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Notes and Comments

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Adoption—Wills—Inheritance Rights of an After-Adopted Child

The testatrix executed her will in 1938 with no reference to or mention of a child and in 1949 she and her husband legally adopted a minor child. The testatrix died in 1950 and the 1938 will was offered for probate in solemn form. A caveat to the probate was filed on behalf of the adopted child, alleging that the will had been revoked, as a matter of law, by the adoption. The trial court sustained a motion to strike the caveat, and upon appeal, the Supreme Court of Georgia, with one justice dissenting, reversed. *Held,* the adoption of the child revoked the will which was executed prior to the adoption.[1]

In this case the Georgia court construed an adoption statute[2] in conjunction with an after-born statute,[3] and concluded that the adopted child stood in the same position as a natural born chlid. Georgia thus joined the majority group of those jurisdictions which have construed similar statutes.[4] The express language of the statute provided that,

[1] Thornton *et al.* v. Anderson, 207 Ga. 714, 64 S. E. 2d 186 (1951).

[2] GA. CODE ANN. §74-414 (1949): ". . . Said adopted child shall be considered in all respects as if it were a child of natural bodily issue of petitioner or petitioners, and shall enjoy every right and privilege of a natural child of petitioner or petitioners; and shall be deemed a natural child of petitioner or petitioners to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instrument of testamentary gift, bequest, devise or legacy unless expressly excluded therefrom."

[3] GA. CODE ANN. §113-408 (1933): "In all cases, the marriage of the testator or the birth of a child to him, subsequently to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will."

[4] Grimes v. Jones, 193 Ark. 858, 103 S. W. 2d 359 (1937); Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782 (1902); Hopkins v. Gifford, 309 Ill. 363, 141 N. E. 178 (1923); Hilpire v. Claude, 109 Iowa 159, 80 N. W. 332 (1899); Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); White v. White, 322 Mass. 30, 76 N. E. 2d 15 (1947); *In re* Rendell's Estate, 224 Mich. 197, 221 N. W. 116 (1928); *In re* Alter's Will, 92 N. J. Eq. 415, 112 Atl. 483 (1921); Hahn v. Sorgen, 50 N. M. 83, 171 P. 2d 308 (1946); Bourne v. Dorney, 184 App. Div. 476, 171 N. Y. Supp. 264 (2d Dep't 1918), *aff'd without opinion,* 227 N. Y. 641, 126 N. E. 901 (1919); *accord, In re* Guilmartin's Estate, 156 Misc. 699, 282 N. Y. Supp. 525 (Surr. Ct. 1935), *aff'd,* 250 App. Div. 762, 293 N. Y. Supp. 665 (2d Dep't 1937), *aff'd without opinion,* 277 N. Y. 689, 14 N. E. 2d 627 (1938); *In re* Kelly's Estate, 182 Misc. 481, 44 N. Y. S. 2d 438 (Surr. Ct. 1943); Alexander v. Samuels, 177 Okl. 323, 58 P. 2d 878 (1936); Fishburne v. Fishburne, 171 S. C. 408, 172 S. E. 426 (1934); Marshall v. Marshall, 25 Tenn. App. 309, 156 S. W. 2d 449 (1941); Bell v. Bell, 180 S. W. 2d 466 (Tex. Civ. App. 1944); Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853 (1901); Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089 (1905); *In re* McLean's Estate, 219 Wis. 222, 262 N. W. 707 (1935). *Contra:* Russell v. Russell, 84 Ala. 48, 3 So. 900 (1888); *In re* Comassi's Estate, 107 Cal. 1, 40 Pac. 15 (1895); Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1890); Succession of McRacken, 162 La. 443, 110 So. 645 (1926); Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306 (1927).

Some jurisdictions have provided by statute that adoption of a child will revoke or set aside prior will. ARIZ CODE ANN. §41-107 (1939); CONN. GEN. STAT. §6956

"said adopted child shall be considered in all respects as if it were a child of natural bodily issue . . . and shall enjoy every right and privilege of a natural child. . . ." This seems to express clearly a legislative intention that an adopted child is to have a standing, in law, equivalent to that of a natural child in all respects, and that birth by law and birth by nature are to be considered the same.

The opinion of the dissenting judge is based primarily upon a strict literal interpretation of the after-born statute and the statute empowering a person to dispose of his property by will.[5] His argument that these statutes are confined solely to the question of a person's right to make a will and neither deal with nor have any relation to the law of inheritance as provided by the statute of distribution and the law of adoption is hardly persuasive. If the will is revoked by the subsequent marriage of the testator or the birth of a child to him, then it *is* necessary to go to the law of descent and distribution to determine what disposition will be made of his property. The argument of the dissent also runs contrary to the majority view which holds that the statute of adoption and all statutes in *pari materia* therewith must be read and construed together.[6]

The point at issue has arisen in North Carolina on two prior occasions,[7] but under an adoption statute[8] which has since been completely

(1949) (see Fulton Trust Co. v. Trowbridge, 126 Conn. 369, 11 A. 2d 393 (1940)); OHIO GEN. CODE ANN. §10504-49 (1937) (Ohio formerly with majority, see Surman v. Surman, 114 Ohio St. 579, 153 N. E. 873 (1925)); PA. STAT. ANN. title 20, §273 (1950) (Pennsylvania formerly *contra, see* Goldstein v. Hammell, 236 Pa. 305, 84 Atl. 772 (1912); *In re* Boyd's Estate, 270 Pa. 504, 113 Atl. 691 (1921).

Adopted child as within contemplation of statutory provision relating to pretermitted children. James v. Helmich, 186 Ark. 1053, 57 S. W. 2d 829 (1933); *In re* Smith's Estate, 86 Cal. App. 2d 456, 195 P. 2d 842 (1948); Bakke v. Bakke, 175 Minn. 193, 220 N. W. 601 (1928); Thomas v. Malone, 142 Mo. App. 193, 126 S. W. 522 (1910); Remmers v. Remmers, 239 S. W. 509 (Mo. 1922); Robertson v. Cornett, 359 Mo. 1156, 225 S. W. 2d 780 (1949); Mares v. Martinez, 54 N. M. 1, 212 P. 2d 772 (1949); Van Brocklyn v. Wood, 38 Wash. 384, 80 Pac. 530 (1905); *In re* Hebb's Estate, 134 Wash. 424, 235 Pac. 974 (1925).

[5] GA. CODE ANN. §113-106 (1933).

[6] Kolb v. Ruhl's Adm'r, 303 Ky. 604, 198 S. W. 2d 326 (1946); Wilson v. Anderson, 232 N. C. 212, 59 S. E. 2d 836 (1950); Hahn v. Sorgen, 50 N. M. 83, 171 P. 2d 308 (1946); *In re* Heye's Estate, 149 Misc. 890, 269 N. Y. Supp. 530 (Surr. Ct. 1933), *aff'd, In re* Heye's Will, 241 App. Div. 907, 271 N. Y. Supp. 1042 (4th Dep't 1934); Nat. Bk. of Lima v. Hancock, 85 Ohio App. 1, 88 N. E. 2d 67 (1948); Marshall v. Marshall, 25 Tenn. App. 309, 156 S. W. 2d 449 (1941); Batchelder v. Walworth, 85 Vt. 322, 82 Atl. 7 (1912).

[7] Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306 (1927). T executed will at time when he had no children, leaving all his property to wife. Later a child was adopted for life and another was born to T and his wife. T died without changing his will. *Held,* natural child allowed to upset the will and share in his father's estate as if father had died intestate; but adopted child not entitled to inherit. Basis of decision was that adoption statute expressly provided that adopted child should inherit as if natural child only if adopting parent died intestate. See Note, 29 N. C. L. REV. 218 (1951).

King v. Davis, 91 N. C. 142 (1884). T died leaving will in which he left certain property to D, an infant and illegitimate child. Between date of making will and his death, T adopted D for life. D rejected gifts in will as being bestowed on a "stranger" and sought to take by virtue of the after-born statute as if T had died intestate. *Held,* the capacity of an adopted child to inherit is established by statute

revised. In each of these early decisions it was held that the adopted child could not inherit. The court was compelled to reach such a result, however, because of the express wording of the then adoption statute which very definitely provided that the adopted child could inherit only if the adoptive parent died *intestate.*

The North Carolina adoption statute was rewritten in 1941,[9] and this revised statute[10] did not contain the provision of the prior acts that the adoptee would inherit only if the adoptive parent died intestate. The General Assembly in 1947 added new provisions to the laws of descent[11] and distribution[12] which were to have taken effect with the new adoption act of that year.[13] These provisions were designed to spell out specifically the details of the adopted child's inheritance rights.[14]

Under present North Carolina statutes our court, if confronted with such a case, should reach a result similar to that reached by the Georgia court. The will would not be revoked, however, but only set aside to allow the child to receive his intestate share of the estate.[15] This fact

which obviously looks to an intestacy and has no reference to cases in which property is disposed of by will.

[8] N. C. PUB. LAWS c. 155, §3 (1872-73): "Such order [order of court granting letters of adoption], when made, shall have the effect forthwith to establish the relations of parent and child between the petitioner and the child or children during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the actual relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to do, if such child had been the actual child of the person adopting it: *Provided,* such child shall not so inherit, and be so entitled to personal estate if the petitioner specially set forth in his petition such to be his desire and intentions." This statute with but few slight changes remained in force until 1941.

[9] See Wilson v. Anderson, 232 N. C. 212, 59 S. E. 2d 836 (1950) and Fairley, *Inheritance Rights Consequent to Adoptions,* 29 N. C. L. REV. 227 (1951) for excellent discussion of the history of the North Carolina adoption statute and its interpretation by the court.

[10] N. C. PUB. LAWS c. 281, §4 (1941).

[11] N. C. GEN. STAT. §29-1(14) (1950): "An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents."

[12] N. C. GEN. STAT. §28-149(10) (1950): "An adopted child shall be entitled by succession, inheritance, or distribution of personal property, including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted parent by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents."

[13] The adoption statute was revised completely in the same session of the Legislature, but because of the failure to provide an enacting clause, the adoption act of 1947 was held void and the act of 1941 continued in effect. See *In re* Advisory Opinion, 227 N. C. 708, 43 S. E. 2d 73 (1947), and N. C. PUB. LAWS c. 300 (1947).

[14] N. C. GEN. STAT. §48-23 (1950): "The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution." This statute is largely a reenactment of the void act of 1947. See note 13 *supra.*

[15] N. C. GEN. STAT. §31-8 (1950): "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." The subse-

should make the reaching of such a result easier for our court than it was for the Georgia court. There also seems to be a better case for such a result under present North Carolina statutes than there is under the Georgia statutes. Our G. S. 31-45[16] specifically gives the after-born child what may be described as "intestacy rights" in that it is provided that such child shall inherit as if the parent had died intestate. Then under G. S. 28-149(10) and G. S. 29-1(14), "intestacy rights" are given to the adopted child, in that such child is entitled by succession or inheritance to any real or personal property by, through and from its adoptive parents as if it were the natural, legitimate child of the adoptive parents. There are no "intestacy rights" expressly given to after-born children under the Georgia after-born statute.[17] However, such rights seem unquestionably to be impliedly granted by the provision that the "will shall be revoked." And while the Georgia adoption statute[18] gives "intestacy rights" to the adopted child in that he is to inherit as a natural child under the laws of descent and distribution in the absence of a will, this leaves it rather indefinite as to what he is to take in case there is a will.

The North Carolina adoption acts since 1941 show clearly a legislative purpose to place the adopted child in the same position as the natural born child.[19] The omission of the provision found in former adoption statutes that adopted children shall inherit only if the adoptive parent dies intestate is a strong indication that the Legislature intended that the adopted child should be considered in all respects as a natural born child.[20] This design is further evidenced by the express legislative declaration that the adoption act should be liberally construed in favor of the child.[21]

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quent birth of issue or adoption of a child does not revoke a will as does a subsequent marriage under G. S. 31-6. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306 (1927). While after-born children not provided for in their deceased parent's will may claim by inheritance their part of the estate under G. S. 31-45, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796 (1926).

[16] N. C. GEN. STAT. §31-45 (1950): "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in G. S. 28-153 to 28-158."

[17] GA. CODE ANN. §113-408 (1933). See note 3 *supra*.

[18] GA. CODE ANN. §74-414 (1949). See note 2 *supra*.

[19] See notes 10-14 *supra*.

[20] Eliminating the provision that an adopted child can inherit only if the adoptive parent dies intestate removes the basis upon which the court in the past has maintained its holding that an adopted child cannot upset a will. Sorrell v. Sorrell and King v. Davis, note 7 *supra*, are thus not now controlling precedents, for their results were founded directly on the express provision of an adoption statute which is no longer in effect.

[21] N. C. GEN. STAT. §48-1(3) (1950): "When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed."

It is by no means certain, however, that the North Carolina court would reach the result advocated. As the right of inheritance from adoption is in derogation of the common law, the court has held that adoption statutes are to be strictly construed so as not to enlarge or confer any rights not clearly given.[22] It cannot be denied that a strict and literal reading of G. S. 31-45 does not make an after-adopted child an after-born child. But it must be remembered that a strict and literal reading of our adoption act is expressly condemned by that act itself.[23]

A question pertinent to the matter under consideration, and not raised in the Georgia case, is: what adoption law shall be controlling, that in effect on the date of adoption or that in effect at the date of the death of the adoptive parent? In the recent case of *Wilson v. Anderson*,[24] the court stated that decisions of the Supreme Court of North Carolina are to the effect that the law in force at the time of adoption governs the right of the child to inherit. The decisions cited by the court to uphold this statement are *Grimes v. Grimes*,[25] and *Phillips v. Phillips*,[26] and neither is authority for such a holding.[27] The statement of the court that an inspection of the various adoption acts reveals plainly a legislative intent that each should be prospective in effect is

[22] *In re* Holder, 218 N. C. 136, 10 S. E. 2d 620 (1940); Ward v. Howard, 217 N. C. 201, 7 S. E. 2d 625 (1940); Grimes v. Grimes, 207 N. C. 778, 178 S. E. 573 (1935); Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19 (1915).

[23] See note 21 *supra*. It is obvious that the after-born statute as now written is leading toward a lawsuit. It is proposed, therefore, that the Legislature amend G. S. 31-45 to expressly include adopted children within its provisions. See SECOND REPORT OF THE COMMISSION ON THE REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES 87 (1939).

[24] 232 N. C. 212, 59 S. E. 2d 836 (1950). P, adopted child of deceased brother of intestate, seeks to inherit through her deceased adoptive father. P was adopted in 1919; intestate died in 1949. *Held*, P is not entitled to inherit even though the brother of her deceased adoptive father died after the effective date of G. S. 28-149(10) and G. S. 29-1(14), the amendments to the statutes of descent and distribution.

[25] 207 N. C. 778, 178 S. E. 573 (1935).

[26] 227 N. C. 438, 42 S. E. 2d 604 (1947).

[27] The question of what law governed was not even at issue in the *Grimes* case. The issue there was whether a child could inherit through its adoptive parent under the statute which was in force from 1873 until 1941. The case is in reality authority for a holding contra to the statement made by the court in *Wilson v. Anderson*. The child was adopted in 1924 when the adoption act of 1919 was in effect; and in determining the rights of the child, the court based its decision upon the act of 1933, the act in force at the time of the death of the intestate from whom the child claimed. The act of 1919 had been repealed and rewritten in 1933. It must be admitted that each law was virtually the same; but, be that as it may, the child was adopted under the provisions of the act of 1919 and his rights were determined under the act of 1933.

The decision in the *Phillips* case was based upon the express provision of the 1941 adoption act. The child had been adopted in 1924, and in this action sought to take through her deceased adoptive father. The court did not state that the controlling law was that in effect at the date of adoption (although the decision did have that result) but simply held that the adopted child could not take advantage of the 1941 act because of its express provision that it applied only to adoptions made after March 15, 1941. The present adoption act does not have such a *prospective* provision.

certainly open to argument. The court apparently arrives at such a conclusion from the provision of G. S. 48-34.[28] Only in the adoption act of 1941[29] is there any express legislative intention, and it is to be noted that this act was made largely retroactive.[30] Certainly, allowing the adopted child to take the benefits of a later act would not interfere with vested rights or judgments already entered.[31]

It is to be particularly noted that the adopted child in the original hearing of *Wilson v. Anderson* was not seeking to take as of the date of the death of her adoptive father but as of the date of the death of the intestate brother of her adoptive father.[32] The contention that the controlling law should be that in effect at the date of death of the adoptive parent was first brought up in a petition to rehear *Wilson v. Anderson,* and in a short opinion denying a rehearing, the court made statements which are susceptible of the interpretation that the applicable law is that in effect at the date of the adoptive parent's death.[33]

Ordinarily the disposition of an intestate's property is governed by the statutes in force at the time of his death.[34] The majority view is

[28] N. C. GEN. STAT. §48-34 (1950): "All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law. . . ." This provision ran through all the adoption acts and is simply a statement of respect by the Legislature for all prior adoption proceedings. There is no indication from this that it was intended that benefits granted in later acts should not apply to all adoptions. The only intent evident seems to be that no provision of the new act is to be construed so as to invalidate existing adoptions. It is rather difficult to imagine how allowing all adopted children to take advantage of the new provisions of inheritance could in any way affect the validity of a previous adoption. It seems that this is a rather weak foundation for the statement by the court that an inspection of the adoption statutes, "reveals plainly a legislative intent that each shall have prospective effect."

