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teachers from adverse district court decisions will be virtually meaningless. The teacher's primary weapon has been the "clear and convincing" standard of proof imposed on the local school boards. On review, that standard will be ignored. Furthermore, the court can manipulate the "minutia of the evidence" phrase to avoid meaningful review of the lower court's findings. The potential effect of *Jones*, however, extends beyond the teacher employment discrimination issue. In the past, appellate courts have delved into intricate evidence in other kinds of employment discrimination cases to expose underlying discrimination. The "minutia of the evidence" phrase can be easily manipulated by a busy appellate court to avoid such time-consuming analysis. If *Jones* represents the beginning of a trend in the extent of appellate review by the Fourth Circuit, the right of appellate review may become no more than a shadow of what it once was.

NIGLE B. BARROW, JR.

Evidence—A New Approach to Character Evidence in North Carolina

In 1904 Professor Wigmore stated that although the Anglo-American rules of evidence had "taken some curious twistings in the course of their development," none was more curious than the rule limiting the admissibility of character evidence only to that of the general community-reputation of the person in question.¹ This rule has generated continuous debate by legal theoreticians and scholars, but the case law has remained unchanged for almost seventy-five years. *State v. Stegmann*² is another curious twist in this area of the law; the North Carolina Supreme Court departed from precedent and the traditional rule and held admissible testimony about the character and reputation of the

1. III J. WIGMORE, EVIDENCE § 1986 (1st ed. 1904). An analysis of this issue must first differentiate between the terms "character" and "reputation." "Character" refers to the actual qualities and characteristics of an individual, while "reputation" is the esteem in which a person is held by others. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 102 (Brandis rev. 1973). As the court stated in *State v. Ussery*, 118 N.C. 1177, 1180, 24 S.E. 414, 415 (1896), "Some critic has said that character lives in a man—reputation outside of him." Unfortunately, judicial decisions have tended to use the terms interchangeably and thus obscure the distinction. V J. WIGMORE, EVIDENCE § 1608 (3d ed. 1940).

2. 286 N.C. 638, 213 S.E.2d 262 (1975).

prosecutrix in a rape case based upon personal opinion and observation, as well as upon her reputation within the community.³ This decision thus represents a major change in the permissible forms of proving an individual's character in North Carolina.

John Richard Stegmann was charged with the abduction and rape of Ruth O'Leta Kendall on September 4, 1973⁴ and was convicted on both counts.⁵ At trial, the defendant alleged that the prosecutrix had consented to the sexual intercourse with him,⁶ and thereby placed the question of her character in issue.⁷ In response, the district attorney introduced the testimony of fourteen witnesses to show the good character and reputation of the complainant.⁸ The first two witnesses testified "properly" as to her good general reputation in the community in which she lived,⁹ and no exception was taken to their testimony.¹⁰ However, when examining the other twelve witnesses, after receiving an answer to his question about the general reputation of Mrs. Kendall, the district attorney went on to ask each witness, "On what do you base your opinion?"¹¹ Eleven answered that their opinions were based upon her general reputation as well as upon their personal opinions about and observations of her.¹² One witness stated that her opinion was based solely upon her personal contact with the prosecutrix.¹³ The defendant's second and third assignments of error were based on the trial judge's admission of this testimony.¹⁴

The North Carolina Supreme Court upheld the lower court's verdict and judgments,¹⁵ abandoning the traditional North Carolina rule

3. *Id.* at 649, 213 S.E.2d at 271.

4. *Id.* at 640, 213 S.E.2d at 265.

5. *Id.* at 643, 213 S.E.2d at 267. Stegmann received a life sentence for the kidnapping charge and a death sentence for the rape charge.

6. *Id.* at 642-43, 213 S.E.2d at 267.

7. *Cf.* State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897); State v. Daniel, 87 N.C. 507 (1882); State v. Jefferson, 28 N.C. 305 (1846); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 105 (Brandis rev. 1973). See text accompanying notes 19-20 *infra*.

