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death was in no way connected with the misrepresentation in the insurance application. In fact the court stated: "We cannot see how defendant was prejudiced by the exclusion of the evidence of the physician." Thus this case simply seems to be one in which the court on appeal felt that the interests of justice would not be promoted by requiring disclosure by the physician, and consequently there was no abuse of discretion in refusing to admit the testimony into evidence.

In the principal case the misrepresentations were directly related to the cause of death—the death was actually the result of a disease which the insured represented he did not have. Thus Sims presents a much stronger case for reversal on the grounds of abuse of discretion than did the Creech case where the death was unrelated to the insured's misrepresentations.

While the inequities of the Sims case may be more academic than real in that a new trial was granted on other grounds, it may nevertheless represent an unfortunate precedent for the exclusion of physician-patient information. It is hoped that in the future the court will not consider this case as a binding precedent for the proposition that privileged information such as here, which will materially affect the outcome of the litigation, may nevertheless be excluded by the trial judge and such exclusion is not subject to review. Had the court on appeal adopted the procedure suggested in reviewing the exclusion of the hospital records, possible confusion as to the meaning of this decision would have been avoided, and the delicate balance of interests embodied in the North Carolina privilege statute would have been preserved.

G.B.H.

Outlawry: Another "Gothic Column" in North Carolina

Once one of the law's most potent weapons, outlawry has been relegated in modern society to an existence as an historian's curiosity. It is obsolete in England and exists in any form in only three of the United States.

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23 Id. at 662, 191 S.E. at 843.
24 In Metropolitan Life Ins. Co. v. Boddie, 196 N.C. 666, 146 S.E. 598 (1929) there is also language which would seem to intimate that exclusion of medical testimony tending to show misrepresentations by the insured on his application is not an abuse of discretion by the trial judge. However, this language is dictum in that this was not the issue raised and decided by the appeal.
25 The new trial was granted for an error in the charge.
Simply stated, one who is outlawed is put outside the protection or aid of the law. Outlawry was a process by which a defendant or person in contempt on a criminal or civil process was declared an outlaw.\(^1\) In ancient England, the status of a freeman was his *laga*, a word that was subsequently confused with the Latin word *lex*.\(^2\) A man's *laga* was his worth: strictly speaking, the compensation that would have to be paid to his kinsmen by anyone who should kill him.\(^3\) A person that refused to answer when he was summoned, or who escaped after being discovered in the commission of a crime, lost his *laga*; he was *utlagatus*, or as we term it, an outlaw.\(^4\) He was then a wolf, *caput lupinum*, to be "knocked in the head"\(^5\) by anyone meeting him.\(^6\)

As early as the time of the Druids in England, the law of the land made full use of deprivation of law as to the disobedient. Part of the Druid creed proposed this sanction, "Let the disobedient be excommunicated; let him be deprived of the benefits of the law; let him be avoided by all..."\(^7\) Sometime during the Anglo-Saxon period outlawry was limited to charges of capital crimes, being in substance a process by which punishments could be inflicted on criminals who refused to answer personally for their crimes.\(^8\) Flight

\(^1\) *Black, Law Dictionary* 1255 (4th ed. 1951). "Outlawry is a punishment inflicted on a person for contempt and contumacy, in refusing to be amenable to, or abide by, the justices of the court which hath lawful authority to call him before them; and it is a crime of the highest nature, being an act of rebellion against that state or community, of which he is a member." 3 *Blackstone, Commentaries* \#283 [hereinafter cited *Blackstone*].

\(^2\) *Radin, Anglo-American Legal History* \#22.

\(^3\) Ibid.

\(^4\) Ibid.

\(^5\) This quaint expression, frequently occurring in common law discussions of outlawry, is still in use colloquially in many parts of North Carolina.

\(^6\) 4 *Blackstone* \#320.