[29] See note 10 *supra.* [30] N. C. PUB. LAWS c. 281, §8 (1941).

[31] As a general rule, rights of inheritance are determined by those laws in effect upon the date of death of the owner intestate. Before his death, no one can have any claim as an heir to his property. See Sorenson v. Rasmussen, 114 Minn. 324, 328, 131 N. W. 325 (1911), where a statute which gave increased rights of inheritance to adopted children was held to apply to all adopted children, whether adopted before or after the passage of such statute. It was held that this would not make the act retrospective. The court stated at page 328 of the opinion: "This statute does not give to past acts a new effect upon mutual rights or liabilities. Nor does it change or affect existing rights. Rights by inheritance in an estate do not accrue until the death of the owner intestate."

[32] See note 24 *supra.* According to the great weight of authority, the right of an adopted child to inherit through an adoptive parent from relatives of such parent is to be determined by the law in force at the time of the death of the person from whom inheritance is claimed. Brooks Bank & Trust Co. v. Rorabacher, 118 Conn. 202, 171 Atl. 655 (1934); *In re* Hewett's Estate, 153 Fla. 137, 13 So. 2d 904 (1943); Kolb v. Ruhl's Adm'r, 303 Ky. 604, 198 S. W. 2d 326 (1946); Appeal of Latham, 124 Me. 120, 126 Atl. 626 (1924); Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325 (1911); Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906); Eck v. Eck, 145 S. W. 2d 231 (Tex. Civ. App. 1940).

[33] Wilson v. Anderson, 232 N. C. 521, 61 S. E. 2d 447 (1950) (Child adopted in 1919. Adoptive parent died in 1943. *Held,* whatever rights of inheritance child acquired by adoption became vested upon the death of her adoptive parent, and the law at that time applied only to adoptions made after March 15, 1941).

[34] Wilson v. Anderson, 232 N. C. 212, 220, 59 S. E. 2d 836, 843 (1950).

that the law in force at the time of the adoptive parent's death determines the right of an adopted child to inherit from his adoptive parent.[35] With this generally accepted rule, together with the legislative intent which may be inferred by the failure to include an express provision making the act of 1949 prospective only,[36] it is submitted that the court should consider the law in effect at the time of the death of the adoptive parent as controlling.[37]

HARRY E. FAGGART, JR.

Conflict of Laws—Custody Awards of Minor Children—Jurisdictional and Full Faith and Credit Requirements

Where a decree awarding custody of a minor child is made in a state court, and a subsequent modification of that decree is sought in the courts of another state, two difficult questions are presented to the second court before it may decide the case on its merits: Is there jurisdiction to make the custody award, and if so, must full faith and credit be accorded the decree made by the sister state?

These problems were raised by two recent cases decided by the North Carolina Supreme Court. In *Sadler v. Sadler*,[1] husband and wife, residents of North Carolina, agreed prior to an extra-legal separation that neither would take the two minor children out of the state without notice to the other. The wife took the children to Georgia in breach of this agreement, and resided there with them. The husband sued out a writ of habeas corpus in a Georgia court, seeking custody of the children. On return of the writ, custody was awarded to the wife. Following this, the husband brought an action for divorce and for custody of the children[2] in the North Carolina Superior Court. The wife answered, requesting alimony and support for the children. The Supreme Court reversed the lower court's award of custody to the husband, holding that the North Carolina court did not have jurisdiction to render the decree and that the Georgia decree was entitled to full faith and credit.

Shortly after the decision in the *Sadler* case, another facet of this

[35] See Note, 18 A. L. R. 2d 960, 962. But see Blodgett v. Stowell, 189 Mass. 142, 75 N. E. 138 (1905), where it is held that the effect of the adoption is determined by the law in force at the time of the adoption.

[36] The adoption act of 1949 did not contain a provision similar to that found in the 1941 act that its provisions regarding inheritance applied only to subsequent adoptions. See note 30 *supra*.

[37] See Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N. C. L. REV. 227 (1951) who takes the contrary view in interpretation of the present North Carolina statutes. Of course, if the adoptive parent died between 1941 and 1949, then the provisions of N. C. PUB. LAWS c. 281, §8 (1941), note 30 *supra*, would be controlling. See notes 26 and 33 *supra*.

[1] 234 N. C. 49, 65 S. E. 2d 345 (1951).

[2] N. C. GEN. STAT. §50-7 (1950).

problem was presented. In *Gafford v. Phelps*,[3] the husband, wife and minor child were residents of North Carolina. Following an extra-legal separation, the wife went to her native state of Alabama, leaving the child with the husband in North Carolina. An agreement was entered into between them whereby each parent was to have custody of the child for a part of each year. This agreement was subsequently made a part of an absolute decree of divorce rendered by an Alabama court. This divorce action was brought by the wife, and the husband was a party, but the child was not in Alabama at the time of the decree nor for three years thereafter. In conformance with the decree, the child went to Alabama for one visit. However, the father refused to allow the mother to take the child when the time arrived for the second visit. The mother brought an action in the North Carolina Superior Court for custody of the child.[4] The Supreme Court, in affirming an award of custody to the father, held that the Alabama decree was not entitled to full faith and credit. The basis for the court's reasoning was that the child was not in Alabama at the time of the decree.

The question of jurisdiction of the North Carolina court was not presented in the *Gafford* case, as all of the parties were within the jurisdiction of the court, and the father and child were domiciled within the state. The jurisdiction of the Alabama court was in issue, however, as the child was not before the court at the time of the decree. Conversely, in the *Sadler* case, the jurisdiction of the Georgia court was conceded, as all of the parties were before that court when the habeas corpus writ was returned and the mother and child were domiciled in Georgia,[5] whereas the jurisdiction of the North Carolina Court was in issue because the children were not before that court at the time of the hearing.

The question of jurisdiction in custody cases has been the source of much confusion in the state courts and the United States Supreme Court has done little to clear up the problem.[6] The majority of states

[3] 235 N. C. 218, — S. E. 2d —— (1952).

[4] N. C. GEN. STAT. §50-13 (1950).

[5] A married woman may acquire a domicile separate from her husband. Williamson v. Osenton, 232 U. S. 619 (1913); Haddock v. Haddock, 201 U. S. 562 (1905).

Whether the domicile of the child is that of the father or mother is often a difficult problem to decide. The North Carolina Supreme Court has stated that, "Ordinarily the domicile of an unemancipated child, during its minority, follows that of the father. However, where parents are separated by judicial decree or divorce and the custody of a child is awarded to the mother, or where a father abandons the mother and child, the child's domicile follows that of the mother. And it should be kept in mind that a child may reside in one place and its domicile may be in another." Allman v. Register, 233 N. C. 531, 534, 64 S. E. 2d 861, 862 (1951). This problem was not raised by the facts of the *Gafford* case, but if this statement be applied to the facts of the *Sadler* case there is some doubt if the domicile of the children ever ceased to be that of the father. Quaere?

[6] In Halvey v. Halvey, 330 U. S. 610 (1947), the Supreme Court stated that full faith and credit did not apply if the awarding state had no jurisdiction, but it did not determine the minimum requirements for jurisdiction. *Cf.* Williams v. Wil-

hold that domicile of the child in the state is necessary to give the court jurisdiction of the cause.[7] North Carolina,[8] Georgia[9] and Alabama[10] are in this group. The rationale of this rule is that custody is a matter of status, and a person's status may be changed only at his domicile.[11] However, custody is not a true change in status, although the authorities refer to it as such for lack of a more accurate name. The relationship between custodian and child is more physical than legal; custody awards are subject to modification, whereas a true change in status effects a permanent result.[12] However, an award of custody does resemble a declaration of status in that it is not terminable at the will of the parties.

A few courts require only the residence of the child if one parent is domiciled in the state;[13] others base jurisdiction on mere residence without a finding of domicile.[14] An analysis of these decisions is made difficult by the frequent interchange of the words "residence" and "domicile" by the courts.[15]

If the state exercises its police power in awarding custody, mere physical presence of the child in the court is held to be sufficient. Thus, when an infant is found in the state neglected or without custodian or

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liams, 325 U. S. 226 (1945) where domicile of at least one party to the divorce and other conformance to due process are necessary before the decree will be entitled to full faith and credit in a sister state. See Mr. Justice Stone, dissenting in Yarborough v. Yarborough, 290 U. S. 202, 214 (1933).

[7] Wear v. Wear, 130 Kan. 205 285 Pac. 606 (1930); Callahan v. Callahan, 296 Ky. 444, 177 S. W. 2d 565 (1944); II BEALE, THE CONFLICT OF LAWS §144.3 (1945); *cf.* Burrowes v. Burrowes, 210 N. C. 788, 188 S. E. 648 (1947) (child in out of state school).

[8] Gafford v. Phelps, 235 N. C. 218, — S. E. 2d —— (1952); Sadler v. Sadler, 234 N. C. 49, 65 S. E. 2d 345 (1951); Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798 (1948); *In re* Biggers, 228 N. C. 743, 47 S. E. 2d 32 (1948); *cf.* Burrowes v. Burrowes, 210 N. C. 788, 188 S. E. 648 (1947).

[9] Hicks v. Hicks, 193 Ga. 446, 18 S. E. 2d 754 (1942).

[10] In Lynn v. Wright, 34 Ala. App. Div. 492, 496, 42 So. 2d 484 (1949), on facts almost identical with those in the *Gafford* case, the Alabama Court of Appeals, quoting from II BEALE, THE CONFLICT OF LAWS §144.3 (1945), expressly held that physical presence of the child was necessary to the jurisdiction of a court rendering a custody award. This decision was reversed and remanded to the court of appeals on another ground by the Alabama Supreme Court in 252 Ala. 106, 42 So. 2d 489 (1949). Following this, certiorari was sought of the Alabama Supreme Court on the jurisdictional question herein discussed. In denying certiorari the court stated that the ruling upon jurisdiction "may be sound," but even if not, the change in circumstances would justify a new award of custody. 252 Ala. 606, 42 So. 2d 490 (1949). *Cf.* Long v. Long, 239 Ala. 156, 194 So. 190 (1940).

[11] RESTATEMENT, CONFLICT OF LAWS §§54, 117, 119, 145, 146 (1934); Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L. Q. 1 (1921).

[12] Note, 2 UTAH L. R. 70 (1951).

[13] Com. *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 Atl. 524 (1930), 78 U. OF PA. L. REV. 1023; *cf.* Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860 (1912) *semble.*

[14] De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896); Durfee v. Durfee, 293 Mass. 472, 200 N. E. 395 (1930); Sheehy v. Sheehy, 88 N. H. 223, 186 Atl. 1 (1936); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 (1925); Note, 47 MICH L. REV. 970 (1933).

[15] See De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896) (dissenting opinion); Note, 2 ARK. L. REV. 78 (1949).

guardian, the state has sufficient interest to award temporary custody.[16]

A substantial number of courts hold that personal jurisdiction over both parents in a divorce suit is sufficient to give the court jurisdiction to award custody of the children.[17] This is true even if the children are not domiciled in the state nor before the court. A theory of parental right forms the basis of these decisions rather than the theory of status.[18] As the parents are within the court's jurisdiction, the children are also said to be before the court. This view has the practical advantage of avoiding a subsequent suit to determine custody. As the award is based on the best interests of the child, the most convenient time to award custody would seem to be when the parties, whose relative qualities are to be considered, are before the court.

If the court finds that it has jurisdiction to award custody, the second question presented is, would a decree modifying a previous award made by a sister state violate the full faith and credit clause of the Constitution? The Supreme Court has held that full faith and credit is required only to the extent of finality accorded the decree in the awarding state.[19] A majority of states follow the rule that a custody award is not binding in that state if subsequent events have altered the original circumstances.[20] The award is predicated on the best interest of the child, consequently a subsequent change in circumstances may justify a modification of the original decree.[21] Thus, there is no violation of the full faith and credit requirement when a court of one state, on the basis of altered conditions, modifies the decree of another state which follows this majority rule. A few courts have modified decrees rendered by courts of other states without a showing of a change in circumstances,[22] the theory being that the domicile has sufficient interest in the welfare

[16] Hartman v. Henry, 280 Mo. 478, 217 S. W. 987 (1920). See Note, 81 U. OF PA. L. REV. 970 (1933).

[17] Stephens v. Stephens, 53 Idaho 427, 24 P. 2d 52 (1933); Wilson v. Wilson, 66 Nev. 405, 212 P. 2d 1066 (1949); Payton v. Payton, 26 N. M. 618, 225 Pac. 576 (1924); *cf.* Crummer v. Crummer, 283 Ill. App. 220 (1935).

[18] Fagan v. Fagan, 131 Conn. 688, 42 A. 2d 41 (1945); *See,* May v. May, 233 App. Div. 519, 253 N. Y. Supp. 606 (1st Dept. 1931).

[19] U. S. Const. Art. IV, §1; 28 U. S. C. §687; Halvey v. Halvey, 330 U. S. 610 (1947); 15 BROOKLYN L. REV. 290 (1949). See Thompson v. Whitman, 18 Wall. 457 (U. S. 1874) where jurisdiction of a state court rendering a judgment was inquired into in a subsequent action in another state on the judgment.

[20] Com. *ex. rel.* Rogers v. Daven, 298 Pa. 416, 148 Atl. 524 (1930); RESTATEMENT, CONFLICT OF LAWS §147 (1934); GOODRICH, THE CONFLICT OF LAWS §136 (3d ed. 1949).

[21] These courts have a very liberal interpretation of what constitutes a substantial change. See Stansbury, *Custody and Maintainance Across State Lines,* 10 LAW AND CONTEMP. PROB. 819 (1944). In Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910) the court said on this point: ". . . it follows that the recognition extra-territorially which custody orders will receive or can command is liable to be more theoretical than of great practical importance."

[22] *In re* Bort, 25 Kan. 308, 37 Am. Rep. 255 (1881); *In re* Alderman, 157 N. C. 507, 73 S. E. 126 (1911); Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. OF CHI. L. REV. 42 (1940).

of the child to override any former adjudication of the question in a sister state. If the court has personal jurisdiction over the child, his interests are deemed to be paramount to any claims between the parents.[23] Similarly, a few courts have made a decision on the facts before them, assuming without actually determining, that the facts in the prior case were different.[24]

In some states an award granted in a habeas corpus proceeding is not binding upon a court of that state having jurisdiction of a subsequent divorce suit.[25] Both the Georgia and the North Carolina courts follow this rule, basing their conclusion on the fact that statutes expressly confer jurisdiction to determine custody in divorce proceedings. Habeas corpus is a proper remedy to determine custody only as between husband and wife, therefore the writ is improper when custody is sought in a subsequent divorce suit.[26]

In the *Sadler* case the court accorded full faith and credit to the Georgia decree, and stated that it was without jurisdiction to make a valid order affecting custody as long as the children were in Georgia. It would seem that no question of full faith and credit was presented, for if the court was without jurisdiction to make any award, full faith and credit is immaterial. If the court had jurisdiction, then full faith and credit is due only to the extent the award was valid in Georgia. As the award would not be binding in Georgia in a subsequent divore proceeding,[27] the North Carolina court was not required to accord full faith and credit. The court's decision that it lacked jurisdiction because the children were not domiciled in North Carolina is in accord with prior North Carolina cases.[28] However, the more convenient procedure would seem to be to take jurisdiction and decide the question while both parents are before the court.[29] Thus, had the court followed this rule as to jurisdiction, it could have decided the issue of custody of the children without violating the full faith and credit clause.

On the other hand, the *Gafford* decision was based upon the lack of jurisdiction of the Alabama court to render a decree of custody as the child was not before that court. Since Alabama follows the majority

[23] The welfare of the child seems to be paramount to any consideration of full faith and credit due a foreign decree. These courts have simply said full faith and credit did not apply in these cases, however such holdings are rare. See Stumberg, *supra* note 22.

[24] *Ex parte* Erving, 109 N. J. Eq. 294, 157 Atl. 161 (Ch. 1931), 32 COL. L. REV. 385 (1932).

[25] Langon v. Langon, 150 F. 2d 979 (D. C. Cir. 1945); Zachry v. Zachry, 40 Ga. 479, 79 S. E. 115; *In re* King, 66 Kan. 695, 72 Pac. 263 (1903); Comack v. Marshall, 211 Ill. 519, 71 N. E. 1077 (1904); *Ex parte* Fuller, 58 Tex. Civ. App. 217, 123 S. W. 204 (1909); Note, 34 GEO. L. J. 105 (1945).

[26] N. C. GEN. STAT. §50-13 (1950); Robbins v. Robbins, 229 N. C. 430, 50 S. E. 2d 183 (1948); GA. CODE §§30-127, 37-122 (1945), Ponder v. Ponder, 198 Ga. 781, 32 S. E. 2d 801 (1945).

[27] See note 26 *supra*.

[28] See note 8 *supra*.

