinary meaning," in order to clarify the exact import of the phrase "arising out of the operation of a motor vehicle." Relying on the holding in *Colson v. Shaw* that the operator of an automobile has a duty to allow his passengers to unload in a safe place, the court concluded that the allegedly negligent acts of the mother fell within the meaning of "arising out of the operation of a motor vehicle," and thus defendant had stated a cause of action for contributory negligence. *Snow* thus gave a broad reading to the scope of G.S. 1-539.21, thereby hinting at the virtual abolition of parental immunity in every phase of automobile transport.

2. Municipal Defendants

In *Jones v. City of Greensboro* the North Carolina Court of Appeals recognized a cause of action under 42 U.S.C. Section 1983 against both individual and municipal defendants. Plaintiff in *Jones* had parked her car at the Greensboro Coliseum Complex when two uniformed police officers asked her to move it. The officers were employed as lot attendants in an off-duty capacity, but they were wearing their police uniforms at the time. When plaintiff refused to move her car, she was forcibly removed to a squad car and taken to a magistrate's office, where she was served with a warrant and released. Plaintiff subsequently instituted an action against the city of Greensboro, the Greensboro Police Department, the Greensboro Coliseum Complex, and the officers as individuals.

Although plaintiff's original pleading made no explicit mention of section 1983, she urged on appeal that the pleading nonetheless stated a valid claim under the statute and therefore should not have been dismissed in the lower court. Section 1983 imposes liability upon "[e]very person, who under color


97. 52 N.C. App. at 133, 277 S.E.2d at 852 (citing Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972)).


99. 301 N.C. 677, 273 S.E.2d 243 (1981). In *Colson* a five-year-old child jumped out of defendant driver's car and was hit by an oncoming vehicle. Although the court of appeals found no North Carolina cases imposing a duty of care to aid persons alighting from a vehicle, it relied on precedent established in other states to hold for the first time that "the operator must at least allow his passengers to unload in a safe place and may not stop his car in a manner likely to create a hazard to those alighting." Id. at 680, 273 S.E.2d at 246. Confining its holding to the facts of case, the *Colson* court held that the youthful age of plaintiff, the heavy street traffic, and the darkness combined to create a jury question as to breach of duty. Id.

100. 52 N.C. App. at 135, 277 S.E.2d at 852.


102. 51 N.C. App. at 573, 277 S.E.2d at 565.

103. Id. at 587, 277 S.E.2d at 573.

104. Id. at 577, 277 S.E.2d at 568. Plaintiff's claims for false arrest, false imprisonment, assault, and libel were held barred by the one-year statute of limitations. Id. at 583, 277 S.E.2d at 570.

105. Id. at 592, 277 S.E.2d at 576.
of any statute, ordinance, regulation, custom, or usage of any State" deprives any other person "of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 106

In allowing plaintiff's section 1983 claim, the court of appeals employed a liberal construction of the rules of substance and procedure in pleading, and noted that "when the allegations give sufficient notice of the wrong of which plaintiff complains, the incorrect choice of the legal theory upon which the claim is bottomed should not result in dismissal if the allegations are sufficient to state a claim under some legal theory." 107 The court noted that municipalities have been held to be "persons" under section 1983, 108 and that state courts may rightfully maintain concurrent jurisdiction with federal courts under the statute. 109 The court remanded for a determination whether the city's permitting off-duty officers engaged in part-time employment to wear city uniforms constituted a violation of section 1983 on the facts of the case. Plaintiff's success on remand will thus depend in part on her ability to prove misrepresentation to the public of police authority and a subsequent denial of rights under color of law or custom as contemplated by section 1983.

In another 1981 decision the court of appeals recognized civil liability of a municipality under a state statute in the case of Edwards v. Akion. 110 Plaintiff in Edwards was assaulted by a city sanitation employee in the course of a dispute between the two concerning refuse collection. 111 On appeal, plaintiff alleged error in the trial court's granting summary judgment for the city, and contended that municipal liability existed under G.S. 160A-485, which provides for waiver of municipal immunity. 112

Because immunity is waived under the statute only to the extent that the city is indemnified by its insurance contract, 113 the court found it necessary to determine whether contractual indemnity for "all sums which the insured shall become legally obligated to pay as damages because of. . . bodily injury. . .