\(^8\) 2 *Pollack & Maitland, History of English Law* 578-81 (2d ed. 1898) [hereinafter cited *Pollack & Maitland*].
was considered an admission of guilt, and outlawry was decreed in the defendant's absence without a trial.\textsuperscript{9} The effect of this judgment was to place the person completely outside the protection of the law.\textsuperscript{10} It was no offense to kill an outlaw; in fact it appears to have been the duty of every man to kill him as one would a despised animal. By breaking the law the wrongdoer had gone to war with the community; the community then declared war on him.\textsuperscript{11}

As the courts and government became more effective and a wrong against an individual was presumed a wrong against the community, private war became obsolete. Outlawry then became a process for compelling one's attendance at court to answer to the community and was extended to misdemeanors.\textsuperscript{12} Upon an appeal of felony or presentment, an indictment was issued charging the accused with the felony. The sheriff was instructed to bring the accused into court. If the summons was returned unserved the court issued a writ of \textit{exigent} to the sheriff directing him to demand the accused at five consecutive court sessions (\textit{quintus exactus}) to appear and answer the indictment. If after these preliminaries the accused did not appear, or was not apprehended, a judgment of outlawry was pronounced by one of the coroners of the county.\textsuperscript{13}


\textsuperscript{10} An outlawry in the case of a felony or treason amounts to a conviction and attainder of the offense charged in the indictment, as much as if the offender had been found guilty by his country. 4 Blackstone *319. Although at an early date the person outlawed could have been slain by anyone with impunity, this right was later taken from civilians and permitted only by the sheriff. By the time of Edward III "[I]t was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death as if he had killed any other man; and so from thenceforth the law continued until this day." 3 Coke, Institutes *383.

\textsuperscript{12} 2 Pollack & Maitland 459. "It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely a 'friendless man' he is a wolf." Fleta, bk. I, ch. 28 (transl. & ed. by Richardson & Sayles), 72 Selden Soc. 72 (1955).

\textsuperscript{13} Instead of becoming substantive punishment, it became mere civil procedure. 1 Pollack & Maitland 459.

\textsuperscript{14} 3 Blackstone, Appendix III, at xx-xxi (Christian ed., Georgetown, D.C., 1818). Professor Holdsworth, in 9 History of English Law 254 (1926), quotes from the \textit{Pleader's Guide} by "Mr. John Surrebutter" a succinct summation of outlawry procedure:

But first attach him, and attend
With capias ad respondend.
Let loose the Dogs of War and furies,
Once the outlawry was adjudged the accused was, in effect, convicted of the crime and his goods and chattels were forfeited to the crown. The harshness of outlawry as it was known prior to Bracton’s time was announced by *Fleta:*

Those who are outlawed are rightfully deprived of all benefit of the law. By this judgment alone, without judicial inquiry, they will be undone. They will not be able to appeal to others, nor is any man bound to them, although they themselves are bound to satisfy all to whom they have an obligation, lest their condition should be bettered by reason of their outlawry, whereas it ought rather to be worsened. And they forfeit their inheritances and tenements, and homages and fealties are dissolved and all other things which by mutual agreement have been contracted by themselves and their heirs, near and remote. And should they have been begotten after the felonie was committed, not only are heirs excluded from their paternal, but also from their maternal, inheritances and from everything, because they are begotten of the seed and blood of a felon.

Because the punishment or result of outlawry was so severe,

> Testatum, Alias and Pluries;  
> But if at length non est invent,  
> At him again with Exigent  
> ....  
> Then smite him as a Coup de Grace  
> With Utlagatum Capias  
> Exacted, outlawed, and embruted,  
> His head, to head of wolf transmuted,  
> Compelled by write of Exigenter  
> The Lists against his will to enter.

14 *Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Rep. 327 (K.B. 1770). The outlaw then, in effect, is condemned in his absence without a trial, and unless he can set aside the judgment, he has no means of re-opening the matter and establishing his innocence before a jury. He does, however, have the recourse open to move to set aside the outlawry by writ of error. In order to obtain this, he must render himself in custody and pray in person allowance of the writ at the bar. If he should succeed in having the outlawry set aside he is put to answer the indictment on which the outlawry was founded. 2 *Hale, Historia Placitorum Corone* 408 (Wilson ed., London, 1778).