[29] See notes 17 and 18 *supra*.

rule in requiring domicile of the child as a prerequisite to jurisdiction, the decision does no violence to the full faith and credit requirement.[30] Even if Alabama followed the rule suggested above, not requiring the domicile of the child if both parents are before the court, the result in the *Gafford* case probably would have been the same. The facts indicated sufficient change in condition to have warranted a new custody award.

Thus, in each of these cases the court consistently applies its rule that presence of the child is necessary to jurisdiction for an award of custody, and indicated the limits of the full faith and credit requirement in such cases.

O. E. Ross, III.

Constitutional Law—Use of Stomach Pump—Denial of Due Process

"Evidence forcibly extracted from the stomach of a prisoner may not be used validly to convict him of a crime, the Supreme Court ruled today. Such procedure, it held, violates the due process clause of the Fourteenth Amendment."[1] The American public was thus informed by the press of the decision in the case of *Rochin v. People of California.*[2] Several state law enforcement officers, without a search warrant, forced their way into the room in which the defendant had been sleeping, acting on information that defendant had narcotics in his possession. Upon their entry defendant swallowed two capsules which had been laying on a night stand. Following a struggle in which the officers were unable to force him to expel the evidence they handcuffed the defendant, took him to a hospital and after strapping him to an operating table, forced a stomach pump down his throat and retrieved the capsules. On this evidence defendant was convicted and sentenced, and the California Supreme Court denied certiorari. The United States Supreme Court unanimously reversed the conviction, however, without unanimity of opinion as to the reasons for the reversal. The majority held that through their actions the state officers had denied defendant due process of law. Justices Black and Douglas, concurring in the reversal, felt that this was too nebulous a standard, and that the specific point involved was that the defendant had been forced to give testimony against himself, thus denying him the protection of the Fifth Amendment.[3]

[30] See note 10 *supra.*

However, the court did not look to the Alabama cases to determine the jurisdiction of the Alabama court. Gafford v. Phelps, 235 N. C. 218, 222, — S. E. 2d —— (1952). This does not seem to conform with accepted principles of conflict of laws. RESTATEMENT, CONFLICT OF LAWS §§7, 8 (1934).

[1] N. Y. Times, Jan. 3, 1952, §1, p. 1, col. 6.

"The Supreme Court struck out today at the forcible use of a stomach pump to get narcotics evidence, denouncing such police methods as akin to the old-time rack and screw." Raleigh (N. C.) News and Observer, Jan. 3, 1952, §1, p. 1, col. 6.

See Time, Jan. 14, 1952, p. 22, col. 1, story entitled, "Freedom of the Stomach."

[2] 72 Sup. Ct. 205 (1952).

[3] Rochin v. People of California, 72 Sup. Ct. 205, 211 (1952).

By common law rules evidence illegally obtained was admissible so long as it was relevant and reliable, and defendant's only remedy was against the officer for the illegal seizure.[4] In 1914, *Weeks v. United States*[5] began a line of cases which has firmly established the federal rule that illegally secured evidence will be excluded from trials in the federal courts.[6] However, the majority of state courts continue to adhere to the common law rule.[7] Three cases involving the use of stomach pumps to procure evidence were reported prior to the *Rochin* case and each followed a separate line of reasoning. In *United States v. Willis*[8] the stomach pump treatment was administered at the instance of federal officers and the federal court held that this was such a violation of the individual's person as to make it an unreasonable search and seizure. In keeping with the federal exclusion rule, this automatically made the evidence inadmissible. In another federal court case, the use of a stomach pump by law enforcement officers was sternly condemned: "If the stomach pump can be justified, then the opening of one's person by the the surgeon's knife can be justified."[9] Three years prior to the *Willis* case the California court decided the case of *People v. One 1941 Mercury Sedan*,[10] again involving the use of a stomach pump in bringing to

[4] 8 WIGMORE, EVIDENCE, §2183 (3d ed. 1940).

[5] 232 U. S. 383 (1914). The common law rule was followed in both the state and federal courts for nearly one hundred years, until the case of Boyd v. United States, 116 U. S. 616 (1885) held that compulsory production of books and papers is unreasonable search and seizure, and that such evidence will be excluded. There was a brief relapse to the common law rule in Adams v. New York, 192 U. S. 585 (1904), but the Supreme Court revived the *Boyd* rule in *Weeks v. United States.* A limitation on the rule was therein made, to the effect that the illegal evidence question must be raised by motion before the trial, but even this was relaxed in Agnello v. United States, 269 U. S. 20 (1925), where it was held that if the defendant had no reason to know that there had been a seizure, a motion before the trial was not necessary. Since 1914 the "federal exclusion rule" has been consistently adhered to in the federal courts, but its limits have been strictly drawn to include only evidence secured by federal officers. For detailed history and criticism of the rule see 8 WIGMORE, EVIDENCE, §2184 (3d ed. 1940).

[6] Note, 35 GEO. L. J. 92 (1946).

[7] *E.g.*, State v. Frye, 58 Ariz. 409, 120 P. 2d 793 (1942); People v. Gonzales, 20 Cal. 2d 165, 124 P. 2d 44 (1942); People v. Richter's Jewelers Inc., 291 N. Y. 161, 51 N. E. 2d 690 (1943); State v. Vanhoy, 230 N. C. 162, 52 S. E. 2d 278 (1950). *But see*, N. C. GEN. STAT. §15-27 (Supp. 1951). For a complete line-up of authority, see 8 WIGMORE, EVIDENCE, §2183 (3d ed. 1940) and notes thereto.

[8] 85 F. Supp. 754 (S. D. Cal. 1949).

[9] *In re* Guzzardi, 84 F. Supp. 294 (N. D. Tex. 1949). However, in this case the stomach of the accused had been pumped by state officers and federal officers were given the evidence. Although saying that this was an unreasonable search and seizure and strongly condemning such practices, the court strictly construed the federal exclusion rule and admitted the evidence since it was gathered by state officers with no federal participation. This holding is in accord with Thompson v. United States, 22 F. 2d 134 (4th Cir. 1927); and Lotto v. United States, 157 F. 2d 623, 625 (8th Cir. 1946) where the court said, "The United States may avail itself of evidence improperly seized by state officers operating entirely on their own account."

[10] 74 Cal. App. 2d 199, 168 P. 2d 443 (1946). In People of California v. Rochin, 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3 (1950) the court affirmed the conviction but lashed out at the officers who had invaded the defendant's privacy and illegally

light evidence of illegally possessed narcotics. Conforming to the majority state rule the court held that the evidence was physical, relevant, and would be admitted without inquiry into the legality of its acquisition. In so holding the court cited with approval *Ash v. State of Texas*[11] where still another rationale was used to admit the evidence. In this case defendant swallowed two diamond rings in the presence of officers who, after locating them with a fluoroscope, forcibly administered an enema and retrieved the rings which were used in evidence to sustain a conviction for possession of stolen property. It was held that inasmuch as defendant had swallowed the stolen property in the presence of the officers, they had a right to search him without warrant. The court said that the method used was the only reasonable means of retrieving the property, and therefore the search and seizure was valid.

From a comparison of these cases involving the use of a stomach pump, all decided prior to the United States Supreme Court decision in the *Rochin* case, the line is still clearly drawn between the state and federal views as to the admissibility of the evidence.[12] The grounds on which the cases were decided, however, are significant. In federal court the evidence was eliminated on the ground of unreasonable search and seizure, and in the states which admitted it, this was the only point discussed. Contrary to the original concept of unreasonable search[13] it is now settled that forcibly taking evidence from the body of the accused violates his rights under the Fourth Amendment.[14]

Perhaps the majority in the *Rochin* case ignored the search and seizure angle because of a reluctance to extend the federal exclusion to the state courts, thereby overruling previous decisions.[15] In 1949 the Court said that the privilege against unreasonable search and seizure applied to protect citizens from state action, but it added that this protection did not force the states to apply the rule of exclusion.[16] This rule

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procured the convicting evidence. Although stating the record revealed "a shocking series of violations of constitutional rights" the court nevertheless followed the common law rule and admitted the evidence.

[11] 138 Tex. Cr. R. 420, 141 S. W. 2d 341 (1940).

[12] A detailed analysis of the admissibility rule in the state and federal courts is not within the scope of this note. However, for excellent discussion on the conflicting views *compare* Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 ILL. L. REV. 303 (1925) and Note, 35 MINN. L. REV. 457 (1951), *with* Comment, 45 MICH. L. REV. 605 (1947) and Note, 25 TULANE L. REV. 410 (1951).

[13] For historical background of the application of the Fourth Amendment, see Harno, *supra* note 12 at 303-307; Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures,* 34 W. VA. L. Q. 137 (1928).

[14] United States v. Willis, 85 F. Supp. 754 (S. D. Cal. 1949). The Fourth Amendment "shows the sacredness of the person. The well-informed practitioner of the law knows that one's home is one's castle. . . . It is rather difficult to reason one into the conclusion that the sacred person may be so violated, over the protest of that person . . ." *In re* Guzzardi, 84 F. Supp. 294 (N. D. Tex. 1949).

[15] See, Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950).

[16] Wolf v. Colorado, 338 U. S. 25 (1949).

is not a constitutional guaranty, but a mere rule of evidence which the Court was unwilling to extend to the states.[17] If it had been decided that Rochin's rights under the Fourth Amendment had been violated the decision would have given a more predictable standard to law enforcement officers, but the Court was apparently unwilling to reverse its position.[18]

Another alternative ground was that argued for in the concurring opinions by Justices Black and Douglas.[19] This was, that in forcing the incriminating evidence from defendant's stomach the officers had forced him to testify against himself in violation of his rights under the Fifth Amendment. This is the view of a minority of state courts in the closely analogous situation of blood tests (for determination of intoxication) taken against the will of the accused.[20] However, it has been decided by the United States Supreme Court that the privilege against self-incrimination extends only to the situation where the evidence forced from the accused is oral or testimonial.[21] This line of reasoning has been adhered to in the majority of state courts and in the lower federal courts.[22] Also, in order to base its opinion in the *Rochin* case on violation of the privilege against self-incrimination, the Court would have had to clear the hurdle of its previous holding that the Fifth Amendment is not made effective by the Fourteenth as to state action.[23]

With these two alternatives[24] unacceptable, the majority in the *Rochin* case, speaking through Mr. Justice Frankfurter, settled the issue on the broad but vague principles of the due process clause of the Fourteenth Amendment. The necessity of protecting the innocent from violations

[17] For criticism of holding in *Wolf* case see Note, 35 CORN. L. Q. 625 (1950).

[18] Note, 18 GEO. WASH. L. REV. 262 (1950).

[19] Rochin v. People of California, 72 Sup. Ct. 205, 211 (1952).

[20] *E.g.*, People v. Dennis, 131 Misc. 62, 226 N. Y. Supp. 689 (Sup. Ct. 1928); Apodaca v. State, 140 Tex. Cr. R. 593, 146 S. W. 2d 381 (1940).

[21] Holmes, J., in Holt v. United States, 218 U. S. 245, 252 (1910): ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him. . . ." (Italics added.) See Note, 22 So. CAL. L. REV. 483 (1949).

[22] State of Oregon v. Cram, 176 Ore. 577, 160 P. 2d 283 (1945). See Comment, 1 VAND. L. REV. 243 (1948).

It would seem to be an unrealistic and strained interpretation to bring the stomach pumping situation within the "testimonial" classification for purposes of the Fifth Amendment. However, it appears that the concurring justices would be willing to overrule the *Holt* case and hold that evidence forcibly taken from the accused does not have to be oral or testimonial in order to violate his rights against self-incrimination.

[23] Adamson v. People of California, 332 U. S. 46 (1947): "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. . . ." From this 5 to 4 decision Justices Douglas and Black of the present Court dissented. See Comment, 33 IOWA L. REV. 666 (1948) and Note, 1 VAND. L. REV. 131 (1947). With the present substantially decreased "liberal" minority, it is believed that the position of the dissent has little chance of becoming the majority rule.

[24] There is another alternative ground on which the decision might have been based, viz., by calling this a coerced confession.

of their persons by law enforcement officers had to be weighed against the inevitable result of allowing a guilty man to escape.[25] The split in authority on the admissibility of such evidence is a recognition of this long-standing judicial dilemma.[26] The Court decided in favor of protecting the individual in a case wherein the officers went far beyond the justifiable bounds of law enforcement activity. Speaking neither of unreasonable search, nor of self-incrimination, the majority declared that the tactics here used were not to be tolerated as they were "methods too close to the rack and screw to permit of constitutional differentiation."[27] The state, through its officers, denied the defendant a fair trial, and the Court stepped in to prevent his punishment under such circumstances.[28]

Here the Court has taken a set of facts, and without applying to them any preconceived definitive test, nevertheless concludes that the conduct violated the Constitution.[29] The precedents in this field are limited, in that particular fact situations are decisive in determining what the phrase "due process of law" entails. It was early recognized that due process was incapable of exact definition.[30] The phrase has acquired meaning only through the process of judicial inclusion and exclusion. Out of this process has come one relatively uniform concept: there are some rights which are so fundamental to liberty and justice that a violation of them involves denial of due process.[31] Since this nebulous criterion is the only limitation upon judicial determination, the Court has consistently felt it necessary to deny that it is resorting to "natural law."[32] Although the standards of due process lack precision and their application depends upon the Court's view of the facts, the judges are called upon to abide by the "community's sense of fair play and decency."[33]

[25] See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Search and Seizure,* 25 COL. L. REV. 11 (1925) at p. 25 *et seq.*

[26] Note, 35 GEO. L. J. 92 (1946).

[27] Rochin v. People of California, 72 Sup. Ct. 205, 210 (1952).

[28] Hughes, J., in Brown v. Mississippi, 297 U. S. 278, 285 (1936): "The state is free to regulate the procedure of its courts . . . unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

[29] Lisenba v. People of California, 314 U. S. 219, 236 (1941): "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence whether true or false. . . . As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. . . ."

[30] Davidson v. New Orleans, 96 U. S. 97 (1877).

[31] For comprehensive listing of these fundamental rights, see Comment, 21 So. CAL. L. REV. 47 (1947) at 57 and notes thereto.

[32] People v. Rochin, 72 Supp. Ct. 205, 209 (1952); Comment, *supra* note 31 at 59-60.

[33] People v. Rochin, *supra* note 32 at 210. In determining what facts offend this sense of fair play, the judges are not left to wander on their own, or draw upon their own feelings and beliefs. They must instead look to the history of prior decisions and to the wisdom of the judges who have gone before. These are the things that form limitations on the Court and keep decisions in the due process field from varying with the whims and idiosyncrasies of the individual judges. See Adamson v. People of State of California, 332 U. S. 46, 67 (1947) (Mr. Justice

Within this line of reasoning and into this pattern of decisions the Court has placed the *Rochin* case. Although lacking the predictability which the minority would like to give to the law of search and seizure,[34] the majority decision would seem to be preferred to one pin-pointed to a specific constitutional guaranty.[35] Its flexibility leaves the way open for the advance of medical science in the field of more accurate crime detection.[36] It appears that a more satisfactory result will be reached since each revolutionary detective device is likely to be tested constitutionally as it is used in securing evidence. Due process, as thus defined, sets an outside limit within which officers may work, but at the same time does not fetter them with power so closely defined as to make it incapable of beneficial use.

Contrary to the impression left by the press in reporting this decision,[37] stomach pumping is not declared to be an unreasonable search and seizure in state courts, nor must such evidence illegally obtained be excluded from state trials. The decision holds only that on the combined facts of this case, viz., the illegal entry into the defendant's room, the assault and battery there, and the further assault, battery, and torture at the hospital, the accused had been denied due process of law as guaranteed by the Fourteenth Amendment. It is believed that out of this and future decisions in similar situations, each of which will be decided on its individual facts, will come a flexible and practicable body of law on the admission of evidence gathered by modern medical devices.

JAMES D. BLOUNT, JR.

Contracts—Statute of Frauds—Recovery of Payments by Vendee

Contrary to most jurisdictions, the North Carolina Supreme Court has consistently carried out the original purpose of the statute of frauds relating to land by refusing to give effect to land contracts which are not in writing or which are not signed by the party charged therewith.[1] This is clearly illustrated by the fact that it is one of only four courts in the United States which does not recognize the part performance exception

Frankfurter concurring). "We ultimately rely, not upon courts of law, but upon the convictions, the habits, and the actions of the community." Curtis, *Due, and Democratic, Process of Law,* 1944 WISC. L. REV. 39 at 52.

[34] To base this decision on the Fifth Amendment would result in "an unequivocal, definite and workable rule of evidence for state and federal courts." People v. Rochin, 72 Sup. Ct. 205, 213 (1952).

[35] Note, 13 DETROIT L. REV. 220 (1950).

[36] See, Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication,* 24 IOWA L. REV. 191 (1939); Note, 36 J. CRIM. L. 132 (1945); Note, 30 N. C. L. REV. 302 (1952).

