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In the *Rochlin* case the vendor has conferred no benefits upon the vendee, and in no event could he be made subject to a decree of specific performance. Were the house to increase in value, the vendor could return the deposit and sell to a higher bidder, and the vendee could neither enforce the contract specifically nor recover damages. To allow a retention of the deposit in this situation would, in effect, be awarding damages for breach of an agreement declared void by the statute, and would be treating the contract as if the statute read "no action shall be brought. . . ." In view of the court's non-recognition of the part performance doctrine and the fact that the North Carolina statute of frauds provides that such a contract as that in the principal case is void, it would seem that application of the minority rule, to allow the vendee to recover the payment made without the necessity of proving the disputed terms of the contract, would better serve the purpose of the statute and would be more consistent with the effect of its prior application.

S. DEAN HAMRICK.

Criminal Law—Convicts—Commencement of Sentence*

In North Carolina, a prisoner sentenced to the state prison system does not begin to serve his sentence until he is actually received from the county jail. In a majority of the states where the issue has been decided in the absence of a controlling statute, a sentence is deemed to begin on the date when it is pronounced. When the defendant is not in custody


17 In Albea v. Griffin, 22 N. C. 9, 10 (1838), the court stated: "We admit this objection [the statute of frauds] to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity, for damages because of non-performance."

18 Of course, the vendor should be allowed to off-set any benefits he has conferred upon the vendee, such as reasonable rental value if vendee has been in possession of the property.

*This material was prepared during the summer of 1951 while the author was serving as a member of the staff of the Institute of Government. It is part of a forthcoming guidebook for prison officials to be published by the Institute.

2 This is not a statutory rule, nor are there any case decisions or rulings of the attorney-general to support it. According to the attorneys for the prison department, this has been the administrative policy since the state took over the county road camp system in 1933.

at the time sentence is imposed, however, the sentence does not commence until he is committed. The minority view, adhered to by North Carolina, has been adopted in two states by statute, while two other states have enacted the majority view. In the federal courts, a sentence is effective when the defendant is received at the prison, but if he is committed to a jail or other place of detention to await transportation to prison, the sentence commences when he is received at the jail or other place of detention. If the judgment directs that the sentence be served in a particular manner, as on a chain gang, then the sentence will not begin until the prisoner arrives to carry out the provisions of the judgment. If it is decided on appeal that the sentence imposed is erroneous and that the defendant must be resentenced, or if the judgment appealed from is affirmed, the bare weight of authority is in favor of allowing credit for time served under the prior sentence.

Because of present judicial and penal administrative practices (and occasionally by mistake), a prisoner may spend a substantial amount of time in jail before he gets to a state prison to begin service of his sentence. Some counties have only two or three criminal court terms a year, and if a defendant is unable to post bail following his arrest; he must remain in jail until his case is called for trial. Furthermore, the prison department does not have to accept a prisoner from a court inferior to

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Footnotes:

1. In re Breton, 93 Me. 39, 44 A. 125 (1899); Volker v. McDonald, 120 Neb. 508, 233 N. W. 890 (1931).
7. John Lovett Ryals, Case no. 8328, March 30, 1951 term of City Court, Raleigh, N. C., sentenced to six months on the roads for public drunkenness and indecent exposure, remained in the Wake County jail from March 30, 1951 until May 8, 1951, because his appeal had not been docketed. He was transferred to the state prison system on May 8, 1951. On July 12, 1951, superior court judge Chester R. Morris denied his petition for a writ of habeas corpus, but recommended that a credit of thirty-nine days be allowed the prisoner for the oversight. His sentence was commuted in accordance with the recommendation of the judge.

As a practical matter, the possibility that a prisoner will be detained at county jails to maintain the property is foreclosed by N. C. GEN. STAT. §148-32 (1943): "... and courts may also sentence prisoners to the county jail to be assigned to work at the county home or other county-supported institution." (Emphasis supplied.) This provision removes the temptation to "forget" to transfer prisoners and work them at the jails by creating another source of labor supply. Therefore, situations similar to the Ryals case are infrequent and inadvertent.

the superior court while the judge retains control over the sentence, so even after conviction and sentence the prisoner must wait until the term of court expires. Prisoners who have appealed their convictions do not have to be accepted by the department, so an additional delay of ten days or more will be encountered unless an appeal is unlikely. Finally, in some counties the department sends to the jail for prisoners only once a week. Although it has been shown that a delay of six months or more is quite possible, the average waiting period would probably be nearer two or three weeks. Such a delay might seem inconsequential to a long term prisoner facing twenty or thirty years, but the state system receives prisoners with as short terms as thirty days, so it is possible for a prisoner to spend as much time awaiting punishment as he spends serving it.