16 *Blackstone* *n*284. The lands of the felon were seized by the crown, but held for only a year and a day. They then returned to the overlord under whom the outlaw had held. *Magna Carta* [1225], c. 22 [9 Hen. 3, 1 Stat. at Large 1 (1762)].

16 *Fleta, op. cit. supra* note 11, bk. I, ch. 28.
the courts were always inclined to reverse an outlawry judgment on the slightest proof of error either in law or fact in order to allow the outlaw the privilege of a trial on the indictment. The proceedings in outlawry are "exceedingly nice and circumstantial: and if any single minute point be committed or misconducted, the whole outlawry is illegal." One of the common grounds for reversal was that the defendant was away from the country at the time the exigent was awarded. However, by statute absence from the country was not a grounds for reversal in cases of indictment for treason. The reason for that statute was "that men would commit treason and presently fly beyond the sea, and remain there till witnesses who should prove the treason were dead; then return and reverse the outlawry for error of their being beyond the sea." Even the alleged traitor, however, could reverse his outlawry if he submitted to the court within a year after the outlawry was pronounced.

In the event the defendant succeeded in reversing the outlawry or was pardoned, what was the result? Firstly, he had to stand trial for the offense on the original indictment. Secondly, he came back into the world "like a new-born baby, quasi modo genitus, capable of acquiring new rights, but unable to assert any of those he had had before his outlawry." He always had to carry the pardon of his outlawry with him because if he did not show it, he might have been slain by those who did not know that he had received the grace of pardon or a reversal.

In misdemeanors, outlawry was regarded as a punishment for contempt of court in not appearing, and was generally more severe than the punishment that would have been inflicted had the outlaw been convicted on the indictment in court. It worked a forfeiture of his goods and chattels and all the profits of his real estate; it could have involved perpetual imprisonment, and could not be reversed without writ of error. However, it did not operate as a conviction of the misdemeanor charged. Once the outlawed

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17 4 BLACKSTONE *320.
18 An Act for the Punishment of Diverse Kinds of Treasons [1552], 5 & 6 Edw. 6, c. 11, § 7.
20 "Being captured," however, was not "submitting" for the purposes of the statute. Id.
21 1 POLLACK & MAITLAND 460.
22 FLETA, op. cit. supra note 11, bk. I, ch. 28.
24 Id. A woman was not outlawed but "waived," a procedure known as
person appeared in court, except in cases of felony and treason, he could post bail or recognizance by statute of Elizabeth; he was also permitted to employ an attorney to represent him in court by a statute of William and Mary.25

Although it is only briefly mentioned in most histories of English law, outlawry was no rarity. It apparently was a common form of treating persons who refused to answer the court’s indictments. For example, we can gather from the records of Lincolnshire, England, for the period 1381 until 1396, a rather high percentage of outlawry decrees. In three courts, the Justice of the Peace, the Justice of Gaol Delivery, and the Kings Bench, there were 483 felons indicted. Of these 483 indictments, only eighty-one were tried. Twenty-three were presumed to have been guilty, fourteen secured pardons, four pleaded clergy, and only five were sentenced to hang. The remainder, which would have been over eighty-three per cent, were outlawed for failure to appear for trial.26 For trespass, there were considerably more convictions. There were 589 indicted of whom about 218 paid fines, while twenty-nine were acquitted. The rest, or about one half, were outlawed.27 These statistics are in general agreement with the findings of Pollack and Maitland, who stated that “the number of men outlawed at every eyre is very large; ten men are outlawed for one who is hanged.”28

Although criminal outlawry is no longer resorted to in England it has never been abolished—it merely passed into disuse.29 The last instance of a proceeding in outlawry was in 1859; there was no judgment of outlawry in that case since the defendant surrendered

waivioris mulieris, since she had never been sworn to the law (an oath of allegiance to the leet), COKE, INSTITUTES *475, nor could a corporation be outlawed since outlawry always presupposes the right to arrest. A corporation could not be arrested. Failure to appear in court represented by an attorney merely worked an attachment of the corporation’s property. 1 BLACKSTONE *477.