8. 286 N.C. at 644-46, 213 S.E.2d at 267-69.

9. *I.e.*, in keeping with the traditional rule, they testified only to her general community reputation and did not speak of their personal opinions of her character or of specific acts or conduct of the prosecutrix.

10. 286 N.C. at 644, 213 S.E.2d at 267 (witnesses Frazee and Smith).

11. *Id.* at 647, 213 S.E.2d at 269.

12. *Id.* at 644-45, 213 S.E.2d at 268-69 (witnesses Hopkins, Judson, Godwin, Ledbetter, Porter, Parker, M. Reinburger, C. Reinburger, Riggan, Cimaglia and Peases).

13. *Id.* at 645-46, 213 S.E.2d at 269 (witness Harris).

14. *Id.* at 643, 213 S.E.2d at 267.

15. 286 N.C. 638, 213 S.E.2d 262 (1975). The majority opinion was written by

that character may not be evidenced by the opinion of the character witness or by specific acts of the person in question.¹⁶ The court held that the district attorney's question "and the answers thereto tended to show the foundation for the character evidence given by the witnesses. A strong or weak foundation for the testimony of a witness aids the jury in determining the weight it will give that testimony. Thus, the question was properly permitted . . ." ¹⁷ The court did, however, find the trial judge in error in admitting the testimony of Mrs. Harris, which was based solely on personal opinion.¹⁸ In effect, the court held admissible testimony based in part on personal observation and in part on general community reputation.

The general rule in the United States is that when seeking to prove a person's character as a collateral matter,¹⁹ the witness may testify only about the general reputation of the person in question in the community in which he lives. The witness is not permitted to testify about the person's specific acts or about the witness's personal knowledge or beliefs.²⁰ This general preference in favor of the indirect method of evidencing character by reputation, as opposed to the direct method of proof by personal opinion, has arisen despite serious questions raised by Professor Wigmore concerning the historical foundations of the rule.²¹

Justice Huskins. Chief Justice Sharp and Justice Copeland both dissented as to the death sentence for the rape conviction. Justice Exum filed a long dissenting opinion based upon his belief that "the only method of proof previously sanctioned by this Court and most other jurisdictions is by showing the general reputation of the witness in the community where she lived," excluding testimony based on personal opinion. *Id.* at 659, 213 S.E.2d at 277.

16. *Id.* at 647, 213 S.E.2d at 269.

17. *Id.* (citations omitted).

18. *Id.* at 649, 213 S.E.2d at 271.

19. Character is a collateral issue in a case when it is offered as evidence of the person's conduct on a particular occasion or of his truthfulness and veracity in general. For purposes of this note, no attempt will be made to differentiate between the various situations in which character evidence may come into issue, e.g., the character of the accused in a criminal proceeding, the character of a witness who has given testimony, the character of a complainant in a rape case, the character of a party to a civil suit, the character of the deceased in a homicide case, etc. Both the majority and minority rules with regard to personal opinion evidence apply equally in all situations.

20. *Michelson v. United States*, 335 U.S. 469, 477 (1948); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110 (Brandis rev. 1973); VII J. WIGMORE, EVIDENCE § 1980 (3d ed. 1940).

21. VII J. WIGMORE, EVIDENCE §§ 1981-82 (3d ed. 1940). In tracing the history of the rule, Wigmore demonstrates that prior to 1865, the universal practice was to permit character witnesses to state their personal opinions of the individual in question. E.g., Trial of Cowper, 13 How. St. Tr. 1106, 1180 (1699); Trial of Hardy, 24 How. St. Tr. 199, 999 (1794); Case of Davison, 31 How. St. Tr. 99, 190 (1808); Trial of Jones, 31 How. St. Tr. 251, 310 (1809). This orthodox practice was altered by the decision in *R. v. Rowton*, Leigh & C. 520, 10 Cox Cr. Rep. 25 (Eng. 1865), where the court