The approved protection against delays before trial is a petition for writ of mandamus. The possibility of securing a writ of habeas corpus seems to be practically foreclosed. Even if formal relief is denied, though, the court has discretion to consider time spent in jail awaiting

12 In North Carolina, a court retains the power to alter a sentence during the term of court at which the sentence is imposed. See, e.g., State v. Calcutt, 219 N. C. 545, 15 S. E. 2d 9 (1941); State v. Warren, 92 N. C. 825 (1885). A federal court never loses this power. Fed. R. Crim. P. 35, 45(c). If the prisoner has already undergone a part of the sentence, however, the court can only reduce it, even though the term of court has not expired. U. S. v. Murray, 275 U. S. 347 (1928); State v. Crook, 115 N. C. 760, 20 S. E. 513 (1894).
14 N. C. Gen. Stat. §7-179 (1943) (justice of the peace courts—if the defendant is present in court when the sentence is pronounced, he has ten days after judgment to appeal; if he is absent, he has fifteen days following notice of the rendition of judgment); N. C. Gen. Stat. §7-195 (1943) (municipal recorder's courts—same procedure as the justice of the peace courts); N. C. Gen. Stat. §7-230 (1943) (county recorder's courts—same procedure as the justice of the peace courts); N. C. Gen. Stat. §7-292 (1943) (general county courts—same procedure as the justice of the peace courts); N. C. Gen. Stat. §7-442 (1943) (special county courts—same procedure as the justice of the peace courts); N. C. Gen. Stat. §15-180 (1943) (superior courts—same procedure as in superior court civil cases); N. C. Gen. Stat. §1-279 (1943) (superior court civil cases—ten days for appeal after rendition of sentence, if during term; if out of term, ten days after notice of rendition); Houston v. Lumber Co., 136 N. C. 328, 48 S. E. 738 (1904) (Appeal may be taken ten days after adjournment. The reason presumably is that the sentence to be appealed from is not fixed during the term.)
15 Felons sentenced to Central Prison at Raleigh are protected to a certain extent by a statute which directs their transfer to Central Prison within five days after the end of the term of court during which they are sentenced. N. C. Gen. Stat. §148-29 (1943).
16 N. C. Gen. Stat. §148-30 (1943): "No male person shall be so assigned [to the state prison system] whose term of imprisonment is less than thirty days."
17 Frankel v. Woodrough, 7 F. 2d 796 (8th Cir. 1925); Chrisman v. Superior Court, 63 Cal. App. 477, 219 P. 85 (1923) (petition for a writ of mandamus denied on ground that good cause for delay existed); Hicks v. Judge of Recorder's Court, 236 Mich. 699, 211 N. W. 35 (1926).
18 Fowler v. Hunter, 164 F. 2d 668 (10th Cir. 1947); Ruben v. Welch, 159 F. 2d 493 (4th Cir. 1947).
trial when it imposes sentence, but this is not an absolute right of the prisoner unless granted by statute.

When a prisoner enters the state system, the prison department must determine the length of time he is to serve, which in turn depends partly on the date on which his sentence is deemed to have begun. The department has generally tended to grant credit for time spent in the county jail if the detention was through no fault or acquiescence on the part of the prisoner. The courts seem to make somewhat the same distinction. Thus, it has been held that where a prisoner is too sick to be moved, or if he has been exposed to a contagious disease, his detention until he can be moved is reasonable. On the other hand, it has been held that time which passed while a prisoner was out on escape did not count as time served.

Several North Carolina cases seem to deny such a distinction, for they contain flat statements to the effect that the date set for the commencement of sentence is immaterial, and that if the time should pass without the sentence being enforced, then the court may set a new date and order the sentence to be carried into execution. In each of these cases, however, the prisoner was at liberty during the delay, and the delay was brought about through a suspension of sentence granted for the prisoner’s benefit. The policy of the prison department to take into account delays in service of sentence which arise through no fault or acquiescence of the prisoner has prevented a flood of litigation, but it was not designed to eliminate these delays and it has not done so.