25 An Act to Prevent Malicious Informations in the Court of King’s Bench, and for the More Easy Reversals of Outlawries in the Same Court [1692], 4 & 5 W. & M., c. 18.

26 KIMBALL, RECORDS OF SOME SESSIONS OF THE PEACE IN LINCOLNSHIRE, 1381-1396, at lii (1955).

27 Id. at lvi.

28 1 POLLACK & MAITLAND 461. Closely allied to outlawry was the ecclesiastical penalty of excommunication. In Saxon laws the excommunicate is “God’s outlaw.” Bracton said he was a “spiritual leper.” Id.

29 9 HALSBURY’S LAWS OF ENGLAND Criminal Law § 373 (2d ed. 1933). Outlawry has been expressly abolished in civil proceedings. Civil Procedure Acts Repeal Act [1879], 42 & 43 Vict., c. 59, § 3.
before the process could be completed. The last judgment of outlawry rendered by a court in England was in 1855. Due to the failure to consider outlawry when the other phases of criminal law have been modernized, now should a defendant be outlawed upon a charge of felony or misdemeanor, there appears to be no means provided in England for securing the reversal of the outlawry. The only apparent way in which a judgment of outlawry can be reversed or rendered inoperative is by a royal pardon or by act of Parliament.

United States

In 1784 one Doan was executed in Pennsylvania upon a writ of outlawry. He had been indicted for robbery in Pennsylvania, but could not be found for trial. After having been outlawed according to the English procedure set out above, he was attainted and subsequently apprehended. Doan appealed from his sentence of hanging (which was ordered to be executed upon the outlawry) on the ground that he was in New York at the time he was being sought in Pennsylvania. The execution was subsequently carried out after consideration by the Supreme Executive Council and the courts of Pennsylvania. Relying heavily on the English precedent, the court remarked:

We would next observe generally that an outlawry for a felony is a conviction and attainder of the offense charged in the indictment, and has been as long in use as the law itself. The intention of it was to compel all men to submit to the laws of this country, and to prevent their escaping justice, by flying and staying away until all the witnesses are dead.

\[Outlawry is unknown in the United States in civil actions. Hall v. Lanning, 91 U.S. 160 (1875); Nathanson v. Spitz, 19 R.I. 70, 31 Atl. 690 (1895). The Massachusetts court did, however, give lip service to civil outlawry, saying that where an action was brought against a partner who had absconded with partnership funds, "without the aid of a statute many courts allowed the action to proceed against such of the partners as were served within the jurisdiction, treating the sheriff's return of non est invenitus as to the absent partner as a substitute for the common law process of outlawry." Tappan v. Bruen, 5 Mass. 193 (1809). Outlawry has never been known in the federal courts. Green v. United States, 356 U.S. 165, 171 (1958).
It is a very important part of the criminal law; and we do not find an occasion, where any question of law, upon a writ of error to reverse an outlawry, in a criminal case, has ever undergone a serious litigation. ... [I]f there be anything improper in taking away the life of a man upon an attainder by judicial outlawry, it belongs to the legislature to alter the law in this particular; the judges cannot do it.\textsuperscript{38}

Virginia dealt with the problem of outlawry in 1821.\textsuperscript{37} The \textit{quintus exactus} was returned, but no judgment was given. The Attorney General moved for a judgment of outlawry. The court denied the judgment, saying that the judgment of outlawry should be given by the coroner as in England, not by the courts.\textsuperscript{38}

Alabama decided in 1871 that the outlawry of England, being repugnant to her constitution and inconsistent with her institutions, was without any force in that state.\textsuperscript{39} The legislature had passed a statute permitting anyone in the state to shoot and kill certain persons in disguise who were terrorizing the state by lynchings and assassinations. The court held that this legislation was not true outlawry.\textsuperscript{40} Further, they held that a person could not be outlawed by the legislature, but only by a judicial proceeding; an act of the legislature is not “by due process of law.”\textsuperscript{41}