Prior to the decision in *State v. Stegmann*, North Carolina followed the majority rule.²² As stated in *Johnson v. Massengill*:²³ "The general rule is that a witness, offered to prove the character of another person, may not testify as to his personal opinion concerning the reputation of such other person but is limited to testimony concerning the character of such person in the community."²⁴

The vast majority of other jurisdictions in the United States follow the limited rule.²⁵ The United States Supreme Court has spoken to this issue only once, in *Michelson v. United States*,²⁶ which was heavily relied upon in the dissent in *Stegmann*. Although the *Michelson* Court approved the general rule, it did so in less than unqualified terms. The Court first discounted the importance of its conclusion by speaking of its

ignored a long line of precedents and held that testimony based on personal opinion alone was inadmissible and that the question to the witness must be framed in terms of the reputation of the individual in question. Wigmore believes this decision to be based in part upon a misunderstanding of a statement made by Lord Ellenborough, C. J. in Jones' Trial, 31 How. St. Tr. 310 (1809), that "It is reputation; it is not what a person knows" that may be used to prove character. Wigmore contends that this remark refers to the exclusion of particular facts attempting to demonstrate a specific trait, and not to the witness's speaking from personal knowledge. VII J. WIGMORE, EVIDENCE § 1982, at 146-47 (3d ed. 1940).

22. See, e.g., *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); *State v. McKissick*, 271 N.C. 500, 157 S.E.2d 112 (1967); *State v. Steen*, 185 N.C. 768, 117 S.E. 793 (1923); *Edwards v. Price*, 162 N.C. 243, 78 S.E. 145 (1913); *Bottoms v. Kent*, 48 N.C. 154 (1855); *State v. Parks*, 25 N.C. 296 (1843). See also 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110 (Brandis rev. 1973).

23. 280 N.C. 376, 186 S.E.2d 168 (1972).

24. *Id.* at 383, 186 S.E.2d at 173. There is one North Carolina decision that possibly cuts the other way. In *State v. Nance*, 195 N.C. 47, 141 S.E. 468 (1928), the court held that a witness, after stating the general character of the individual inquired about, may of his own accord say in what respect the person's character is good or bad.

One writer has viewed this case as upholding the use of personal opinion. Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 512 (1939) [hereinafter cited as Ladd]. Presumably, a witness could amplify his conclusion as to a person's character by stating that it was based on personal observation. However, the later case of *State v. Hicks*, 200 N.C. 539, 157 S.E. 851 (1931) seems to indicate that *Nance* was meant to allow the witness to qualify his conclusion "by adding that [the person's character] is good for certain virtues and bad for certain vices," thus limiting any elaborations to references to specific traits of character. *Id.* at 541, 157 S.E. at 852.

25. See, e.g., *Deschenes v. United States*, 224 F.2d 688 (10th Cir. 1955); *United States v. Neff*, 343 F. Supp. 978 (E.D. Pa. 1972), *aff'd*, 475 F.2d 861 (3d Cir. 1973); *People v. Ward*, 134 Cal. 301, 66 P. 372 (1901); *People v. Gordon*, 103 Cal. 568, 37 P. 534 (1894); *Gifford v. People*, 148 Ill. 173, 35 N.E. 754 (1893); *Hischman v. People*, 101 Ill. 568 (1882); *Borders v. Commonwealth*, 252 Ky. 577, 67 S.W. 2d 960 (1934); *State v. Harrison*, 168 La. 1115, 123 So. 800 (1929); *State v. King*, 78 Mo. 555 (1883); *State v. Pearce*, 15 Nev. 188 (1880); *State v. Todd*, 28 N.M. 518, 214 P. 899 (1923); *People v. Van Gaasbeck*, 189 N.Y. 408, 82 N.E. 718 (1907); *State v. Magill*, 19 N.D. 131, 122 N.W. 330 (1909); *Commonwealth v. Gaines*, 167 Pa. Super. 485, 75 A.2d 617 (1950); *Prater v. State*, 104 Tex. Crim. 669, 284 S.W. 965 (1926); *State v. Williams*, 38 Wyo. 340, 266 P. 1056 (1928).