A prisoner who is being detained in a county jail after trial has two possible means of effecting his transfer to the state system so that his sentence will commence. First, he may petition for a writ of habeas corpus, seeking his release from the county jail on the ground of unreasonable detention. Second, he may petition for a writ of mandamus.

Byers v. U. S., 175 F. 2d 654 (10th Cir. 1949), cert. denied, 339 U. S. 976 (1950); Ryan v. State, 100 Ala. 105, 14 So. 765 (1894); People v. Rose, 41 Cal. App. 2d 445, 106 P. 2d 930 (1940); People ex rel. Lenefsky, on Behalf of Ash v. Ashworth, 56 N. Y. S. 2d 5 (1945), aff’d, 270 App. Div. 809, 60 N. Y. S. 2d 283 (1946) (discretion is in the parole authorities); Galyon v. State, 189 Tenn. 505, 226 S. W. 2d 270 (1950) (discretion is in the parole authorities); Ex parte Davis, 71 Tex. Cr. 538, 160 S. W. 459 (1913); Cohn v. Ketchum, 123 W. Va. 534, 17 S. E. 2d 43 (1941).


Other factors affecting this determination are good conduct allowances, commutations, paroles, escapes, etc.


State v. McAfee, 198 N. C. 507, 152 S. E. 391 (1930); State v. Vickers, 184 N. C. 676, 114 S. E. 168 (1922); State v. Cockerham, 24 N. C. 204 (1842).

Gorovitz v. Sartain, 1 F. 2d 602 (N. D. Ga. 1924); Ex parte Sichofsky, 273 F. 694 (S. D. Cal. 1921) (he may get credit on his sentence for the delay, if "timely application" is made.); Thomas v. State, 151 So. 473 (Ala. 1933).
asking the court to direct the jailer to perform his ministerial duty as an officer of the court and surrender the prisoner to the state authorities. Combined with this request would have to be a prayer for an order directing the state authorities to take him into custody.

Should the prisoner already be in a state prison when he realizes the consequences of the delay in transfer, he may petition for a writ of habeas corpus when the time spent in the state prison plus the period of detention in the county jail after trial equals the total sentence imposed, less good conduct allowances, on the ground that he has completed service of his sentence. And, although there is no authority for such a course, no good reason appears why he could not petition the court for a writ of mandamus directing his release.

Two steps could be taken immediately without legislative or judicial action, which would effect a partial remedy to this problem of wasted time. The prison department could arrange for more frequent trips to jails from which it gets road camp prisoners, or it could arrange to be called when prisoners are awaiting transfer. And, with careful preservation of prisoners' rights, a system of prompt waiver of appeal rights in proper cases would serve to eliminate time wasted while the prisoner is waiting for the expiration of the appeal period. A general tightening up of all of the procedures involved between arrest and commencement of sentence would immediately effect a saving of time for state prisoners too often delayed en route from arrest to punishment, and would pay for itself in the resulting decrease in county penal expenditures.

HARPER JOHNSTON ELAM, III.

Dead Bodies—Recovery for Wrongful Interference with or Neglect

North Carolina is in accord with most jurisdictions in holding that there is a quasi-property right in the body of a dead person for purposes of interment. The surviving spouse has the paramount right to the body; if there is no surviving spouse, the right goes to the next of kin. An interference with the right to possess the body and bury it is a breach of duty which may make the wrongdoer liable for damages including mental anguish. Generally, only the person having the right of burial may maintain action for wrongs to the body.

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27 N. C. GEN. STAT. §17-3 (1943); Clark v. Surprenant, 94 F. 2d 969 (9th Cir. 1938); Alexander v. Posey, 32 Ala. App. 494, 27 So. 2d 237 (1946); Johnson v. Lindsey, 89 Fla. 143, 103 So. 419 (1925); Whalen v. Cristell, 161 Kan. 747, 173 P. 2d 252 (1946); State ex rel. Murphy v. Wolfer, 127 Minn. 102, 148 N. W. 896 (1914).

28 The assumption is made, of course, that the saving to the prisoners would justify the added expense.

1 Kyles v. Southern Ry., 147 N. C. 394, 61 S. E. 278 (1908).

2 Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Kyles v. Southern Ry. supra note 1; Koerber v. Patek, 123 Wis. 453, 102 N. W. 40 (1905); 25 C. J. S., Dead Bodies §§2-3, 8 (1941).