---

107. 51 N.C. App. at 593, 277 S.E.2d at 576 (citing Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979)).
108. See, e.g., Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) (analysis of statute's legislative history compels conclusion that Congress intended municipalities to be included among those to whom § 1983 applies). Although the court in Jones also found the individual police officer defendants amenable to suit, the police department and the coliseum complex, as component parts of the city, were held immune under § 1983. 51 N.C. App. at 593, 277 S.E.2d at 576.
111. Id. at 696, 279 S.E.2d at 899.
112. Id. at 690, 279 S.E.2d at 896. N.C. Gen. Stat. §160A-485(a) (1976) specifically provides that "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance." For a general overview of municipal tort liability, see Berger, Municipal Tort Liability: A Legislative Solution Balancing the Needs of Cities and Plaintiffs, 16 Urb. L. Ann. 305 (1979).
caused by an occurrence" included coverage for intentional torts.\textsuperscript{114} Noting that "the courts are . . . inclined to hold in favor of coverage" where no specific exclusionary clause is found, the court held that the acts of the sanitation worker were an "occurrence" as contemplated by the terms of the insurance policy.\textsuperscript{115} In the city's voluntary waiver of immunity by the purchase of insurance, the majority discerned a clear intent on the part of the municipality to protect victims from the tortious acts of its employees.\textsuperscript{116}

The court therefore reversed the trial court's grant of summary judgment for the city and held that the policy in question covered "intentional torts committed by a City employee, when neither expected nor intended by the City, if these actions were committed within the scope of the employee's duties."\textsuperscript{117} By emphasizing in dictum that "scope of employment" is to be liberally construed, "especially where the business involves a duty to the public,"\textsuperscript{118} the court revealed a solicitude for the interests of tort victims and increases the likelihood of recovery under § 160A-485.

\textbf{F. Releases}

In 1981 three cases reached the court of appeals in which tort victims who intended to release particular tortfeasors from liability executed instruments which instead purported to release anyone involved.\textsuperscript{119} In each case, the court held that a release executed under circumstances amounting to fraud or mutual mistake of fact may be reformed to reflect the intention of the parties.\textsuperscript{120}

In \textit{Cunningham v. Brown}\textsuperscript{121} plaintiff, a passenger on a motorcycle driven by her husband was injured in an accident with an automobile driven by the defendant. In exchange for $4,975 from her husband's insurance company, she executed an instrument releasing her husband and any other person, firm, or corporation . . . from any and all claims" resulting from the accident.\textsuperscript{122} In her later action against defendant, the trial court entered summary judgment against plaintiff, based on the claim that defendant had been released from liability.\textsuperscript{123}

\textsuperscript{114} 52 N.C. App. at 691, 279 S.E.2d at 896.
\textsuperscript{115} Id. at 691-92, 279 S.E.2d at 896, 897. See generally Annot., 33 A.L.R.2d 1027 (1954) (discussing "assault" as an "accident" within coverage clause).
\textsuperscript{116} 52 N.C. App. at 693, 279 S.E.2d at 897.
\textsuperscript{117} Id. (emphasis in original). The question whether defendant employee was acting within the scope of his employment at the time of the assault is to be determined by the jury. Likewise, under plaintiff's second theory of recovery, the jury is to determine whether the city negligently failed to supervise the activities of its employee, thereby incurring statutory liability. Id. at 698, 279 S.E.2d at 900.
\textsuperscript{118} 52 N.C. App. at 698, 279 S.E.2d at 900.
\textsuperscript{120} The court in \textit{Cunningham} considered both fraud and mutual mistake, while the \textit{McBride} and \textit{Peede} courts considered only mutual mistake.
\textsuperscript{121} 51 N.C. App. 264, 276 S.E.2d 718 (1981).
\textsuperscript{122} Id. at 269, 276 S.E.2d at 723.
\textsuperscript{123} Id. at 266, 276 S.E.2d at 721. At common law a release of one joint tortfeasor operated as
The court of appeals conceded that on its face the instrument would release anyone involved in the accident from liability. It reasoned, however, that "[a] release, like any other contract, is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake of fact." The court held that the trial judge improperly refused to admit plaintiff's affidavit alleging facts constituting fraud. It explained that extrinsic evidence is not barred by the parol evidence rule when a party tries to demonstrate fraud or mutual mistake. The court reversed the summary judgment because the affidavit presented sufficient evidence of fraud and mutual mistake of fact to establish a genuine issue of fact as to the scope of the release.

The court of appeals followed Cunningham in both McBride v. Johnson Oil & Tractor Co. and Peede v. General Motors Corp. to reach the same conclusion that the law of the place of the injury applies when determining the validity of a release.

---

TORTS

1982] 1481

A release of all, even if its terms provided otherwise. See, e.g., Simpson v. Flyler, 258 N.C. 390, 128 S.E.2d 843 (1963). Under the Uniform Contribution Among Tort-Feasors Act, N.C. Gen. Stat. § 1B-4 (1959), however, a release given to one tortfeasor only discharges others if its terms so provide. Brown's defense rested on the notion that the instrument specifically released her from liability.