26. 335 U.S. 469 (1948).

lack of expertise in the field of evidence in general.²⁷ The Court then endorsed the majority rule, primarily because it was loath to make sweeping changes in the established law, and because the Court saw itself as an improper forum in which to fashion rules of procedure and evidence for state courts.²⁸ Significantly, *Michelson* did not deal with the issue in constitutional terms,²⁹ thus leaving it to the states to decide the matter for themselves. For all these reasons, *Michelson* should not be viewed as a preemptive or controlling decision in the area of character evidence.

In spite of the number of jurisdictions that adhere to the majority position, a few states, most notably Iowa³⁰ and Minnesota,³¹ have stated that character evidence based upon a witness's personal observations of the person in question is as competent and worthy of consideration as evidence of that person's general reputation.³²

Underlying the debate over the proper form of proof in this area are conflicting policy considerations. Two major propositions are often stated in support of the majority rule. First, there are the "overwhelming considerations of practical convenience."³³ As stated in *People v. Van Gaasbeck*:³⁴

If a witness is to be permitted to testify to the character of an accused party, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant and the particular actions of the defendant which have led him to his favorable conclusion. In most instances, it would be utterly impossible for the prosecution

27. This is because the law of evidence is normally developed by state courts of the last resort and due to the paucity of occasions that the Supreme Court has to rule on such matters. *Id.* at 486.

28. *Id.*

29. *Spencer v. Texas*, 385 U.S. 554, 563 (1967).

30. *See State v. Sterrett*, 68 Iowa 76, 25 N.W. 936 (1885); *accord*, *State v. Ferguson*, 222 Iowa 1148, 270 N.W. 874 (1937); *State v. Richards*, 126 Iowa 497, 102 N.W. 439 (1905).

31. *See State v. Lee*, 22 Minn. 407 (1876). *See also Richmond v. Norwich*, 96 Conn. 582, 115 A. 11 (1921); *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907); *Mathewson v. Mathewson*, 81 Vt. 173, 69 A. 646 (1908); *State v. Hosey*, 54 Wash. 309, 103 P. 12 (1909).

32. It is important to note that the minority rule does not seek to exclude evidence of general reputation. It merely holds evidence based on personal opinion to be on an equal footing in terms of relevance and credibility and hence admissibility.

The MODEL CODE OF EVIDENCE rule 306 (1942) would allow opinion evidence, as well as evidence of general reputation, as proof of the character of the accused in a criminal action. The UNIFORM RULES OF EVIDENCE rule 608(a) (1974) would permit opinion evidence concerning the character for truthfulness or untruthfulness of a witness.

33. *People v. Van Gaasbeck*, 189 N.Y. 408, 418, 82 N.E. 718, 721 (1907).

34. 189 N.Y. 408, 82 N.E. 718 (1907).

to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusions were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its admissibility would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation.³⁵

This fear of opening up "a history of the person's whole life" at trial and thus diverting the focus of the proceeding and the attention of the jury has been expressed in a number of North Carolina cases.³⁶

The second argument supporting the majority rule is based upon the fear that the personal opinion given by the witness may be based upon personal prejudice towards the individual in question or upon a misinterpreted or unrepresentative experience with that person.³⁷ Not only would testimony founded on such inadequate bases not be probative, but it could also lead into a discussion of specific acts of the person in question, which is universally condemned.³⁸ For these reasons, among others,³⁹ most courts have believed that reliability and credibility are gained by the use of the opinion of the community as a whole as opposed to that of a single individual.

Professor Wigmore was one of the earliest and most ardent supporters of the liberal minority position, and one of the most vociferous critics of the majority rule.⁴⁰ He argued that personal observations and opinion were simply a more credible and reliable form of proof and that

35. *Id.* at 418, 82 N.E. at 721.