[37] See note 1 *supra.*

[1] "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some person by him thereto lawfully authorized." N. C. GEN. STAT. §22-2 (1943).

to the statute.[2] While specific performance is denied,[3] recovery for benefits conferred pursuant to oral contracts failing to meet the statutory requirements is allowed in order to prevent unjust enrichment.[4] The legislative intent favoring a strict application of the statute is illustrated by G. S. 22-2,[5] which provides that contracts falling within the statute "shall be void," whereas the original English Statute of Frauds was merely to the effect that "no action shall be brought" on contracts falling within its purview.[6]

A deviation from this strict attitude is found in the recent case of *Rochlin v. West Construction Company,*[7] involving an oral contract under which defendant was to construct a house and convey the house and lot to plaintiff. Pursuant to the agreement the vendee paid $1000 in advance. Upon tender of the deed, a dispute arose as to the amount of the purchase price, and the transaction was never consummated. Vendee sought to recover the money paid and the vendor claimed the right to retain the $1000 as damages for failure of the vendee to perform. The trial court excluded all evidence of the contract, but the supreme court reversed, saying that the evidence should be admitted, and if the terms were as claimed by the vendee then the money was to be recovered, but if as alleged by the vendor then he should retain the $1000.

The decision is in accord with prior North Carolina cases[8] and with the weight of authority[9] in following the general rule that where a vendee has made payments under a contract which fails to meet the requirements of the statute of frauds, he may not recover them if the vendor is willing and able to perform the contract. Despite the statutory provision that a contract for the sale of land is void unless signed by the party to be charged,[10] the North Carolina court has held such a contract in parol

[2] See Note, 101 A. L. R. 944 (1936). "The doctrine of part performance has no place in our jurisprudence and will not dispense with the necessity of a writing." Grantham v. Grantham, 205 N. C. 363, 366, 171 S. E. 331, 333 (1933).

[3] Ballard v. Boyette, 177 N. C. 24, 86 S. E. 175 (1915); Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); Barnes v. Teague, 54 N. C. 278 (1854); Flummer v. Adm'r of Owens, 45 N. C. 254 (1852); Allen v. Chambers, 39 N. C. 125 (1845).

[4] Carter v. Carter, 182 N. C. 186, 108 S. E. 765 (1921); Bullard v. Boyette, 171 N. C. 24, 86 S. E. 175 (1915); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Johnson v. Armfield, 130 N. C. 575, 41 S. E. 705 (1902); North v. Bunn, 128 N. C. 196, 38 S. E. 814 (1901); Vick v. Vick, 126 N. C. 123, 35 S. E. 257 (1900); Wilkie v. Womble, 90 N. C. 254 (1883); Barnes v. Brown, 71 N. C. 508 (1874); Capps v. Holt, 58 N. C. 153 (1859); Murdock v. Anderson, 57 N. C. 77 (1858); Chambers v. Massey, 42 N. C. 286 (1851).

[5] See note 1 *supra.*

[6] Statute of Frauds, 29 Car. 11, c. 3. Practically all American statutes of frauds have followed this form, with only a few states providing that contracts failing to meet the statutory requirements are to be void. 49 AM. JUR. 872 (1943).

[7] 234 N. C. 443, 67 S. E. 2d 464 (1951).

[8] Durham Consol. Land & Improvement Co. v. Guthrie, 116 N. C. 383, 21 S. E. 952 (1895); Syme, Adm'r v. Smith, Adm'r, 92 N. C. 338 (1884); Green v. N. C. R.R., 77 N. C. 95 (1877); Foust v. Shoffner, 62 N. C. 242 (1860).

[9] See Notes, 169 A. L. R. 187 (1947); 1916 D L. R. A. 468.

[10] N. C. GEN. STAT. §22-2 (1943).

to be voidable only, and valid unless repudiated by the party to be charged.[11] Following this construction, the repudiating party who avails himself of the statute is left in the position in which he finds himself at the time of repudiation and can recover no payments made pursuant to the contract.[12] While there is a possible distinction between the case at hand and prior North Carolina cases in point,[13] in that in those cases the terms of the contract were not in dispute, it is obvious that parol evidence of the contract and of benefits conferred because of it must be admitted, or the vendor could end the action on the pleadings by simply denying the contract or pleading a different one.[14] In those jurisdictions which adhere to the minority view and allow a recovery of any benefits conferred upon the other party regardless of who repudiates the contract, the basis for the decisions has been: (1) That the contract is void and consequently neither party may retain benefits received because of it,[15] or (2) that regardless of the wording of the statute, if there can be no specific performance decreed, a recovery may be had so as to place the parties in the status quo.[16]

[11] "The contracts entered into in compliance with this section are not void but voidable merely at the instance of the party to be charged. And when such party takes advantage of the provisions of the statute, he repudiates the contract in its entirety and cannot derive any benefit from it." Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 381, 384, 21 S. E. 952, 953 (1895). McCall v. Textile Industrial Institute, 189 N. C. 775, 128 S. E. 349 (1925).

[12] But this does not prevent an action against the repudiator for benefits conferred upon him. In Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952 (1895), the vendee took possession under a contract failing to meet the requirements of the statute of frauds, and cut timber upon the land. Vendee then refused to perform and abandoned the land. In a suit by the vendee to recover the deposit paid, the court allowed the vendor to retain the amount paid as well as recover damages by way of a counter-claim for the value of the timber cut. The court stated that the contract was admitted and that so long as it existed, plaintiff could not rely on the common counts. *But cf.* Davis v. Lovick, 226 N. C. 252, 37 S. E. 2d 680 (1946), where the owner sought ejectment against a tennant, who pleaded as a defense an oral lease contract to extend for the owner's life. The plaintiff admitted the contract in the reply, but pleaded the statute of frauds. The court held that the parol contract was not a necessary basis for the relief sought, and because it was invalid under the statute of frauds, plaintiff was entitled to the ejectment.

[13] See note 8 *supra.*

[14] The court has admitted parol evidence under similar circumstances. Perry v. Norton, 182 N. C. 585, 109 S. E. 644 (1921); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Love v. Atkinson, 131 N. C. 544, 42 S. E. 966 (1902); Luton v. Badham, 127 N. C. 96, 37 S. E. 143 (1900). The parol evidence may not be introduced in order to establish the contract for the purpose of securing specific performance, but only for the purpose of determining whether the vendee is entitled to recover the amount he has paid under such agreement. Rochlin v. West Construction Co., 234 N. C. 443, 67 S. E. 2d 464 (1951).

[15] Reedy v. Ebsen, 60 S. D. 1, 242 N. W. 592 (1932), where the court stated that all jurisdictions which follow the majority rule have a statute which does not expressly make, or has not been interpreted as making, contracts within its terms void, rather than voidable. Brandeis v. Neustadtl, 13 Wis. 142 (1860), where the court says that the majority rule should prevail where the original English statute is in force, but where the statute declares such contracts void, the minority rule should apply. Merten v. Koester, 199 Wis. 79, 225 N. W. 750 (1929).

[16] Nelson v. Shelby Mfg. & Improv. Co., 96 Ala. 515, 11 So. 695 (1892); Burks

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,[17] 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.[18]

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.[1] 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.[2] When the defendant is not in custody

v. Douglas, 156 Ky. 462, 161 S. W. 225 (1913) (although prior Kentucky cases followed the majority rule); Scott v. Bush, 26 Mich. 418 (1873); Brown v. Pollard, 89 Va. 695, 17 S. E. 6 (1893).

[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.

[1] 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.

[2] Alexander v. Posey, 32 Ala. App. 494, 27 So. 2d 237 (1946); State v. Nichols, 167 Kan. 565, 207 P. 2d 469 (1949); Harding v. State Bd. of Parole, 307 Mass. 217, 29 N. E. 2d 756 (1940); Braxton v. State, 103 Miss. 127, 60 So. 66 (1912); Commonwealth *ex rel.* Lerner v. Smith, 151 Pa. Super. 265, 30 A. 2d 347 (1943) (stating general rule, although controlled by statute adopting the minority view); State *ex rel.* Plumb v. Superior Court, 24 Wash. 2d 510, 166 P. 2d 188 (1946); 15 AM. JUR. 110 (1951). *Contra:* Gorovitz v. Sartain, 1 F. 2d 602 (N. D. Ga. 1924) (The court upheld an Atlanta Penitentiary regulation directing that time commenced when a prisoner was received, citing a Georgia statute directing that good conduct allowances began when a prisoner was received.); Clifford v. Maryland, 30 Md. 575 (1869); *Ex parte* Holden, 31 Okla. Cr. 133, 237 P. 622 (1925).

at the time sentence is imposed, however, the sentence does not commence until he is committed.[3] The minority view, adhered to by North Carolina, has been adopted in two states by statute,[4] while two other states have enacted the majority view.[5] 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.[6] 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.[7] 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.[8]

Because of present judicial and penal administrative practices (and occasionally by mistake[9]), 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,[10] 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

[3] *In re* Breton, 93 Me. 39, 44 A. 125 (1899); Volker v. McDonald, 120 Neb. 508, 233 N. W. 890 (1931).

[4] *Ex parte* Gough, 124 Cal. App. 493, 12 P. 2d 968 (1932); Keyes v. Chrisman, 118 Ore. 626, 247 P. 807 (1926).

[5] *In re* Fuller, 34 Neb. 581, 52 N. W. 577 (1892); Commonwealth *ex rel.* Accobacco v. Burke, 162 Pa. Super. 592, 60 A. 2d 426 (1948).

[6] 18 U. S. C. §3568 (1948); Moss v. U. S., 72 F. 2d 30 (4th Cir. 1934).

[7] Dixon v. Beaty, 188 Ga. 689, 4 S. E. 2d 633 (1939).

[8] McDonald v. Moinet, 139 F. 2d 939 (6th Cir. 1944); *Ex parte* Phair, 2 Cal. App. 2d 669, 38 P. 2d 826 (1934); D'Alessandro v. Tippins, 98 Fla. 853, 124 So. 455 (1929); Jackson v. Commonwealth, 187 Ky. 760, 220 S. W. 1045 (1920); Lindsey v. Superior Court, 33 Wash. 2d 94, 204 P. 2d 482 (1949). *Contra:* People *ex rel.* Boyle v. Ragen, 400 Ill. 571, 81 N. E. 2d 444 (1947) (controlled by statute), *cert. denied,* 335 U. S. 868 (1948); Davenport v. State, 143 Miss. 765, 109 So. 789 (1926) (controlled by statute); Clemons v. State, 92 Tenn. 282, 21 S. W. 525 (1893); Powell v. State, 124 Tex. Cr. 513, 63 S. W. 2d 712 (1933).

[9] 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.

[10] N. C. GEN. STAT. §7-70 (1951).

the superior court while the judge retains control over the sentence,[11] so even after conviction and sentence the prisoner must wait until the term of court expires.[12] Prisoners who have appealed their convictions do not have to be accepted by the department,[13] so an additional delay of ten days or more[14] 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,[15] but the state system receives prisoners with as short terms as thirty days,[16] 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.[17] The possibility of securing a writ of habeas corpus seems to be practically foreclosed.[18] Even if formal relief is denied, though, the court has discretion to consider time spent in jail awaiting

[11] N. C. GEN. STAT. §148-30 (1943).

[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).

[13] N. C. GEN. STAT. §148-30 (1943).

[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 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 day."

[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. 689, 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,[19] but this is not an absolute right of the prisoner[20] unless granted by statute.[21]

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.[22] 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.[23] 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.[24] 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.[25] 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.[26] Second, he may petition for a writ of mandamus,

[19] 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. 766 (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).

[20] Byers v. U. S., 175 F. 2d 654 (10th Cir. 1949), *cert. denied,* 339 U. S. 976 (1950); 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).

[21] People *ex rel.* Cohalan, on Behalf of Buckner v. Warden, 96 N. Y. S. 2d 749 (1950); Commonwealth *ex rel.* Lerner v. Smith, 151 Pa. Super. 265, 30 A. 2d 347 (1943); Lindsey v. Superior Court, 33 Wash. 2d 94, 204, P. 2d 482 (1949).

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

[23] O'Neil v. State, 134 Ala. 189, 32 So. 667 (1902).

[24] State v. Finch, 177 N. C. 599, 99 S. E. 409 (1919).

[25] 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).

[26] 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.[27] 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.[28] 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[1] 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.[2] Generally, only the person having the right of burial may maintain action for wrongs to the body.[3]

[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).

[3] Stephenson v. Duke University, 202 N. C. 624, 163 S. E. 598 (1932). See Note 19 CORN. L. Q. 108, 111 (1933).

While North Carolina has consistently held this right to be a property right, the cases have not been in accord as to the reasons for conferring such right nor as to the party possessing the right. The mother of a son whose body had been mutilated has been denied the right to sue for damage suffered as a direct result of the wrongful mutilation.[4] In *Stephenson v. Duke University,*[5] the Court held that the statute of distributions no longer determined who possesses the right to the body,[6] and spelled out its adherence to the majority theory: that the right to possess the body, and therefore, to maintain action for injuries thereto, grows out of the duty to bury the body.[7] Yet, in *Morrow v. Cline,*[8] without any discussion of the burial duty theory, the right to sue for mutilation of their father's body was conferred upon minor children.[9]

In several respects the use of the duty to bury as the theoretical basis for the right to maintain action for wrongs to the body leads to confused reasoning and undesirable results. If the wrongdoer's act makes burial impossible, so that there is no duty of burial on the plaintiff normally having such duty, may the plaintiff nevertheless maintain an action against the wrong doer?[10] When a person without the duty to do so buries a mutilated body, he is legally entitled to recover of the estate of the deceased for expenses incurred in performing the burial,[11] thereby diminishing the property available for distribution. Should not the distributees, therefore, be entitled to sue the wrongdoer whose injury to the body made interment more expensive?

If the right to maintain action for wrongs to the body is made to rest upon the theory that the right grows out of the duty of burial, the es-

[4] Stephenson v. Duke University, *supra* note 3; Floyd v. Atlantic Coast Line Ry., 167 N. C. 55, 83 S. E. 12 (1914).

[5] 202 N. C. 624, 163 S. E. 598 (1932).

[6] In Floyd v. Atlantic Coast Line Ry., 167 N. C. 55, 83 S. E. 12 (1914), it was held that there could be no question as to the father's exclusive right as he by the statute of distributions was entitled to all of the personal property of the deceased. The *Stephenson* case clearly reversed this holding—the statute does not apply.

[7] The established rule is that the right in the dead body grows out of the duty of burial. Stephenson v. Duke University, 202 N. C. 624, 163 S. E. 598 (1932); 15 AM. JUR. 831 (1938).

Quaere: Do next of kin, as such, have a legal duty to bury their dead? The common law casts the duty of burial on the person under whose roof death occurred. 17 C. J. 1142 (1919). The estate of the deceased is liable for funeral expenses. Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127 (1896). A search of the authorities has revealed no legal duty of burial on next of kin other than spouses and parents.

[8] 211 N. C. 254, 190 S. E. 207 (1937).

[9] Quaere: Do minors have a legal duty to bury their dead?

[10] See Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917). Where plaintiff's father died at sea and defendant's employees embalmed the body so that it could have been kept without danger to the living, and the deceased had ample funds to defray the expense of shipment home, his address being known, but defendant's emplovee had the body thrown overboard, plaintiff was entitled to recover. There was a duty on defendant to deliver the body. See Bonaparte v. Fraternal Funeral Home, 206 N. C. 652, 175 S. E. 137 (1934) where a widow recovered punitive damages for the wrongful withholding of her husband's body.

[11] See Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127 (1896).

sential injury involved which is the outrage to the sensibilities of close kin is ignored and the person most hurt may be denied recovery[12]—having no right because he has no duty of burial. In fact, the right to possess the body may not grow out of the duty to bury it,[13] but the converse may be true.[14] It is natural that someone should—by virtue of intimate relationship or for other good reason—have a preferential right to the body. But why should a preferential right in one survivor clothe wrongdoers with immunity to action for mental anguish caused other survivors? It is submitted that the better theory upon which to base these cases is this: There is in the surviving spouse, children, parents and other close kin[15] a right to have the body of the deceased treated with due respect; an interference with that right is a breach of duty and the wrongdoer may be held liable to any or all of them who suffer injury.[16] Such a rationale avoids the technical difficulties inherent in the quasi property-burial duty theory and is more in accord with the ends of justice.[17]

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[12] "Obviously, in cases of this character, any pecuniary loss to plaintiff must usually be merely trifling. The great injury done consists in the outrage upon the sensibilities. . . ." Koerber v. Patek, 123 Wis. 453, 464, 102 N. W. 40, 44 (1905).

In a dissenting opinion in Floyd v. Atlantic Coast Line Ry., 167 N. C. 55, 62, 83 S. E. 12, 15 (1914), Clark, C. J., said: "This is a tort pure and simple, and the wife is entitled to recover for it just as she has recovered in actions for failure to deliver a telegram whereby she as well as her husband has suffered mental anguish." He noted that by the very nature of the situation the mother is the person who most naturally would suffer mental anguish in mutilation cases.

[13] "The right had its origin in sentiment, in affection for the dead, in religious belief in some future life," O'Donnell v. Slack, 123 Cal. 285, 289, 55 Pac. 906, 907 (1899).

[14] Where the deceased's wife was absent and failed to assume the trust incident to her right, a waiver was implied; the right of custody descended immediately to the next of kin—the father of the deceased—and he, having the custody of the body, had the duty of burial. Southern Life and Health Ins. Co. v. Morgan, 21 Ala. App. 5, 105 So. 161 (1925).