New York provides for outlawry in an action for treason, and no other. The procedure is provided by statute and requires that the application be made only upon a bench warrant issued for the apprehension of a person who has pleaded guilty, or has been convicted but cannot be found.\textsuperscript{42} The result of such outlawry is rather severe, since the outlaw is deemed civilly dead and all his property is forfeited to the state.\textsuperscript{43}

Of all the states only Pennsylvania continues to preserve by statute common law outlawry almost in the form that prevailed in the days of Blackstone.\textsuperscript{44} The Pennsylvania statute provides that when any person has been indicted in any court of criminal juris-

\begin{itemize}
  \item \textsuperscript{38} Id. at 90.
  \item \textsuperscript{37} Commonwealth v. Haggerman, 4 Va. (2 Va. Cas.) 244 (1821).
  \item \textsuperscript{38} Virginia abolished outlawry in 1887. VA. CODE ANN. § 19.1-15 (1960).
  \item \textsuperscript{39} Dale County v. Gunter, 46 Ala. 118, 140 (1871).
  \item \textsuperscript{40} Id. at 141.
  \item \textsuperscript{41} Ibid.
  \item \textsuperscript{42} N.Y. CODE OF CRIM. PROC. §§ 814-25.
  \item \textsuperscript{43} N.Y. CODE OF CRIM. PROC. § 819.
  \item \textsuperscript{44} PA. STAT. ANN. tit. 19, § 1321 (1930).
\end{itemize}
diction within the commonwealth for "treason, felony of death, robbery, burglary, sodomy or buggery, or as accessories before the fact to any of the same offenses," common-law outlawry may be declared in the event the accused cannot be found or does not present himself before the court. Execution or imprisonment can result without a trial, once the outlawry is decreed.

Texas abolished outlawry in all forms by constitutional provision in 1876. Six other states have taken cognizance of outlawry in their constitutions. North Carolina provides that "no person ought to be outlawed but by the law of the land." Arkansas, Maryland, Massachusetts, New Hampshire and Tennessee have essentially the North Carolina provision, but have added "or by judgment of his peers." Of the six states which provide constitutionally for outlawry, only North Carolina has implementing statutory machinery.

Outlawry was apparently imported into our country with some early vigor, but during the nineteenth century was either abolished or fell into disuse. No recent American cases involving judicial outlawry proceedings have been found. Except for the limited New York statute, the unused Pennsylvania statute, and the North Carolina adaptations to be discussed next, outlawry has gone the way of enfeoffment in the United States.

**NORTH CAROLINA**

From passage of the reception statute in 1715 until the Revolution, the English law of outlawry was the law of North Carolina.

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46 "[S]aid sentence of outlawry shall have the legal effect of a judgment upon the verdict or confession against the person so outlawed." PA. STAT. ANN. tit. 19, § 1321 (1930). This statute is taken from an act of 1791 nearly verbatim, according to the historical note. The compiler included in the historical note a statement of the Report on the Penal Code defending the statute. "They form in themselves as good a system of outlawry as can now be suggested," the Commission reported, "and are so skillfully and ably drawn as to require no amendment of importance. Although proceedings in outlawry have been rarely reported in our state, yet they are indispensably necessary in every complete system of criminal jurisprudence."

47 TEX. CONST. art I, § 20.

48 N.C. CONST. art. I, § 17. Cf. MAGNA CARTA [1225] c. 29 [9 Hen. 3, 1 Stat. at Large 1 (1762)]: "No freeman shall... be outlawed... but by lawful judgment of his peers or by the law of the land."


The common law was enlarged somewhat by the Colonial Assembly. In 1770 an act was passed giving the Attorney-General power to prosecute riot charges in any superior court in the province and to "declare outlaws all those who avoided the summons of the court for sixty days." The act allowed "such outlaws to be killed with impunity." Persons who were charged with counterfeiting and refused to surrender to the authorities within sixty days were susceptible to being killed by any of the citizenry on sight. Another statute dealt solely with runaway slaves. Such slaves were not generally declared outlaws, but if a slave ran away "and killed cattle," a proclamation was to be issued against him by any two justices of the peace, and if he did not return immediately he could be killed on sight.