36. *See, e.g.*, *State v. Adams*, 193 N.C. 581, 137 S.E. 657 (1927); *Edwards v. Price*, 162 N.C. 243, 78 S.E. 145 (1913); *Bottoms v. Kent*, 48 N.C. 154 (1855). *See also* 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 n.91 (Brandis rev. 1973); Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17, 19 (1970).

37. Ladd, *supra* note 24, at 511, citing *Phillips v. Kingfield*, 19 Me. 375 (1841); *State v. Shull*, 131 Ore. 224, 282 P. 237 (1929); *Kimmel v. Kimmel*, 3 S. & R. 336, 8 Am. Dec. 655 (Pa. 1817).

38. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 & n.91 (Brandis rev. 1973). *See* text accompanying notes 33-36 *supra*.

39. A number of other less important and less persuasive policies have been advanced in favor of the majority rule, including: the fear that testimony based on personal observations would violate the opinion rule, Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17, 19 (1970); that such evidence would invade the province of the jury, as it is their job to infer character from the facts, Ladd, *supra* note 24, at 510; and that reputation is a fact which may be presented to the jury and utilized by them as a basis to evaluate character, *id.*

40. *See* note 21 *supra*.

it would be preferred both by the parties and by jurors.⁴¹ Professor Stansbury contends that although attorneys and judges may know that the witness should limit his testimony only to that of general reputation, the layman is not so schooled in the ways of the law. The practical result is that often the witness will state what is in fact his personal opinion of the person in question, although couching it in terms of the person's general reputation in the community. Stansbury, therefore, argues that a more realistic approach would be to admit testimony based clearly and solely on the witness's personal opinion.⁴²

Court decisions upholding the minority rule have relied on yet another theory to support their position. In both *State v. Sterrett*⁴³ and *State v. Lee*,⁴⁴ the two leading minority view cases, the courts reasoned that since the purpose of the introduction of character evidence is to present a foundation for a presumption by the jury that the person in question acted in a certain way, the crucial question becomes whether the person *in fact* possesses a certain disposition and not whether he is reputed to be of such disposition. Therefore, the personal opinion of the witness as to the person's character is evidence of that fact and is of equal competence to testimony of the reputation of the person's character. Although other equally persuasive arguments have been made,⁴⁵ these policies are the most popular justifications cited for the minority rule.

With this long standing theoretical controversy and the prior devel-

41. VII J. WIGMORE, EVIDENCE § 1986 (3d ed. 1940). "So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief." *Id.* at 166.

42. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 n.99 (Brandis rev. 1973); *cf.* Ladd, *supra* note 24, at 517, wherein the author states: "When reputation for character is offered . . . , the jury undoubtedly regard [*sic*] the statement of the accused's reputation as corresponding to the opinion of the witness."

43. 68 Iowa 76, 78-79, 25 N.W. 936, 937-38 (1885).

44. 22 Minn. 407, 409-10 (1876).

45. *See* Ladd, *supra* note 24. Reliance upon reputation as evidence is a throwback to the days of small, rural communities. In view of today's complex, urban society however, witnesses have little contact with the person in question other than personal observation. As a result, their testimony concerning the person's community reputation is, in reality, personal opinion evidence in the guise of reputation. *Id.* at 515, *citing* Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937); *accord*, State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973) (evidence of good character is no longer confined to reputation in the community in which a person lives), *overruling sub silentio* State v. Smoak, 213 N.C. 79, 195 S.E. 72 (1938).

The fear expressed in the majority rule jurisdictions that personal opinion testimony will be based on prejudice or isolated or trivial experiences (*see* text accompanying notes 37-38 *supra*) can be overcome by the device of cross-examination and requirements relating to the laying of a proper foundation for the character witness's testimony. Ladd, *supra* note 24, at 518.

opment of North Carolina case law in mind, the holding and the implications of the decision in *Stegmann* can properly be analyzed. First, the North Carolina Supreme Court did not completely embrace the minority rule. By excluding the personal opinion testimony of Mrs. Harris, but admitting that of the other witnesses,⁴⁶ the court espoused a middle ground. Clearly, testimony based solely on general reputation will continue to be admissible, while that based *solely* on personal opinion will be excluded. However, the holding of the case now makes it permissible to introduce evidence consisting of both personal opinion and observation *and* general reputation testimony. The district attorney's question, "On what do you base your opinion?," although criticized by the court as being "unnecessary and ineptly phrased"⁴⁷ will not constitute reversible error, and thus is allowable.