[15] In Boyle v. Chandler, 3 Harr. 323, 138 Atl. 273 (Del. 1927), the husband and children of the deceased were permitted to maintain action. See Note, 19 CORN. L. Q. 108, 112 (1933) which suggests that the immediate family be allowed a right of action. In Koerber v. Patek, 123 Wis. 453, 458, 102 N. W. 40, 42 (1905), speaking of the right in the dead body, the court said: "The person having charge of it cannot be considered as the owner. . . . He holds it only as a sacred trust . . . a court of equity might control the exercise of those rights by one relative with due regard to the interest of others. . . ."

[16] In Koerber v. Patek, *supra* note 15, it was said that there is no right more sacred to the individual than the right to bury the dead, none where the court need less hesitate to impose upon a willful violator the uttermost consequences of his act. In Larson v. Chase, 47 Minn. 307, 312, 50 N. W. 238, 240 (1891) the court, commenting on a case in which defendant had dug up the body of plaintiff's child, noted that the recovery was made to rest upon the trespass to the land and said: "It would be a reproach to law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on land but the indignity to the dead." It would seem equally a reproach to law if recovery is made to depend upon whether plaintiff was under a duty to bury the body.

[17] In Matthews v. Forrest, 235 N. C. 281, 285, 69 S. E. 2d 553, 556 (1952),

Evidence—Use of Chemical Tests to Determine Intoxication—Self-incrimination

The need for chemical analyses of body substances to determine intoxication in drunken driving[1] cases is well recognized.[2] Body substances which may be used for such analyses include blood,[3] urine,[4]

decided since this note was written, recovery was allowed for mental anguish suffered as a result of desecration of plaintiff's wife's grave by defendant's removal of the floral designs therefrom the day after the burial. In noting that "the tenderest feeling of the human heart centers around the remains of the dead," the court said: "In recognition of this reality, we hold that compensatory damages may be awarded a plaintiff for mental suffering actually endured by him as the natural and probable consequence of a trespass to his burial lot. . . ." It would seem that the right to recovery should rest upon the reality of mental anguish actually endured, even had the burial lot been a "potters field," and not solely upon the technicality of a trespass to the plaintiff's land.

[1] Terms describing the degree to which a person must be affected by alcohol in order to render unlawful his act of operating a motor vehicle vary among the states and are variously interpreted by the courts. No effort will be made in this note to distinguish between "intoxicated," "under the influence," and other terms. The term "drunken driving," is inclusive and for purposes of this note indicates that degree of intoxication under which one operates a motor vehicle unlawfully. For a discussion of various terms and groupings by states, see Newman, *Proof of Alcoholic Intoxication,* 34 KY. L. J. 250, 250-252 (1946).

[2] The customary method of determining intoxication is by noting: (1) ability to stand and walk, (2) speech, (3) odor of breath, (4) color of face, (5) steadiness of hands, (6) condition of eyes, and (7) "unusual" acts deviating from normal conduct. Harger points out the inadequacy of these methods in *Some Practical Aspects of Chemical Tests for Intoxication,* 35 CRIM. L. & CRIMINOLOGY 202, 203 (1944). "Every public prosecutor knows the difficulty in trying this kind of case [drunken driving]. The defense interposed always has some plausible excuse, either that the accused had liquor on his breath but had not imbibed excessively, or that the stupor and other objective manifestations of drunkenness were produced by shock, by the injury which the accused himself may have suffered, or from some other cause than intoxication. In some instances it is undoubtedly true that these are the causes and that an innocent person because of his conduct and appearance is facing prosecution. To determine the truth or falsity of the defense and the correctness of the charges against the accused, chemical fluid tests can accurately solve the issue in many cases. . . . When the alcoholic content in body fluid is sufficiently high, this scientific test is unquestionably the most reliable method of determining intoxication. When properly used in the trial it should be most effective in bringing out just results." Ladd and Gibson, *Legal-Medical Aspects of Blood Test to Determine Intoxication,* 29 VA. L. REV. 749 (1943). See also, Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication,* 24 IOWA L. REV. 191 (1939).

"A chemical examination of body fluids or tissues definitely demonstrates whether or not alcohol is present and in what concentration. The replacement of guesswork and superficial opinions, and even personal prejudices, by positive scientific evidence seems very desirable, not only to strengthen the enforcement of the law against the drinking driver, but also to protect the innocent who may be charged with a criminal offense because of some pre-existing pathological condition." Kozelka, *Scientific Tests for Alcohol Intoxication,* 24 WIS. L. BULL. (No. 4) 19 (1951). See Note, 4 WYO. L. J. 103 (1949); Leonard, *Tests for Intoxication,* 38 J. CRIM. L. & CRIMINOLOGY 533 (1948).

[3] When alcohol is absorbed it is transported to all parts of the body, where it is stored in proportion to the water content of each body material. The concentration in the body material remains the same as the alcohol content decreases. Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing the Breath,* 110 J. AM. MED. ASS'N 779 (1938). The alcoholic content of the brain is the ultimate information desired. Since the brain and the blood have about the same water content, the amount of alcohol in the blood is approximately the same

spinal fluid,[5] saliva[6] and breath.[7] Utilization of the breath analysis is facilitated by practical advantages,[8] and a number of recent cases[9] indicate that the popularity of this test is increasing.

The device commonly used to test breath for alcoholic content is known as the Harger Drunkometer.[10] Its operation is relatively simple. A sample of breath is obtained by having the subject inflate a small balloon. The sample is released into the Drunkometer apparatus, where it is forced through a solution that reacts to the presence of alcohol by a change in color.[11] By weighing the carbon dioxide content of the

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as the amount in the brain. Aside from an analysis of the alcohol content of the brain itself, obviously impractical in the case of a living person, an analysis of the blood is considered to be the most accurate index of intoxication. "It appears that the blood alcohol concentration furnishes the most reliable chemical criterion of intoxication." Muehlberger, *Comments on Medicolegal Aspects of Chemical Test of Alcoholic Intoxication by Dr. I. M. Rabinowitch,* 39 J. CRIM. L. & CRIMINOLOGY 411, 415 (1948).

[4] The alcoholic content of the urine is determined by urinalysis. This figure is converted to a figure for the alcoholic content of the blood by a prescribed ratio. There is, however, some dispute as to the accuracy of the ratio. For a discussion of this dispute with citations to various medical writers see Note, 2 SYRACUSE L. REV. 94 (1950).

[5] Spinal fluid tests are said to provide a highly accurate index to the degree of intoxication. Harger, Lamb and Hulpieu, *A Rapid Chemical Test for Intoxication. Employing the Breath,* 110 J. AM. MED. ASS'N 779 [1938]. But these tests are delicately performed and therefore impractical in cases of arrests for drunken driving.

[6] Tests using saliva are apparently rare. For discussions as to the practicability and accuracy of the saliva test, see Letourneau, *Chemical Tests in Alcoholic Intoxication,* 28 CAN. B. REV. 858, 868 (1950) and Rabinowitch, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication,* 39 J. CRIM. L. & CRIMINOLOGY 225, 244 (1948).

[7] The amount of alcohol present in the breath of the subject is determined. This figure is converted by a certain ratio to show the alcoholic content of the blood. It is important to remember that the urine, saliva, and breath test results are transposed in order to determine the alcoholic content of the blood, which is significant of the alcoholic content of the brain. Thus the result of all these tests are more remote from the ultimate information desired than the result of a blood test.

[8] Some advantages accruing to simplicity of the breath analysis are: (1) breath in probably the easiest of the test materials to obtain. (2) the test may be completed in a short period of time, (3) the accused person is more likely to acquiesce to a breath test than to a blood test and (4) a sample of breath may be obtained immediately upon arrest.

[9] People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951); Willenar v. State, 228 Ind. 248, 91 N. E. 2d 178 (1950); People v. Morse, 325 Mich. 270, 38 N. W. 2d 322 (1950); State v. Hunter, 4 N. J. Super. 531, 68 A. 2d 274 (1949); McKay v. State, 235 S. W. 2d 173 (Tex. Crim. App. 1951); Guenther v. State, 153 Tex. Crim. Rep. 519, 221 S. W. 2d 780 (1950).

[10] Invented by Dr. D. N. Harger in 1938. Other breath tests are used such as the "Intoximeter" of Jetter and the "Alcoholometer" of Greenberg and Keator but these are not as well known as the Harger apparatus. See Letourneau, *Chemical Tests in Alcoholic Intoxication,* 28 CAN. B. REV. 858 (1950). All of these tests are basically the same in principle.

[11] This solution is composed of potassium permanganate in the presence of sulphuric acid. Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing the Breath,* 110 J. AM. MED. ASS'N 779 (1938), say that alcohol causes a striking change in the color of the solution. This has a psychic effect on the subject and may enable the securing of truthful statements from him where he at first denied drinking.

breath required to discolor the solution, the amount of alcohol in the breath may be computed.[12] This figure is then transposed to indicate the alcoholic content of the blood.[13]

Where law enforcement agencies utilize chemical tests such as the Drunkometer, and attempt to introduce the results in evidence, questions of admissibility are usually raised. A recent Illinois case[14] is illustrative of the type of problems that may appear when the interpretive results of the Drunkometer test are offered as evidence. Defendant was charged with drunken driving. At trial, testimony for the state tended to show that after defendant's arrest, he voluntarily submitted to the Harger Drunkometer breath test. Over objection, the operator of the Drunkometer testified that the alcoholic content of defendant's blood was .30 per cent, and that in his opinion this indicated that the defendant was under the influence of alcohol at the time of his arrest.[15] Defendant was

[12] The volume of breath required to effect the color change is passed through a tube containing a carbon dioxide absorbent. This tube is weighed before and after the test, the difference in weight corresponding to the weight of carbon dioxide in the breath that caused the solution to change color. This process is based on the observation that aveolar air (the last portion of a deep expiration) contains approximately 5.5 per cent carbon dioxide. Thus the weight of the carbon dioxide as determined above, is 5.5 per cent of the weight of the breath required to effect the change of color. From this the weight of alcohol in one cubic centimeter of breath may be computed. For a full explanation and description, see Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing the Breath,* 110 J. AM. MED. ASS'N 779 [1938].

[13] The weight of alcohol in one cubic centimeter of blood is approximately 2000 times the weight of alcohol in one cubic centimeter of breath. Harger, Lamb, and Hulpieu, *supra* note 12.

[14] People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951).

[15] "Settled medical opinion apparently is that any person is unfit to drive when his blood alcohol concentration is at or in excess of fifteen-hundredths of one per cent. When the concentration is less than this, a person may or may not be unfit to drive depending upon individual characteristics and reaction to alcohol." State v. Hunter, 4 N. J. Super. 531, 533, 68 A. 2d 274, 275 (1949).

The Committee on Tests for Intoxication of the National Safety Council recommended the following guide to significant alcohol levels:

(1) If the blood contains .05% alcoholic content, it is presumed that the subject was not under the influence of liquor.

(2) If the blood contains more than .05% but less than .15% alcoholic content there is no presumption that the subject was or was not under the influence of liquor.

(3) If the blood contains .15% or more alcoholic content it is prima facie evidence that subject was under the influence of liquor. See C. W. Muehlberger, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication,* 39 J. CRIM. L. & CRIMINOLOGY 411 (1948).

These standards are generally allowed in evidence in most state courts. Some states have statutes that establish a similar criteria. *E.g.* "Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle . . . while in an intoxicated condition, the court may admit evidence of the amount of alcohol in the defendant's blood. . . . For the purposes of this section (a) . . . five hundredths of one per centum, or less . . . alcohol . . . prima facie evidence that the defendant was not in an intoxicated condition; (b) . . . more than five hundredths of one per centum and less than fifteen-hundredths of one per centum . . . alcohol . . . relevant evidence, but . . . not to be given prima facie effect in indicating . . . intoxicated condition; (c) . . . fifteen-hundredths of one per centum, or more . . . alcohol . . . prima facie evidence . . . defendant was in an intoxicated condition." N. Y. VEHICLE AND TRAFFIC LAWS §70(5)

found guilty as charged. On appeal, the Appellate Court of Illinois held that there was no error in permitting the introduction of testimony showing the results of the Drunkometer test. In answer to the objection that there is lack of unanimity in the medical profession as to whether intoxication can be determined by an analysis of the breath, the Court held this to go only to the credibility of the testimony.[16] Defendant's objection was based on a Michigan decision,[17] rendered a year earlier, in which the admission of the results of the test over such an objection was held to be reversible error.[18] Both cases were actually decided on the same objection: The Drunkometer has not been accorded general scientific recognition as an accurate index of the alcoholic content of the blood. Authorities are in conflict on the point,[19] as are the cases.[20] However, the principal case appears to represent the prevailing view.[21]

The introduction of the results of chemical tests frequently encounters objections based upon constitutional issues: Unreasonable search and seizure[22] and violation of the privilege against self-incrimination.[23]

[16] People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951).

[17] People v. Morse, 325 Mich. 270, 38 N. W. 2d 322 (1950).

[18] In People v. Morse, 325 Mich. 270, 38 N. W. 2d 322 (1950), two officers, one of whom had studied for a month with Dr. Harger, the inventor of the Drunkometer, and in turn instructed the other, testified that the test provided an accurate index of the alcoholic content of the blood. A doctor also testified to this effect, and the article by Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing the Breath,* 110 J. AM. MED. ASS'N 779 [1938], was noticed by the court. But five doctors testified contra, one doctor testifying that " what is going on in this test is that you have got a continuous series of errors, some for and some against, so that the thing works like a slot machine." People v. Morse, *supra* at 272, 38 N. W. 2d at 323. In holding the evidence inadmissible, the court noted that, while the five doctors testified that most of the medical profession do not regard the Drunkometer as a reliable indicator of intoxication, there was no testimony in the record that there is general scientific recognition or acceptance of the test by medical profession. It is interesting to note that the court relied on several lie detector cases in reaching their decision.

In People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951), Dr. Harger himself testified that the test is reliable. His testimony and several articles claiming the test to be accurate apparently convinced the court, so that they rejected People v. Morse, *supra,* and followed McKay v. State, 235 S. W. 2d 173 (Tex. Crim. App. 1951) which had held the test evidence admissable over the accuracy objection.

[19] See Letourneau, *Chemical Tests in Alcoholic Intoxication,* 28 CAN. B. REV. 858 (1950), for a discussion of this conflict with citations to various medical authorities in which the accuracy and reliability of the breath test is examined.

[20] See cases cited note 9 *supra.*

[21] Of the cases cited in note 9 *supra,* only three have passed on the reliability and general scientific recognition of the Drunkometer test. People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951); People v. Morse, 325 Mich. 270, 38 N. W. 2d 322 (1950); McKay v. State, 235 S. W. 2d 173 (Tex. Crim. App. 1951). Apparently, People v. Morse, *supra,* is the only case holding the test evidence inadmissible on this ground.

[22] "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . ." U. S. CONST. AMEND. IV. Most state constitutions have similar provisions.

[23] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U. S. CONST. AMEND. V. Iowa and New Jersey have a statu-

Both of these issues were raised in the instant case,[24] but were disposed of on a procedural point.[25] The issue of unreasonable search and seizure has been raised in several other "chemical test" cases, but it has met with little success.[26] However, a recent Supreme Court case[27] indicates a possible extension of the due process requirement of the Federal Constitution to situations where the right against unreasonable search and seizure is violated. The case concerned forcible "stomach pumping" and conceivably could be held applicable to cases involving compulsory chemical tests to determine intoxication.[28]

While the issue of self-incrimination is frequently raised as an objection to the admissibility of the results of the tests, there appears to be but one *Drunkometer* case[29] where this issue was effectively before the reviewing court. There, the court found that the self-incrimination privilege had been waived. However, the issue has often been raised in cases where results of blood tests[30] and urinalyses[31] were sought to be

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tory privilege against self-incrimination. All other states have adopted the privilege by constitution. For example: "In all criminal prosecutions every person charged with crime has the right . . . not [to] be compelled to give self incriminating evidence . . ." N. C. CONST. ART. I §11.

[24] People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951).

[25] In Illinois, by statute, all constitutional questions must be taken directly to the Supreme Court. If a case involving a constitutional question is taken to the Appellate Court, and the case also involves a nonconstitutional error, over which that court has jurisdiction, the right to bring the constitutional question to the Supreme Court is waived. People v. Terrill, 362 Ill. 61, 199 N. E. 97 (1935)

[26] Novak v. Dist. of Columbia, 49 A. 2d 88 (D. C. Munic. App. 1947). Apparently a valid arrest would suffice in most cases to make untenable any objection on the ground of unreasonable search and seizure. Also, in states that do not follow the federal exclusionary rule, evidence of the results of the tests might be admitted, even though illegally seized.

For an excellent discussion of the effect of unreasonable search and seizure on the use of chemical tests for intoxication, see INBAU, SELF-INCRIMINATION (1st Ed. 1950) at pp. 79-80.

[27] Rochin v. People of California, 72 S. Ct. 205 (1952). (As officers seized defendant, he swallowed two morphine capsules. He was taken to a doctor and by "stomach pumping" the two capsules were disgorged from his body).