In 1868 the current outlawry statute was enacted. It provides:

In all cases where any two justices of the peace, or any judge of the Supreme, superior, or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual processes of the law, the judge or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; ... which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself ... and if any person against whom the proclamation has been thus issued, continues to stay out, lurk and conceal himself, any citizen of the State may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called and warned to surrender, may slay him without accusation or impeachment of any crime.

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52 Potter, Administration and Duties of the Office of the Justice of the Peace 443 (2d ed. 1828).
The statute was possibly a reaction to the presence within this state at the time of a notorious band of outlaws. It is almost inconceivable that such a situation existed less than one hundred years ago in North Carolina, but below is quoted the introduction to a history of the individual members of this outlaw clan.

The homely old adage that there is nothing 'new under the sun' is constantly verified by actual facts occurring every day. The accounts handed down by tradition of the 'bold archer Robin Hood' keeping whole counties on the alert, and disputing the right to kill fat bucks in the royal forest with the boldest barons, have seemed almost too daring for belief, yet here we have—in this enlightened period of the world's history—a whole state of the most powerful and most enlightened nation on earth successfully defied by a band of less than a dozen Outlaws. Individual hunters essay to track and capture them, and their bones bleach in the forest paths for their temerity, troops—regular and irregular—attempt their subjugation, and are ingloriously repelled by these dauntless, law-defying bandits.

Not only are they secure in their swampy retreats. They boldly make raids into the neighboring country, and release prisoners from the constituted authorities. They fearlessly enter towns and deliberately carry off the municipal archives and county treasures.

The most fertile brain ever conjured up such deeds of courage, cruelly and skillful military stratagems as have marked the career of undaunted men, in whose veins the blood of Indian and Negro is strangely commingled. Indeed, it seems as if the white Frankenstein by his crimes has raised a fearful monster that will not down at the bidding of his affrightened master.\(^4\)

These marauders pillaged and roamed throughout Robeson and surrounding counties in the 1860's and 1870's. State militia, Confederate troops, and an irate citizenry eventually hunted them down and killed or captured them.

Apparently the North Carolina outlawry is limited to arrest and apprehension of felons, with constitutional limitations upon sen-

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\(^4\) Introduction to Norman, The Lowery History (DeWitt ed., New York, ca. 1909).
tencing without a trial, attainder and corruption of blood or forfeiture.\textsuperscript{55} The North Carolina statute differs greatly from commonlaw outlawry, the most significant distinction being that a person so declared cannot be executed or sentenced on the outlawry. The apparent purpose of the statute is merely to extend the citizen's power of arrest. It is provided elsewhere that "every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable grounds to believe to be guilty of such offense..."\textsuperscript{68} But such an arrest is unlawful if no felony in fact has been committed.\textsuperscript{57}

Not all of North Carolina's outlawry is ancient history. From time to time it is utilized where notorious or heinous crimes are involved. One of the most recent and significant outlawries involved an escapee of Camp Polk prison farm in Wake County in 1960. Robert Tyson, an inmate of the prison farm, walked away from the farm on March 24, 1960, shortly before the mutilated body of the wife of the prison's mess steward was discovered.\textsuperscript{68} The evidence pointed unquestionably to Tyson as the perpetrator of the crime. Tyson ran at large throughout the county for over a week, broke in homes, raped a woman and a seventeen-year-old girl, and evaded brazenly all of the law enforcement machinery of the state. The highway patrol, the National Guard, special deputies, and regular

\textsuperscript{55} "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony." N.C. Const. art. I, § 9. "No person shall be put to answer any criminal charges...but by indictment, presentment, or impeachment." N.C. Const. art. I, § 2. See also N.C. Const. art. I, § 13 (right to trial by jury); N.C. Const. art. I, § 29 (recurrence to fundamental principles). The only punishments permitted in North Carolina are "death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold any office of honor, trust, or profit under the State." N.C. Const. art. II, § 1.