One problem in attempting to define the scope of *Stegmann* is that the court, in adopting this new rule, did not give a detailed discussion of the possible policy justifications for its decision. The reason given by the court for the decision⁴⁸ seems to fall within the policy adopted by the other minority state courts:⁴⁹ since the issue before the court is the *fact* of the person's disposition, personal opinion testimony is competent proof of such fact. The court did not cite those opinions, however, and it was silent as to the other popular policies in favor of the minority rule.⁵⁰

The court's partial adoption of the minority rule can be criticized for taking a "half a loaf" approach. The personal observations of a witness, now allowed by the court, will assist the jury in evaluating the character evidence introduced. However, one can argue that jurors will likely not differentiate between the community-reputation evidence and the personal opinion evidence and so will not use the latter only to reinforce the former, as the court apparently intends. Professors Stansbury and Ladd believe that jurors already tend to interpret reputation testimony as consisting of the personal opinion of the witness.⁵¹ The new rule increases this likelihood of jury confusion, so the court should drop its charade, recognize the practicalities of the situation and admit personal opinion evidence *per se*.

46. See text accompanying notes 9-16 *supra*.

47. 286 N.C. at 647, 213 S.E.2d at 269.

48. See text accompanying note 15 *supra*.

49. See text accompanying notes 43-44 *supra*.

50. See text accompanying notes 40-45 *supra*. Nor did the court refer to the decisions or policies which support the majority position.

51. See note 42 and accompanying text *supra*.

Furthermore, by recognizing the probative value of personal opinion testimony under limited circumstances, the court should go on to realize that the same value is present when the personal opinion testimony comes in by itself and that safeguards are available to prevent any adverse effects of such an offer of proof.⁵² Having acknowledged the value of the evidence, there is no justification for the court's not differentiating between evidence of reputation and of personal knowledge and belief as suggested by Professor Wigmore.⁵³ In short, there would seem to be no reason why the court, if it is disposed to move away from the majority rule, should not completely embrace the minority position. As stated by Professor Ladd, "[t]he emphasis upon the means of proving character should be directed to the probative quality of the testimony to be obtained rather than to the formalistic procedure of satisfying the demands of legal ritual."⁵⁴

The North Carolina Supreme Court's decision in *State v. Stegmann* raises almost as many questions as it answers and will obviously need clarification in later cases. However, it seems to represent the first tentative steps on the part of the court to adopt a new approach to the controversial area of character evidence. At least for the time being, it is clear that character testimony may consist of both the general reputation of the individual in question and personal observations and opinions of the witness concerning the person in question. This is a new rule, and practicing attorneys in North Carolina should take careful note of it.

STEVEN WILLIAM SUFLAS

Federal Courts—Bradford v. Weinstein: The Federal Courts Reopen the Door to Prisoners' Civil Rights Claims

Since the mid-1960's the federal courts have witnessed a tremendous influx of state prisoner petitions.¹ Claimants have sought civil

52. Proper requirements for laying a foundation for a witness's testimony and for cross-examination will serve to exclude testimony with an inadequate basis or founded on personal prejudice. Likewise, control of the proceedings by the presiding judge will avert a degeneration of the testimony into a listing of specific acts of the person in question or a recounting of his life's history, which are both still condemned.

53. VII J. WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

54. Ladd, *supra* note 24, at 517-18.

1. Petitions filed by state prisoners in the federal courts totaled 13,423 in 1974, an increase of 1,439.3% over the total in 1960. The 1974 total is more than double the