[28] See the concurring opinion by Mr. Justice Douglas, Rochin v. People of California, 72 S. Ct. 205 (1952). "I think that words taken from his [defendant's] lips, capsules taken from his stomach, *blood taken from his veins* (italics added) are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment," 72 S. Ct. at 213.

[29] Spitler v. State, 221 Ind. 107, 46 N. E. 2d 591 (1943). This is apparently the first case in which Drunkometer evidence reached a court of last resort. Defendant raised the issue of self-incrimination, but the court found that he had consented to the test and thereby waived the constitutional privilege. No valid objection here to admissibility on the basis of the test results being unreliable, as they were admissible by statutory provision. ". . . [the] court may admit evidence of the amount of alcohol in the defendant's blood . . . as shown by a chemical analysis of his breath, urine or other bodily substance . . ." IND. ANN. STAT. §47-2003 (2) (1940). See also the N. Y. Statute cited note 18 *supra*.

[30] *E.g.;* People v. Tucker, 88 Cal. App. 2d 333, 198 P. 2d 941 (1948); State v. Ayres, 70 Idaho 18, 211 P. 2d 142 (1950); State v. Koenig, 240 Iowa 592, 36 N. W. 2d 765 (1949); State v. Sturtevant, 96 N. H. 99, 70 A. 2d 909 (1950); Brown v. State, 240 S. W. 2d 310 (Tex. Crim. App. 1952).

[31] *E.g.;* Ridgell v. United States, 54 A. 2d 679 (D. C. Munic. App. 1948); Novak

introduced in evidence. These tests are similar[32] to breath analyses in their impact on the question of self-incrimination and therefore the cases in which they are involved should indicate the outcome of Drunkometer cases where the question is effectively raised. Square holdings,[33] as well as *dicta*[34] in some of the blood test and urinalysis cases indicate that the privilege against self-incrimination does not extend to compulsory chemical tests. Most legal scholars agree.[35]

Most cases dispose of the issue of self-incrimination by finding consent to the tests on the part of the accused amounting to a waiver of the privilege.[36] For instance, where the accused submits to a test after being told that he has a constitutional right to refuse and that he would not be required to take it, consent is found.[37] Where he submits after being warned that the results of the test may be used against him, the test is deemed non-compulsory.[38] Even where such a warning is not given, a finding of consent is not precluded.[39] If accused submits to the test because he "thinks it is the law," he has consented.[40] Encourage-

v. Dist. of Columbia, 49 A. 2d 88 (D. C. Munic. App. 1947); Bovey v. State, 197 Misc. 302, 93 N. Y. S. 2d 560 (Ct. Cl. 1949); City of Columbus v. Van Meter, 89 N. E. 2d 703 (Ohio Ct. App. 1950); City of Columbus v. Thompson, 89 N. E. 2d 604 (Ohio Ct. App. 1950). See cases cited in Note 164 A. L. R. 967 (1946) for decisions on both blood tests and urinalyses prior to 1946.

[32] Some distinction might be made in the case of blood tests. Note that they involve an *invasion of the body*, while urinalyses and breath tests involve only the taking of waste material. Nevertheless, the courts apparently make no distinction between blood, urine and breath tests.

[33] Cases holding compulsory tests not violative of privilege against self-incrimination are People v. Tucker, 88 Cal. App. 2d 333, 198 P. 2d 941 (1948). (Specimen of blood taken from defendant without his knowledge and while he was suffering from cerebral concussion); State v. Ayres, 70 Idaho 18, 211 P. 2d 142 (1950). (Blood test. Here, the results of the test were favorable to defendant, though they indicated he had been drinking); State v. Sturtevant, 91 N. H. 99, 70 A. 2d 909 (1950). (Blood test. The court assumed that defendant was incapable of consent); State v. Nutt, 78 Ohio App. 336, 65 N. E. 2d 675 (1946). (Comment on refusal to submit urine for test permitted); State v. Gatton, 60 Ohio App. 192, 20 N. E. 2d 265 (1938).

Apparently the one case holding directly that compulsory chemical tests are violative of the privilege is Apodaca v. State, 140 Tex. Crim. Rep. 593, 146 S. W. 2d 381 (1940). (Urinalysis. After breaking a "coke" bottle in which he had voided, defendant was compelled to void in a milk bottle.)

[34] "The whole history of the privilege against self-incrimination shows that it was designed to protect against testimonial compulsion" (Interpreting the Federal provision). Ridgell v. United States, 54 A. 2d 679, 683 (D. C. Munic. App. 1948).

"It is the rule in this jurisdiction that physical facts discovered by witnesses on information furnished by the defendant may be given in evidence, even where knowledge of such facts is obtained in a privileged manner, by force, by intimidation, duress, etc." State v. Cash, 219 N. C. 818, 821, 15 S. E. 2d 277, 278 (1941). See State v. Duguid, 50 Ariz. 276, 72 P. 2d 435 (1937).

[35] 8 WIGMORE, EVIDENCE §2265 (3d ed. 1940), and see authorities, *supra* note 2.

[36] The constitutional privilege may be waived, and where the accused submits voluntarily to the test, he has waived his privilege against self-incrimination. Willenar v. State, 228 Ind. 248, 91 N. E. 2d 178 (1950).

[37] Spitler v. State, 221 Ind. 107, 46 N. E. 2d 591 (1943). (Breath test).

[38] Ridgell v. United States, 54 A. 2d 679 (D. C. Munic. App. 1948). (Urinalysis).

[39] City of Columbus v. Van Meter, 89 N. E. 2d 703 (Ohio Ct. App. 1950).

[40] State v. Werling, 234 Iowa 1109, 13 N. W. 2d 318 (1944). (Blood test).

ment is permissible, as where the subject is informed that if the specimen is "right," it will be to his benefit,[41] or where a doctor tells accused that he intends to swear that accused is intoxicated, and that "the odds are against him" unless he submits to the test.[42] Most cases take a negative approach to the determination of whether or not the accused person consented.[43] Thus, where there is no evidence of duress,[44] compulsion,[45] or entrapment,[46] a voluntary submission is usually found. The same follows where accused *makes no objection.*[47] One court has even intimated that the taking of a specimen *from an unconscious person* might be deemed non-compulsory.[48] A writer aptly submits that, ". . . a deliberate effort seems to have been made . . . to attach a very broad meaning to the word 'voluntary' and thereby obviate a determination of the basic issue [self-incrimination] itself."[49]

Where the court relies on consent to dispose of the question of self-incrimination,[50] a problem might arise because of the nature of the evidence. Suppose that X is arrested for drunken driving, and apparently consents to the Drunkometer test. At trial Dr. Y testifies, over objection, that the results of the test show that the alcoholic content of X's blood at the time of the test was .40 per cent, and this in his opinion indicates intoxication. It could be contended that there was error in admitting the evidence on the theory that such a degree of intoxication would render X incapable of consent. The higher the degree of intoxication shown by the results of the test, the greater the proof of the subject's incapacity to consent. Thus it would seem that such evidence in certain cases would tend to exclude itself. Even under the broad concept of consent, *i.e.* failure to object, this would apparently be true, on the theory that the results of the test indicate lack of ability to object on the part of the defendant. Of course, the distinction between the degree of intoxication required to support a conviction for drunken driving and that required to vitiate consent is recognized,[51] so only where the results

[41] Novak v. Dist. of Columbia, 49 A. 2d 88 (D. C. Munic. App. 1947). (Urinalysis).

[42] State v. Small, 233 Iowa 1280, 11 N. W. 2d 377 (1943). (Blood test).

[43] This approach may be justified by the wording in most provisions that a person may not be *compelled* to testify against himself. See constitutional provisions cited *supra* note 26.

[44] State v. Werling, 234 Iowa 1109, 13 N. W. 2d 318 (1944); (Blood test). State v. Small, 233 Iowa 1280, 11 N. W. 2d 377 (1943). (Blood test).

[45] State v. Cash, 219 N. C. 818, 11 S. E. 2d 277 (1941). (Blood test and urinalysis).

[46] State v. Morkrid, 286 N. W. 412 (Iowa 1939). (Blood test and urinalysis).

[47] State v. Koenig, 240 Iowa 592, 36 N. W. 2d 765 (1949). (Blood test).

[48] State v. Cram, 176 Ore. 577, 160 P. 2d 283 (1945).

[49] INBAU, SELF-INCRIMINATION (1st ed. 1950) at pp. 73-74.

[50] That is, Courts that consider or will consider the compulsory taking of a specimen of blood, urine, breath, etc. to be a violation of the privilege against self-incrimination.

[51] Halloway v. State, 146 Tex. Crim. Rep. 353, 175 S. W. 2d 258 (1943). (Urinalysis).

of the test show a fairly high degree of intoxication would the above theory be applicable.[52]

From a practical standpoint, the individual defendant who attempts to have the results of chemical tests excluded on the theory described above is in an unenviable position. It would be essential in most cases to obtain a favorable ruling in the trial court. A preliminary hearing on admissibility is imperative as the nature of the objection to the evidence is such that the presence of a jury would be disastrous.[53] Suppose, in the hypothetical case, a motion for a preliminary hearing is made and granted, and X introduces testimony tending to show that the results of the Drunkometer test indicate a degree of intoxication that would render him incapable of voluntary submission. Several possibilities are presented. If the trial judge finds as a fact that the results of the test show that X was incapable of consent, and he thereby excludes the evidence, the theory has accomplished its purpose.[54] The trial judge may find that the results of the test indicate that X was capable of consent, and on the basis of this finding, admit the evidence. Chances are that a reviewing court would find no error on appeal, if the finding of fact were supported by evidence. However, if the trial judge finds that the results of the test indicate incapacity, but he admits the evidence, his action would undoubtedly be held erroneous. But in most cases there is evidence other than that furnished by the results of the Drunkometer[55] and if that evidence is sufficient to justify a conviction, the admission of the Drunkometer evidence would probably not be considered prejudicial and a reversal by the reviewing court could not be expected. Conceivably, if the only evidence of intoxication is that furnished by the results of the test, a finding of incapacity by the trial judge coupled with admission of the evidence would be reversible error.[56]

Thus, the objection outlined above might be ineffective in all but a few cases. Nevertheless, it is an objection that must eventually be decided by courts that rely on consent in order to hold the results of chemical tests admissible. In 1945, it was predicted that courts taking such

[52] *Cf.* Testimony of Dr. Taylor in State v. Creech, 229 N. C. 662, 51 S. E. 2d 348 (1948), to the effect that blood alcohol ratio of .25 to .30 per cent would render one incapable of forming a premeditated intent to kill and know the consequences of it.

[53] For an example of a preliminary hearing on admissibility granted to decide the incapacity objection, see State v. Sturtevant, 96 N. H. 99, 70 A. 2d 909 (1950).

[54] In some cases, however, the state might appeal. For example, see N. C. GEN. STAT. §15-179 (1943), as amended §15-179 (1951 Supp.)

[55] See, *e.g.*, City of Columbus v. Van Meter, 89 N. E. 2d 703 (Ohio Ct. App. 1950).

[56] This could hardly occur. Perhaps where the accused were unconscious, there would be a lack of evidence based on the customary observational methods, but in such a case, the accused could not consent anyway, not because the test results show incapacity, but because he was unconscious. State v. Cram, 176 Or. 577, 160 P. 2d 283 (1945) *semble.*

a position were destined to face difficulties.[57] Appearance in the cases[58] of the type of technical argument as that described indicates the accuracy of that prediction. The trend will undoubtedly continue. As the advantages of accurate chemical tests are apparent,[59] admissibility of their results in evidence should not depend on voluntary submission to the test by the accused. Where admissibility is dependent upon consent, statutory provision for "consent" as a condition to the use of the public highway should be considered.[60]

JOHN R. MONTGOMERY, JR.

Mortgages—Action for Dower in the Equity of Redemption

In a case of first impression the North Carolina Supreme Court has held that a wife's dower in the equity of redemption of real property, which had been mortgaged by her husband prior to coverture, was not barred in spite of the fact that the husband and wife had surrendered possession to the mortgagee eighteen years prior to the date of the action and the mortgagee had been in continuous possession since that time.[1]

[57] "Moreover, if the test is voluntary, and consent is necessary, how and to whom must this permission be given? Who will determine this, the judge or jury? Can an intoxicated person consent? Although as yet the queries have not been raised in any case, there is no doubt that as the tests become used more widely, the issue of 'consent' will appear as a valuable defense mechanism. Therefore, if chemical tests for alcoholic intoxication are to be employed to maximum advantage, their use should not be dependent upon the arrested driver's consent." Comment, 40 ILL. L. REV. 245, 249 (1945).

[58] State v. Sturtevant, 96 N. H. 99, 70 A. 2d 909 (1950) (Here, consent was held unnecessary so that no determination was made as to whether the test results could be excluded on the incapacity to consent because of intoxication theory. However, the court seemed to recognize that such a contention might be successful). Halloway v. State, 146 Tex. Crim. Rep. 353, 175 S. W. 2d 258 (1943) (Court held that defendant's own testimony to the effect that he was not intoxicated caused the rejection of his contention that he was incapable of consenting to the taking of a specimen of his urine). Guenther v. State, 153 Tex. Crim. App. 519, 721 S. W. 2d 780 (1949). (Defendant had raised the theory of incapacity to consent, but waived the objection, and consequently, it was not before the court). "While the test . . . shows a drunken condition which might have been sufficient to relieve appellant from any waiver of his rights to object to the evidence giving the result of the test, yet it will be seen that no such objection has come to this Court." Guenther v. State, *supra* at p. 520, 221 S. W. 2d at p. 781. Note that the Texas court requires voluntary submission by the accused in order to render results of chemical tests admissable. Apodaca v. State, 140 Tex. Crim. Rep. 593, 146 S. W. 2d 381 (1940).

[59] See note 2, *supra*.

[60] Apparently there is dispute as to whether the use of the public highway is a privilege or a right. *See* Johnston, *The Administrative Hearing for the Suspension of a Driver's License*, 30 N. C. L. REV. 27 (1951) at pp. 27-35. Statutory provision for compulsory chemical tests would be valid in either event. As a condition to the exercise of the privilege in the former, and as a reasonable exercise of police power in the latter. For a penetrating analysis of the validity of such statutory enactments, see Comment, 40 ILL. L. REV. 245 (1945).

[1] Gay v. Exum, 234 N. C. 378, 67 S. E. 2d 290 (1951).

At common law a widow had dower only in lands of which her husband was seised during coverture,[2] but by statute[3] North Carolina provides that a widow shall have dower in all equities of redemption. Hence, a wife has inchoate dower in the equity of redemption when her husband's land is encumbered by a mortgage prior to coverture. The general rule is that a wife may redeem the mortgage to protect her inchoate dower during the lifetime of her husband.[4] This is true when the mortgage was made after coverture with the wife joining in the mortgage deed,[5] or the husband purchased land encumbered by a prior mortgage,[6] or in the case of purchase money mortgages.[7] By analogy, it would seem to apply to a case where the mortgage was made prior to coverture.[8]

North Carolina has a statute of limitations which bars an action to redeem a mortgage where the mortgagee has been in possession for ten years after the right of action accrued.[9] As pointed out above,[10] the wife has the right to redeem the mortgage to protect her inchoate dower. Since her right to redeem arises when the mortgagee goes into possession, while her husband is yet alive, it would seem that requisite possession by the mortgagee should operate to bar the rights of all parties, including the wife, who could have redeemed during this period.

This is the logic followed by the Maine court in a decision involving a fact situation similar to the principal case. In the Maine case,[11] the husband executed a mortgage before coverture. After he was married, the mortgagee entered and took possession. After the husband's death the wife brought an action in equity to redeem the mortgage and have her dower allotted. The court held that the action for redemption must fail. It reasoned, in answer to the wife's contention that the statute of limitations did not begin to run against her until her husband's death, that since her husband was seised of the premises, mortgaged before coverture, she was entitled to dower in the equity of redemption and that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband. Therefore, her right to redeem arose when the mortgagee went into possession and since twenty years had elapsed, her right to redemption was lost.

[2] TIFFANY, REAL PROPERTY §322 (Abridged ed. 1940).
[3] N. C. GEN. STAT. §30-4 (1943).
[4] Vaughan v. Dowden, 126 Ind. 406, 26 N. E. 74 (1891); Smith v. Hall, 67 N. H. 200, 30 Atl. 409 (1892); Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721 (1906); 2 JONES, MORTGAGES §1067 (6th ed. 1928); OSBORNE, MORTGAGES 874 (1951).
[5] Taylor v. Taylor, 207 Ala. 217, 92 So. 109 (1922); Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471 (1913).
[6] Bigoness v. Hibbard, 267 Ill. 301, 108 N. E. 295 (1915).
[7] Campbell v. Ellwanger, 81 Hun 259, 30 N. Y. Supp. 792 (Sup. Ct. N. Y. 1894). See Hamm v. Butler, 215 Ala. 572, 112 So. 141 (1927).
[8] See Batchelder v. Bickford, 117 Me. 468, 104 Atl. 819 (1918).
[9] N. C. GEN. STAT. §1-47(4) (1943).
[10] See note 4 *supra*.
[11] Batchelder v. Bickford, 117 Me. 468, 104 Atl. 819 (1918).