In Macklin v. Dowler, 53 N.C. App. 488, 281 S.E.2d 164 (1981), a case concerning the Uniform Contribution Act, a veterinarian's receptionist was bitten after her employer allegedly ordered her to help load dogs into a car. The veterinarian claimed he was released from liability by the receptionist's instrument releasing the dog's owner. He argued that G.S. 1B-4 was not applicable because he was secondarily liable, while the statute only applies to tortfeasors who are jointly and severally liable. The court rejected his argument, holding that G.S. 1B-4 applies whenever two or more persons are liable for the same injury.

124. The court applied North Carolina law even though the release was executed in Massachusetts, reasoning that the relevant law is the same in each state. Thus it avoided the question of whether the general North Carolina rule of lex loci contractus should yield to the Restatement position that the law of the place of the injury applies when determining the validity of a release. Restatement (Second) of Conflict of Laws § 170 (1971). Cunningham v. Brown, 51 N.C. App. at 268-69, 276 S.E.2d at 722-23.

125. 51 N.C. App. at 269, 276 S.E.2d at 723. This is not a novel position. See, e.g., Ward v. Heath, 222 N.C. 470, 24 S.E.2d 5 (1943) (fraud); Cheek v. Southern Ry., 214 N.C. 152, 198 S.E. 626 (1938) (mutual mistake). In Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976), however, the court was faced with similar circumstances and did not consider fraud or mistake. In Battle the trial court granted summary judgment on one defendant after plaintiff executed an instrument releasing two named defendants and "all other persons" from liability. The court of appeals affirmed, rejecting plaintiff's claims that the instrument was only intended to release the named defendants, and that the words releasing others were mere surplusage. It reasoned, "Where from the terms of the release, it must be apparent to the claimant that its execution forecloses further compensation from any source, the result is one voluntarily accepted by the claimant himself." Id. at 619, 220 S.E.2d at 99 (quoting Bonar v. Hopkins, 311 F. Supp. 130, 134 (W.D. Pa. 1969)).

126. Cunningham's affidavit included claims that she thought she was signing a receipt for the check, and that the insurance adjuster told her her dealings would not affect her claims against Brown. Cunningham v. Brown, 51 N.C. App. at 265-66, 276 S.E.2d at 721.

127. Only fraud was raised by the appellant. The court considered the mistake issue sua sponte, holding that the failure of the parties to achieve the intended result in their instrument could be a mutual mistake of fact permitting reformation, rather than a mistake of law for which relief is normally unavailable. Id. at 271-74, 276 S.E.2d at 724-26.

128. 52 N.C. App. 513, 279 S.E.2d 117 (1981). The court refused to overrule Battle. See note 128 supra. Instead it distinguished Battle as not involving a claim of mutual mistake, not seeking reformation, and not supported by affidavits. Id at 515, 279 S.E.2d at 119.

The McBride court also reversed a dismissal of plaintiffs' complaints against the intended releasor, noting that he was a necessary party to the actions for reformation. Id. at 520, 279 S.E.2d at 122.

129. 53 N.C. App. 10, 279 S.E.2d 913, cert denied, 304 N.C. 196, 285 S.E.2d 100 (1981). In permitting the reformation of the release, the court also noted that the provisions of the release...
conclusion on very similar facts. In Johnson v. Dunlap the court of appeals considered the effect of a subsequent release on the validity of a prior release. Plaintiff signed a release exculpating defendant from possible liability before he entered the pit area of defendant's racetrack. After suffering serious injuries, he signed a second release in exchange for $1,500. The court of appeals reversed a judgment notwithstanding the verdict (JNOV) for defendant, holding that defendant waived his rights under the first release when he presented the second release to plaintiff for execution. Since there was evidence that plaintiff was mentally incompetent when he signed the second release, the JNOV was improper.

G. Res Ipsa Loquitur

In Arey v. Board of Light & Water Commission the court of appeals held that a res ipsa loquitur instruction is not appropriate when a sudden sewer obstruction causes sewage to back up into a home. After noting the split in authority among states, the court reasoned that the instruction is inappropriate because a sewer system is not in the exclusive control of a municipality, and it is unreasonable to expect a municipality to insure against sewer back-ups. could only affect plaintiff's tort claim, and would not apply to his claim under breach of warranty. Id. at 17, 279 S.E.2d at 918.

130. Note that in all three of these cases the defendant tortfeasor was trying to avoid liability based on releases negotiated and paid for by third-party tortfeasors. The inequity of defendants escaping liability while injured parties remain less than fully compensated clearly supports the court's liberal application of reformation principles.


132. The court held that even if there were no waiver, the jury could find that the first release was ineffective, based on evidence that plaintiff had not seen nor had a chance to read that release before signing it. Judge Clark repeated the principle that "releases which exculpate persons from liability for negligence are not favored by the law." Id. at 317, 280 S.E.2d at 763.