\textsuperscript{58} State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954). The interest of society in the immediate apprehension of criminals is so great that even a private citizen is given the power of arrest when he has observed the commission of a felony. Hall, The Law of Arrest 86 (2d ed. 1961). The risk of the arrest is on the citizen. When no felony has in fact been committed an arresting citizen will be liable in damages for false arrest. Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906). But where the arrestee has been declared an outlaw, "any citizen....may capture, arrest, and bring to justice, and in case of flight or resistance by him....may slay him without accusation or impeachment of any crime." Thus, a person can in fact, though not in law, be executed without a trial. The risk of false arrest is removed and the use of deadly force justified merely on written affidavit of two Justices of the Peace.

\textsuperscript{68} Raleigh News and Observer, April 9, 1960, p. 1.
police posses were unable to contain him. On April 4, 1960, Wake County superior court Judge George Fountain signed papers declaring Tyson an outlaw. Governor Hodges announced the offer of a reward of four hundred dollars "to any private citizen who triggers the outlaw's arrest...."\(^{60}\)

**Conclusion**

Is there really any need existing today for any state to resort to outlawry for obedience to its laws? Default judgments and attachments of properties in civil cases, and contempt proceedings in criminal cases have sufficiently enforced attendance in court to obviate the barbaric outlawry. When a suspect had fled from the state's jurisdiction in a criminal case, the constitution, statutes and treaties provide for extradition.\(^1\)

"A ready recourse to outlawry is, we are told, one of the tests by which the relative barbarousness of various bodies of ancient law may be measured."\(^{62}\) Such crude administration of justice is obviated by any number of improvements in law enforcement since the feudal kings of Bracton's day. The public has at its disposal, local constables and policemen, sheriffs and their departments, the highway patrol with statewide jurisdiction, the State and Federal Bureaus of Investigation, the National Guard, up-to-date communications, and a more civilized and better informed public.

The possibilities of abuse of procedure and the resulting injustice to a victim of such a decree militate strongly against its existence. At common law a very thorough and intricate procedure was required in order to outlaw a person. One or more writs of

\(^{59}\)Id. The decree of outlawry may be found in 55 Wake County Superior Court Civil Docket 40. Tyson probably never knew he had been declared an outlaw since the decree issued April 4, 1960, and Tyson had committed suicide on April 5.


\(^{62}\)2 Pollack & Maitland 448.
NOTES AND COMMENTS

Capias, an exigent, five exactions at five consecutive county courts, and a proclamation at the door of a place for divine worship were required before an outlawry could be incurred. North Carolina’s outlawry is less sanguinary, but the procedure is dangerously simple.63

Nothing remains of the social order for which outlawry was fashioned. A re-evaluation of this archaic statute is recommended before any irreparable injustice occurs which could reflect upon the dignity of the laws of North Carolina.

Bobby G. Deaver

Pleadings—Material and Immaterial Variance

In Hall v. Poteat the plaintiff alleged that the defendant negligently drove his automobile, without lights, from the right shoulder of the highway into the path of the plaintiff’s oncoming automobile. It was further alleged that this occurred so suddenly that it was impossible for the plaintiff to avoid a collision. On trial the plaintiff’s testimony tended to show that the defendant’s automobile was stopped, without lights, in the plaintiff’s lane of travel when the collision occurred. No objection to the introduction of this evidence was made by the defendant. On motion, the trial court granted a judgment of involuntary nonsuit. On appeal, the North Carolina Supreme Court, although conceding that the plaintiff’s testimony was sufficient to support a finding of negligence on the part of the defendant,2 held that the variance between the plaintiff’s allegations and proof was material, and thus fatal. Accordingly the judgment of nonsuit was affirmed.

Variance occurs when the proof does not conform to the case pleaded. North Carolina, like most code jurisdictions, has by statute set out three degrees of deviation of facts proved from facts pleaded.4 As a literal reading of these statutes seems plainly to

1 257 N.C. 458, 125 S.E.2d 924 (1962).
2 257 N.C. at 463, 125 S.E.2d at 928.
3 See CLARK, CODE PLEADING § 120 (2d ed. 1947).
4 The first two degrees are defined in N.C. Gen. Stat. § 1-168 (1953):
"1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just. 2. Where the variance is not material as herein provided, the judge may direct the fact