The same reasoning is applied when the mortgagor's wife is not made a party to a foreclosure proceeding. Such a foreclosure is invalid as to her and she may still redeem the mortgage to protect her inchoate dower;[12] but, if she does not redeem within the period allowed by the statute of limitations, by the great weight of authority, the mortgagee or those claiming under him acquire good title against the wife and her dower in the equity of redemption is lost.[13]

The court in the principal case reasons that the wife's right of dower in the equity of redemption is not barred by using an analogy to cases where a husband is disseised by adverse possession during coverture. The law seems clear that a widow's inchoate dower is not lost when her husband is disseised of real property by adverse possession, either with or without color of title.[14] The reason is that during coverture the wife has no right to possession while her husband is alive. She cannot compel her husband to sue and she is without power to sue in her own name. Since she has no right of action until dower vests at the death of her husband, adverse possession during coverture does not bar her dower.[15] However, the wife does have the right to redeem from the mortgagee in possession to protect her inchoate dower. Therefore, it would seem that the court's analogy is not applicable.

The court also states that, "the loss of the husband's right to redeem by surrendering the possession of the premises to the mortgagee for a period sufficient to bar an action by him for redemption, does not have any greater force and effect upon his widow's right of dower in the equity of redemption than if he had conveyed all his right, title, and interest in such equity of redemption to the mortgagee by deed without the joinder of his wife."[16] While this statement is true, the court fails to realize that it is not action or inaction by the husband that should operate to bar the dower, but rather the failure of the wife to exercise her right to redeem the mortgage within the period allowed by the statute of limitations.

The North Carolina Court has stated by way of dictum that a widow is entitled to dower in an equitable estate of her husband only if the husband has an equity that he could enforce if living.[17] However, the

[12] Taylor v. Taylor, 207 Ala. 217, 92 So. 109 (1922) (wife joins in mortgage); Bigoness v. Hibbard, 267 Ill. 301, 108 N. E. 294 (1915) (purchased subject to existing mortgage); Campbell v. Ellwanger, 81 Hun 259, 30 N. Y. Supp. 792 (Sup. Ct. N. Y. 1894) (purchase money mortgage). No North Carolina cases have been found on this point.

[13] Bigoness v. Hibbard, *supra* note 12, Campbell v. Ellwanger, *supra* note 12. *Contra:* Barr v. Van Alstine, 120 Ind. 590, 22 N. E. 965 (1889). As to the widow's status when she has joined in the execution of the mortgage and foreclosure is had, see Note, 19 N. C. L. Rev. 82 (1941).

[14] Rook v. Horton, 190 N. C. 180, 129 S. E. 450 (1925). See Note, 41 A. L. R. 1115 (1926).

[15] Rook v. Horton, *supra* note 14.

[16] Gay v. Exum, 234 N. C. 378, 380, 67 S. E. 2d 290, 291 (1951).

[17] "But it is said a widow may be endowed of an equitable estate. This is so

decision in the principal case clearly overrides this dictum.

The North Carolina Court has a traditionally favorable attitude towards dower,[18] but it is hard to find any logical reason for not applying the ten year limitation to the wife's dower in the equity of redemption. Should a case with similar facts come before the court again, the matter should be examined anew.

ERNEST S. DELANEY, JR.

Municipal Corporations—"Necessary Expense" as Question of Law or Fact—Determination of Local Necessity*

Until 1868 the General Assembly could authorize counties, cities and towns to levy taxes and incur debt without limit.[1] Local governmental units had taken advantage of this freedom by investing heavily in the internal improvements program, suffering heavy losses when the improvement companies failed.[1a] There was a prevalent feeling that the General Assembly had allowed the public money to be foolishly spent, and there arose a demand that restrictions be imposed upon this unlimited power. One resulting limitation upon the power of the General Assembly and upon the imprudence of county and municipal officials is found in Article VII, section 7, of the North Carolina Constitution, which provides that "[n]o county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses thereof,* unless approved by a majority of those who shall vote thereon in any election held for such purpose."[2] [Italics added.]

The exception of "necessary expenses" from the application of this provision raised the question of who decides what are "necessary expenses," as well as the problem of which expenditures fall within the meaning of the term.[3] It was early established that the courts are to

where the husband has an equity that he could enforce if living. But in this case he had none that he could enforce, . . . And as the husband would have had no equity the plaintiff has none. . . ." Rhea v. Rawls, 131 N. C. 453, 454, 42 S. E. 900 (1902).

[18] "Dower is a favorite of the law . . . and the courts will not be astute to find ways by which it will be barred." Rook v. Horton, 190 N. C. 180, 184, 129 S. E. 450, 452 (1925).

* 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.

[1] *See* University R.R. v. Holden, 63. N. C. 410, 426, 431, 434 (1869).

[1a] *See* University R.R. v. Holden, 63 N. C. 410, 426, 432 (1869); Galloway v. Chatham R.R., 63 N. C. 147, 153 (1869).

[2] This section was amended by vote at the general election of November 2, 1948. It formerly required a "vote of the majority of the qualified voters therein."

[3] See Coates and Mitchell, *"Necessary Expenses,"* 18 N. C. L. REV. 93 (1940), for a thorough discussion of the classifications of expenditures, the tests and standards which have evolved from the cases deciding what are and what are not "neces-

decide what are "necessary expenses" as a class, and the local governing authorities are to decide whether those types of expenditures classed as "necessary expenses" by the court are in fact necessary in a particular time and place.[4] This proposition has been reiterated and followed in numerous decisions.[5] It is supported by logic as well as by precedent,[6]

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sary expenses," and the relative functions of the courts and commissioners.

Another problem developed when the court suggested in several cases that it would go further than merely to determine what classes of expenditures come within the meaning of "necessary expenses," and would also differentiate among localities to which the classifications would apply. See Coates and Mitchell, *"Necessary Expenses,"* 18 N. C. L. REV. 93 at 113 (1940). But this question was laid at rest in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. 2d 702 (1946), holding that parks and playgrounds *are not* a necessary expense; there the court stated that Atkins v. Durham, 210 N. C. 295, 186 S. E. 330 (1936), holding that parks and playgrounds *are* a necessary expense *for a populous industrial city like Durham,* would not be followed as precedent. The court said further: ". . . the *Atkins* case proceeds on the theory that, by constitutional intent, the restriction [Art. VII, §7] may apply to some municipalities and not to others, depending on population, industrial and other factors—a rule which if left to the governing bodies to apply, invades the province of the courts, and if left to the courts, is difficult, if not impossible, to apply. However such conditions may control the taxing authorities in determining, within the scope of their power, when a need, recognized by the Constitution as a necessary expense, arises in the particular jurisdiction, no such distinction is inherent in the constitutional provision. What is a necessary expense is a matter for the courts." Id. at 9, 40 S. E. 2d 702, 708 (1946).

[4] In the first case to consider the question, an injunction was sought against the levy of a tax to build a bridge. It was alleged that the bridge was ill-placed, unnecessary, inconvenient, and extravagantly expensive. The court stated: "Who is to decide what are the necessary expenses of a county? . . . 'Repairing and building bridges is a part of the necessary expenses of a county . . . so the case before us is within the *power* of the county commissioners. How can this court undertake to control its exercise? Can we say, such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge, it should be erected as heretofore, *upon posts,* so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abuttments, and to have *stone pillars,* at a heavier outlay at the start, but such as will ensure permanence, and be cheaper in the long run? . . . this court is not capable of controlling the *exercise* of power . . . and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities. . . . Broadnax v. Groom, 64 N. C. 244, 249-250 (1870). This decision was interpreted in Wilson v. Charlotte, 74 N. C. 748 (1876), to mean that the courts are to determine what class of expenditures fall within the definition of "necessary expenses," and the commissioners are to decide whether those types of expenditures so classed are in fact necessary in a particular instance. This is the accepted rule of subsequent decisions.

[5] Green v. Kitchen, 229 N. C. 450, 50 S. E. 2d 545 (1948); Jefferson Standard Life Insurance Co. v. Guilford County, 213 N. C. 293, 34 S. E. 2d 430 (1945); Nantahala Power and Light Co. v. Clay County, 213 N. C. 698, 197 S. E. 603 (1938); Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271 (1937); Palmer v. Haywood County, 212 N. C. 284, 193 S. E. 668 (1937); Wilson v. Charlotte, 206 N. C. 856, 175 S. E. 306 (1934); Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 171 S. E. 909 (1933); Glenn v. Commissioners, 201 N. C. 233, 159 S. E. 439 (1931); Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25 (1926); Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17 (1925); Fawcett v. Mount Airy, 134 N. C. 125, 128, 45 S. E. 1029, 1030 (1903) ("If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine."); Black v. Commissioners, 129 N. C. 121, 39 S. E. 818 (1901); Herring v. Dixon, 122 N. C. 420 (1898); Mayo v. Washington, 122 N. C. 5 (1898); Vaughn v. Commissioners, 117 N. C. 429, 434 (1895) (". . . conceding as we do that the cost of erecting courthouses and jails . . . is one of the necessary expenses of a county, we have no authority . . . of

as it would be impractical for the courts to enter into the administration of local affairs by passing on the necessity of each individual appropriation.[7]

While recognizing that this rule has been an integral part of the law of North Carolina since 1870, the court could not agree upon its application to the situation presented in *Green v. Kitchen*[8] in 1948. The problem arose in this way: The Town of Weldon paid the salary and expenses of its police chief while he attended a 90-day course of special training at the National Police Academy in Washington, D. C. This expenditure had not been approved by the voters of the town. A taxpayer sued to have the payments returned on the ground, among others, that they were not for a "necessary expense" within the meaning of Article VII, section 7, of the Constitution. The defendants (commissioners, mayor, and police chief of Weldon) demurred *ore tenus* to the complaint on the ground that it did not state a cause of action. The demurrer was sustained and the action dismissed. On appeal, this judgment was affirmed, and it was held that special training of a policeman is a necessary municipal expense.

There was no dissent from the decision on the merits of the case.[9]

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determining what kind of a courthouse is needed or what would be a reasonable limit to the cost."); McCless v. Meekins, 117 N. C. 34 (1895); McKethan v. Commissioners, 92 N. C. 243 (1885); Evans v. Commissioners, 89 N. C. 154 (1883); Cromartie v. Commissioners, 87 N. C. 134 (1882); Satterthwaite v. Commissioners, 76 N. C. 153 (1877).

[6] In Mitchell v. Trustees, 71 N. C. 400, 401 (1874), the court stated that "[i]t borders on the ridiculous to ask the Courts to say whether $34 for office rent, $20 for a book, $25 for a table, etc., etc., are necessary expenses." In Wilson v. Charlotte, 74 N. C. 748, 760 (1876): "No other rule could be adopted without inconvenience and injury. If no one could contract with a county for the building of a bridge, or with a city for the building of a market house, or other work coming apparently within the class of necessaries, and which the government of the corporation has deemed necessary, except at the risk of having the contract avoided by the decision of a court, which may take a view of the actual necessity different from that of the city government; then no one would contract without either charging an extra proportionate to the risk, or insuring safety by *getting* the opinion of the court if possible. The public business would be sacrificed or seriously obstructed, and the courts would assume the duties of municipal government, for which they were not intended."

[7] Except in cases of fraud, the courts cannot control the discretion of the local authorities. Fawcett v. Mount Airy, 134 N. C. 125, 45 S. E. 1029 (1903). In Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 171 S. E. 909 (1933), it was contended that there was no necessity for 81 miles of water main, 7½ miles of sewer main, 22 miles of improved streets, and 3 miles of paved streets, costing $200,000 in the aggregate, for the benefit of 4 or 5 families living in a municipal corporation covering only 1400 acres. The court held that since waterworks, sewerage systems and streets come within the class of necessary expenses, it could not control the discretion of the commissioners as to when they were needed.

[8] 229 N. C. 450, 50 S. E. 2d 545 (1948).

[9] Four issues were decided by the court in favor of sustaining the validity of the expenditure. It was held that statutory authority could be implied from the express power to appoint and employ police; that police training is a public purpose within the meaning of Art. V §3 of the North Carolina Constitution; that police training is a necessary expense within the meaning of Art. VII §7; and that the payment did not violate Art. 1 §7, which forbids "separate emoluments or privileges from

Three justices, however, writing two opinions, did not think that the "necessary expense" question was presented to the court for decision. Mr. Justice Stacy said that the only question was whether the complaint stated facts sufficient to constitute a cause of action. Inasmuch as the truth of the allegation that the payments "were not necessary expenses of said Town" was admitted by demurrer, the complaint stated a cause of action under Article VII, section 7, and "[t]he demurrer should have been overruled, and the defendants put to answer."[10] He further stated his position, in reliance upon the established rule as to the relative functions of the courts and commissioners: "Nowhere on the record now before us (complaint and demurrer) does it appear that the Commissioners of Weldon have declared or determined that the instant expenditures are necessary for the governance of the municipality. On the other hand, they have come into court and conceded on demurrer that the expenditures are 'not necessary expenses of said Town.' When the body first charged with responsibility in the matter says the expenditures are not necessary, how can we say otherwise without usurping the powers of the local authorities? It is only when the question is presented as one of law, stripped of any question of fact, that the courts are authorized to act in the premises. . . . The Commissioners of the Town . . . are first to determine as a matter of fact whether a given expenditure is 'for the necessary expenses thereof' before the courts can be called upon to say whether such expenditure falls within the category of necessary governmental expenses."[11] In this view, Justices Winborne and Denny concurred.

Justice Ervin, writing the majority opinion, took a contrary view which to the dissenting justices disrupted a long line of decisions and left the law in confusion. He pointed out that "[i]n reaching this decision, we have not overlooked the allegations of the complaint that the expenditures involved 'were not necessary expenses of said Town.' . . ." But "[*t*]*hese allegations are not averments of fact. They are mere conclusions of law* asserted by the pleader. Consequently, they are not admitted by the demurrer."[12] [Italics added.] He took cognizance of the rule which reserves to the discretion of the local authorities the de-

the community but in consideration of public service." See Coates, *Green v. Kitchen*, 27 N. C. L. REV. 500 (1949). It is readily apparent that no one of the three dissenting justices thought the expenditure was invalid. Justice Stacy simply thought that "we do not reach the question discussed in the majority opinion." *See* Green v. Kitchen, 229 N. C. 450, 460, 50 S. E. 545, 552 (1948) (dissenting opinion). Justices Winborne and Denny stated that "if the question were properly before us, we might not have any quarrel with the majority view that the expenses incurred in question here, might fall within that class of expenditures that come within the definition of "necessary expenses." . . . Id. at 462, 50 S. E. 545, 553 (1948) (dissenting opinion).

[10] Id. at 461, 50 S. E. 2d 545, 553 (1948).

[11] Id. at 460, 50 S. E. 2d 545, 552 (1948).

[12] Id. at 457, 50 S. E. 2d 545, 550 (1948).

cision on the need of a given project in a designated locality, but did not think that his conclusion was in conflict.

The majority opinion did not clarify this position, but it is believed that it can be sustained under the previously existing law,[13] and that the quandary of having two opposing contentions stem from the application of the one proposition can be resolved. The demurrer to the allegation that the expenditure was not for a necessary expense of Weldon did not constitute a factual determination of non-necessity by the commissioners, because a valid action on behalf of the town could only have been taken by them in a lawfully held and constituted meeting.[14] The official determination that the expenditure was in fact necessary was made, in effect, by adoption of the resolution which authorized the policeman to take a leave of absence with pay and which appropriated a sum of money to cover his expenses.[15] This prior determination of factual necessity by the commissioners presented the "necessary expense" question to the court as a matter of law,[16] and it properly decided the case

[13] See note 5 *supra.*

[14] The exercise of the power to decide whether a particular expenditure is necessary for a designated locality otherwise than by a majority vote of the commissioners assembled in a lawful meeting is not a determination by the "Board of Commissioners."

N. C. GEN. STAT. §§160-1 (1943) (". . . every incorporated city or town is a body politic and corporate. . . ."); 160-3 ("The corporate powers can be exercised only by the board of commissioners, or in pursuance of resolutions adopted by them, unless otherwise specially provided by law."); 160-269 (". . . every matter shall be put to a vote. . . . The governing body shall not by executive session or otherwise consider or vote on any question in private session."); 153-1 ("Every county is a body politic and corporate . . . and its powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them."). Jefferson Standard Life Insurance Co. v. Guilford County, 225 N. C. 293, 302, 34 S. E. 2d 430, 435 (1945) (". . . it is sufficient to point to the lack of any corporate finding that the proposed undertaking . . . was necessary or needed in the city of High Point for county governmental expenses. This is fundamental to the undertaking. And the fact that 'in the judgment of the several members' of the board of commissioners such a public building was necessary is not a corporate action, and determinative of the fact."); O'Neal v. Wake County, 196 N. C. 184, 187, 145 S. E. 28, 29 (1928) (". . . to make a contract which shall be binding upon the county the board must act as a body convened in legal session, regular, adjourned, or special. A contract made by members composing the board when acting in their individual and not in their corporate capacity while assembled in a lawful meeting is not the contract of the county. As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference and intelligent discussion of proposed measures. . . . The principal applies to corporations generally, and by the express terms of our statute . . .[N. C. GEN. STAT. §153-1 (1943)] every county is a corporate body.") By the provisions of N. C. GEN. STAT. §160-1 (1943), every incorporated city or town is also a corporate body. See also London v. Commissioners, 193 N. C. 100, 136 S. E. 356 (1927); Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. 271 (1891) (by implication).