133. In Hyder v. Weilbaecher, 54 N.C. App. 287, 283 S.E.2d 426 (1981), the court of appeals held that a res ipsa loquitur instruction was proper when it could be inferred from the evidence that a surgeon left an eight and one-half inch wire in his patient's jugular vein. The court held that the trial judge's instruction was insufficient because it told the jury that the principle of res ipsa loquitur "carries the question of negligence to the jury," but failed to explain that "it furnishes or would be some evidence, in the absence of explanation of the defendant, that the accident arose from want of care." Id. at 291, 283 S.E.2d at 428-29 (emphasis in original).


136. The court limited its opinion to cases involving sudden obstructions where there are no circumstances from which negligent design or construction can be inferred, and where the city has no prior notice of malfunctions. 50 N.C. App. at 509, 274 S.E.2d at 270-71 (1981).
H. Minors

In 1981 two key statutes revised an expanded causes of action relating to minors. The statutory provision pertaining to damages recoverable from parents for a tort to property committed by their child, G.S. 1-538.1, was rewritten both to broaden the scope of the remedy available and to increase the amount of damages recoverable. Recovery for property damage originally was limited to $500 from "the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property" belonging to plaintiff. The 1981 amendment increases the amount recoverable to $1000 from "the parents of any minor who shall maliciously or willfully injure [plaintiff] or destroy the real or personal property [of plaintiff]." By imposing vicarious liability upon parents, the Act originally was designed to stimulate proper parental supervision as an aid in the control of juvenile delinquency. The 1981 expansion of parental liability evidences a continuing belief in the value of the statute's deterrent effects.

Deterrence of youthful misbehavior was also evident in the enactment of two new sections of the Elementary and Secondary Education Act. Section 115C-398 imposes liability upon students for damage caused to school buildings, furnishings or textbooks. Section 115C-399 imposes liability upon anyone willfully damaging or trespassing upon a school bus. The requirement of notice to parents in the event of willful damage to school property and the direct imposition of student liability should operate to help preserve school property.

I. Damages

Although a trial judge has discretionary power to set aside a jury's award

138. Id.
145. In 1981 the General Assembly made three unrelated statutory changes in the damages
of damages in a personal injury case that power is not without limits. In Worthington v. Bynum the North Carolina Court of Appeals recognized those limits when it reinstated a jury verdict in a personal injuries case, holding that the trial judge had abused his discretion in setting aside the verdict. The jury had awarded plaintiffs substantial damages for injuries they suffered in a car wreck. On motion of defendant, however, the trial judge set aside the verdict. Conceding that it is extremely unusual for an appeals court to overturn a trial judge's decision setting aside a jury verdict, the court of appeals said this outcome is nevertheless required when the trial judge abuses his or her discretion.

Judge Whichard agreed with the result reached by the majority but argued that the "abuse of discretion" test was inappropriate. Rather, an appeals court should consider whether the trial judge followed the standard of Howard v. Mercer in determining damages. Howard held that the test for granting or denying a motion to set aside a verdict and order a new trial on the damage issue should be whether the jury verdict was within the maximum limit of a reasonable range. If the jury verdict was within that range, then the motion should be denied. When the trial judge fails to apply this standard, Judge Whichard argued, he becomes subject to reversal for error, but not on the grounds that he committed an abuse of discretion.

area that are worthy of note. First, the maximum amount a plaintiff may recover in a wrongful death action for medical expenses of the decedent was raised from $500 to $1,500. The change was made by Law of May 28, 1981, ch. 468, 1981 N.C. Sess. Laws, 1st Sess. 733 (codified at N.C. Gen. Stat. § 28A-18.2 (Cum. Supp. 1981)).


Finally, N.C. Gen. Stat. § 6-21.4 was amended to provide that attorneys' fees may be taxed as court costs against a plaintiff in any civil action brought against a principal or school teacher for corporal punishment of a student, upon a finding that the action was without substantial merit. Law of May 13, 1981, ch. 381, §1, 1981 Sess. Laws, 1st Sess. 424 (codified at N.C. Gen. Stat. § 6-21.4 (Cum. Supp. 1981)).

146. N.C.R. Civ. P. 59, for example, sets out nine instances in which a trial court can set aside a jury verdict and grant a new trial.


149. Id. at 412, 281 S.E.2d at 170.

150. Id. at 410, 281 S.E.2d at 168. One plaintiff was awarded $175,000; the other was awarded $150,000.

151. Id.

152. Id. at 410-11, 281 S.E.2d at 168-69.

153. Id. at 419, 281 S.E.2d at 173 (Whichard, J., concurring).


155. 53 N.C. at 419, 281 S.E.2d at 173 (Whichard, J., concurring).