[15] ". . . it seems to us that the action of the town council in expressly authorizing and directing the expenditure to be made ought to be deemed tantamount to a determination on its part that it was necessary or needed for the proper enforcement of law and order within the municipality." Green v. Kitchen, 229 N. C. 450, 458, 50 S. E. 2d 545, 551 (1948).

[16] The term "necessary expenses" includes law and fact. The courts decide the one and the local authorities the other. Glenn v. Commissioners, 201 N. C. 233, 159 S. E. 439 (1931); Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25 (1926).

on its merits, without invading the discretion left by law to the local authorities.[17]

This view is further borne out by pursuing to conclusion the course of action advocated by the dissenting opinions. Suppose that the demurrer had been overruled and the defendants "put to answer." Logically, the truth of the allegation of the non-necessity of the expenditure would have been denied, thereby raising an issue to be decided by the jury, or by the judge if jury trial were waived. This would clearly have constituted a substitution of the finding of the jury or judge for that of the commissioners, contrary to the undisputed rule of law that it is within the discretion of the local governing authorities to determine whether in fact an expense is necessary for a particular locality. Paradoxically, it is the very result which the dissenting justices wanted to avoid.

What the court disagreed on was not whether the necessary expense question is one of law and fact or one exclusively of law, nor the question of the relative functions of the courts and commissioners. Rather, the trouble arose from the failure to distinguish between the question of fact in the determination of "necessary expense," which is decided in the discretion of the local governing authorities, and a question of fact as used in its usual and technical sense, which is decided by the trier of fact with reference to the evidence in the case. The effect of the argument of the dissenting opinions was to confuse the two meanings of the one term, and while recognizing the rule which reserves to the commissioners the power to decide the necessity of a particular expenditure, cut it short of its full significance by insisting, in effect, that the question be submitted to a jury. It seems clear from this case that the factual determination of local necessity, as a prerequisite to the existence of the necessary expense question as a matter of law, can only be made by the local governing authorities acting in an official capacity, if the power reserved to them by the force of a long line of decisions is not to be usurped.

In order to reach the decision that the allegation of non-necessity

[17] The majority stated without explanation that its conclusions did not "render all authorized proceedings of the governing authorities of municipal corporations subject to judicial control. The converse is true for the reason that courts will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." Green v. Kitchen, 229 N. C. 450, 459, 50 S. E. 2d 545, 551 (1948). But the dissenting justices clearly felt that the decision that special training of Weldon's police chief was a necessary expense was an infringement of the commissioners' power. The argument was advanced that ". . . if this court is going to decide both questions of law and fact involved in what is "necessary expense" and when such expense is a necessary one for a particular locality, then governing authorities of municipalities may find themselves confronted with a *mandamus* to require them to send all their officers to a police school at public expense, whether they think it proper to do so or not." Id. at 462, 50 S. E. 2d 545, 553 (1948) (dissenting opinion).

demurred to by the commissioners in *Green v. Kitchen* was a mere conclusion of law, and thus not admitted,[18] it was necessary to find that the commissioners had previously made a determination of local necessity.[19] They had not expressly made such a finding, but the majority of the court did not think that one was required. It treated the express authorization of the expenditure by the commissioners as tantamount to a determination and declaration on their part that it was necessary for the proper enforcement of law and order within the municipality.[20] On the other hand, the dissenting opinions were clearly based upon the belief that no finding of necessity had been made by the local authorities.[21] The majority seems to represent the better view, but since no authority was used to support this position, and since several prior cases[22] had indicated that an *express* declaration of local necessity was essential before the court could classify an expenditure as a necessary expense as a matter of law, it may be appropriate to question the soundness of the position[23] in order to determine how far it may be relied upon in the future.[24] It is believed that in so far as prior cases require an *express*

[18] A demurrer admits for the purpose of testing the sufficiency of the pleading, the truth of factual averments and relevant inferences to be deduced therefrom, but not conclusions of law asserted by the pleader. *E.g.,* General American Insurance Co. v. Stadium, 223 N. C. 49, 25 S. E. 2d 202 (1943); Cathay v. Southeastern Construction Co., 218 N. C. 525, 11 S. E. 2d 571 (1940); Leonard v. Maxwell, Com'r, 216 N. C. 89, 3 S. E. 2d 316 (1939); Hussey v. Kidd, 209 N. C. 232, 183 S. E. 355 (1935).

[19] The term "necessary expenses" is a mixed question of law and fact. See note 16 *supra* and cases cited note 5 *supra.* Until the factual question of necessary expense is determined, it seems that the question cannot exist as one *exclusively* of law.

[20] "The town made this expenditure to maintain law and order within its borders. In so doing it was performing an inherent function of sovereignty delegated to it by the State under statutes enacted by the Legislature in conformity to the Constitution. Since the Town of Weldon could not confer upon itself the constitutional and statutory authority to make an expenditure for this purpose by any action of its governing authorities, we are unwilling to adjudge that it acted illegally in this particular case in exercising a discretionary power conferred upon it by the Constitution and legislative fiat merely because of some supposed insufficiency in the phrasing of the resolution of its governing body directing the making of the expenditure. But even if it be assumed that the Town of Weldon could not exercise a discretionary power conferred upon it by the Constitution and the Legislature in the absence of some linguistic proclamation by its governing body that the expenditure in question was necessary or needed in the locality embraced by its limits, it seems to us that the action of the town council in expressly authorizing and directing the expenditure to be made ought to be deemed tantamount to a determination and declaration on its part that it was necessary or needed for the proper enforcement of law and order within the municipality." Green v. Kitchen, 229 N. C. 450, 458, 50 S. E. 2d 545, 550 (1948).

[21] See text p. 316.

[22] See note 25 *infra.*

[23] An alternative approach is to consider whether the majority position changes previously existing law, or whether there has heretofore been no actual decision on the point.

[24] The court also stated that ". . . we are unwilling to adjudge that it [Town of Weldon]acted illegally *in this particular case* . . .", Green v. Kitchen, 229 N. C. 450, 458, 50 S. E. 2d 545, 550 (1948), but there is no reason to believe that this was said with the intention of restricting the decision to the facts of the case.

declaration of necessity, they are of questionable validity.[25] In addition,

[25] Two cases follow the same line of reasoning found in the dissenting opinions of *Green v. Kitchen*. In Wilson v. Charlotte, 206 N. C. 856, 175 S. E. 306 (1934), the resolution authorizing the issuance of bonds to erect a fire drill tower failed to recite that the tower was a necessary expense for the city of Charlotte. The trial judge found that in fact the tower was not necessary. On appeal, the order restraining the bond issue was affirmed, as no exception had been made to the finding. Here the trial judge clearly exercised the fact finding function reserved to the local authorities. Under the reasoning of the majority opinion in *Green v. Kitchen*, the authorization of the bond issue would have been treated as tantamount to a finding of local necessity, and the necessary expense question decided as one of law by the court, which might well have led to a different result, since the only question considered by the court on appeal was whether the facts found were sufficient to support the judgment.

There was language in Black v. Commissioners, 129 N. C. 121, 39 S. E. 818 (1901), to the effect that where an allegation that expenditures were not made for necessary expenses was denied, an issue of fact was raised which the judge was not authorized to try, and that the court could not in this situation presume that the commissioners acted properly. McCless v. Meekins, 117 N. C. 34, 23 S. E. 99 (1895), where the court presumed that notes were given for necessary expenses of the county, was distinguished on the ground that there it was not denied that the indebtedness was based upon the necessary expenses of the county. But again, if the rule giving local authorities the power to decide the necessity of a project in a given locality is to be followed, the fact question in *Black v. Commissioners* was decided before the litigation was begun, and the denial of the allegation of non-necessity could not revive this question of fact for jury decision without usurping the power reserved to the commissioners. At the trial stage the necessary expense question seems exclusively one of law.

In Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271 (1937), holding that an airport is not a necessary expense, the court "noted that the ordinance appropriating the $5,000 in question is not predicated upon any finding or determination of the governing body that it is for a necessary expense." Id. at 65, 195 S. E. 271, 274 (1937). Since the decision was to the effect that an airport is *not* a necessary expense as a class, this language has no significance on the question whether an express finding of local necessity is a prerequisite to a decision that an expenditure *is* a necessary expense as a matter of law. When the court determines the necessary expense question in the negative, it necessarily acts independently of any declaration to the contrary by local authorities, in line with the relative functions of the courts and commissioners, although practically, a finding that a tax is for a necessary expense by the commissioners is *persuasive* on the court in its deciding the question as a matter of law. Martin v. Raleigh, 208 N. C. 369, 180 S. E. 786 (1935). This is to be distinguished from an answer by the court in the affirmative, which raises the problem of the principal case. Apparently, the observation in *Sing v. Charlotte* was made merely to buttress an opinion which could have been reached even if the commissioners had expressly stated by resolution that the airport was a necessary expense for Charlotte.

In Jefferson Standard Life Insurance Co. v. Guilford County, 225 N. C. 293, 34 S. E. 2d 430 (1945), the court declared a provision in a deed by which the county agreed to assume certain indebtedness to the plaintiff, unenforceable as an express contract on the several grounds that it was violative of the necessary expense limitation of Art. VII, §7, and the debt limitation provision of Art. V, §4 of the Constitution, and that the board of commissioners had not acted in its corporate capacity, or in pursuance of the requirements of the County Finance Act. The court stated: "Testing the present case by these constitutional limitations and statutory provisions, and decisions of this Court interpretive thereof, it is sufficient to point to the lack of any corporate finding that the proposed undertaking . . . was necessary or needed in the city of High Point for county governmental purposes. This is fundamental to the undertaking. And the fact that 'in the judgment of the several members' of the board of commissioners such a public building was necessary is not a corporate action, and determinative of the fact." Id. at 302, 34 S. E. 2d 430, 435 (1945). It is not entirely clear whether or not the authorization for the incurrance of the indebtedness was considered by the court to have been made by a lawfully adopted resolution of the board of commissioners. If the undertaking was not made by the board of commissioners acting in its corporate capacity, then the contract is unenforceable against the town on this ground. Also,

there is some slight authority to support the majority opinion.[26] More-

an appropriation *invalidly* made cannot suffice for a determination of local necessity. On the other hand, if the authorization was validly made, and if the language quoted above refers only to the omission of an expression in the resolution that the building was a necessity for the locality, then the court may be demanding an express declaration of local necessity as a prerequisite to a finding of necessity by the court. However, this does not necessarily follow. Since the purpose of the assumption of the debt (erection of county office building) had previously been classified a necessary expense, *e.g.*, Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279 (1909), for the court here to decide that as a matter of law the expenditure was not for a necessary expense would be differentiating between localities, which practice the same court has since condemned in Purser v. Ledbetter, 227 N. C. 1, 40 S. E. 2d 702 (1946). See note 3 *supra*. If the court was deciding that the indebtedness was not in fact for a necessary expense for Guilford County, then it invaded the power reserved to the local authorities.

There is language in one other case, which if not explained, might be misleading. In Hall v. Commissioners of Duplin, 195 N. C. 367, 142 S. E. 315 (1928), a taxpayer sought to enjoin the county board of commissioners from issuing bonds for the purpose of erecting schoolhouses. The trial court upheld the validity of the bond issue on the basis of its finding of fact that the proposed schoolhouses were necessary for the maintenance of the six-month school term required by Art. IX, §2 of the Constitution, and that in providing them the county was acting as an administrative agent of the state. These facts are essential to the validity of bonds issued for school purposes without the approval of the voters, Hall v. Commissioners of Duplin, 194 N. C. 768, 140 S. E. 739 (1927), as schools are not a necessary expense within the meaning of Art. VII, §7 of the Constitution. Bridges v. Charlotte, 221 N. C. 472, 20 S. E. 2d 825 (1942); Greensboro v. Guilford County, 209 N. C. 655, 184 S. E. 473 (1936). The plaintiff in the *Hall* case contended that inasmuch as the bond resolution was silent as to the necessity of the expenditures for maintaining the constitutional school term, the court had no power to make this finding, and that to allow such action would in effect permit the court to pass a bond ordinance or to amend one already passed by the county commissioners. The supreme court sustained this contention, and said that when bonds are issued for the purpose of erecting or purchasing schoolhouses or lands for school purposes without approval of the voters on the basis of their being necessary for the establishment or maintenance of the six month school term as required by Art. IX, §2, *this purpose must be set forth in the bond resolution itself*. But it must be noted that expenditures for school purposes have had a unique history. See Coates and Mitchell, *"Necessary Expenses,"* 18 N. C. L. REV. 93 at 109 (1940). They were repeatedly refused admission into the circle of "necessary expenses," and were only belatedly given a comparable status through the invocation of Art. IX of the Constitution, to avoid the restriction of Art. VII, §7. Collie v. Commissioners, 145 N. C. 170, 59 S. E. 44 (1907). Therefore, an expenditure to do more than is necessary to operate schools for the constitutional term is still subject to the mandate of Art. VII, §7, and must be approved by a vote of the people. A finding of necessity in order to bring the expenditure within the provisions of Art. IX, §2 is not the same as a finding of "necessary expense" within the meaning of Art. VII, §7; therefore, the language in *Hall v. Commissioners* is not applicable to the question of whether an express declaration of local necessity should be made by the local authorities.

It is probable that in none of the cases here discussed was the court actually thinking of whether or not to require an expression of necessity by resolution adopted by the board of commissioners.

[26] In McCless v. Meekins, 117 N. C. 34, 23 S. E. 99 (1895), defendant resisted payment of bonds on the ground that the complaint did not show that the county orders for which the bonds were issued were given for the necessary expenses of the county, or by sanction of a vote of the people, and were therefore void. In rejecting this contention, the court stated that since the complaint alleged that the orders were valid, this was sufficient, as a county order issued without a popular vote, except for necessary expenses, would be invalid; that there was nothing to show that the orders were not issued for necessary expenses except an averment in the answer to that effect, based on the failure of the plaintiff to so allege and not as a substantive fact; and that the presumption was that the commissioners acted within the scope of their authority and issued the orders for necessary expenses.

over, allowing the authorization of an expenditure to suffice for an express determination that it is necessary can clearly be supported by reason, for as a practical matter, few businessmen serving as members of a city or county board of commissioners are likely to feel that a word formula is required to express their opinions on the necessity of making appropriations for particular purposes. Assuming that a commissioner will not reject and forget his usual and customary methods of doing business when he steps from private life to public office, it is perhaps more accurate to say that it may be presumed from the fact that an expenditure was authorized, that the purpose was considered a necessary expense by the commissioners, than to say that it may be presumed that they did not think it necessary because they did not say that it was. The unnatural requirement that a certain phrase be used to indicate that a determination of local necessity has been made would impose an undue penalty upon the local authorities, as it would serve in many instances to shift the *factual* question of necessary expense from the commissioners to the courts. The absence of a requirement that the finding of local necessity be expressly stated does not open the doors to fraudulent or excessive expenditures of public funds, for the abuse of discretion by local authorities is always subject to review by the courts.[27]

The soundness of the holding in *Green v. Kitchen* seems beyond dispute, but until its significance has been determined through its application to other situations, it may be advisable for local authorities to embody in each appropriation resolution, or stipulate by separate resolution (unless popular approval is secured), that it has been determined that the expenditure is a necessary expense for that county or municipality.[28] This is clearly decisive of the factual question of necessary expense and leaves only the question of law to be decided by the courts.

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It seems that the commissioners could as well be deemed to have determined that an expenditure was necessary when it was made by valid resolution, but omitted an expression of necessity.

In Tate v. Greensboro, 114 N. C. 392, 19 S.E. 767 (1894), an analogous case in another field, the court assumed throughout that the city acted in the public interest, although there was no declaration by the city to that effect. A street committee appointed by the board of commissioners decided to have certain trees removed from land located in front of plaintiff's home which had been dedicated for street purposes. In an action for damages for lessening the comfort of the home by removing the trees when not necessary for public convenience, the court refused to review the exercise of discretion in the matter by the city in the absence of an allegation of want of good faith, on the ground that to allow a jury to judge of the correctness of the conclusion reached by the street committee would be transferring to court and jury the discretion which the law vests in municipalities.

[27] *E.g.*, Riddle v. Ledbetter, 216 N. C. 491, 5 S. E. 2d 542 (1939); Hudson v. City of Greensboro, 185 N. C. 502, 117 S. E. 629 (1923); State v. Staples, 157 N. C. 637, 73 S. E. 112 (1911); Southern Ry. v. Commissioners, 148 N. C. 220, 61 S. E. 690 (1908).

[28] As a matter of practice, resolutions authorizing bond issues do expressly state that the commissioners have determined that the purpose for which the proceeds will be used is a necessary expense, for this is presently required by bond attorneys doing business in North Carolina.