UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 31 | Number 3 Article 4

4-1-1953

Notes and Comments

North Carolina Law Review

Appeal and Error—Criminal Law—Examination of Record for Reversible Error Upon Court's Own Motion in Capital Cases*

The general function of an appellate court is to review the rulings of a lower court for the purpose of determining whether or not reversible error has been committed.[1] Accordingly, the North Carolina Supreme Court will look into the charge of the trial judge for those errors assigned[2] and discussed[3] in the appellant's brief which were (1) reserved by timely objections during the trial,[4] and (2) some which were not objected to during the trial provided they come within certain classes, such as a misstatement of the law by the trial judge,[5] or an expression of an opinion by the trial judge,[6] or an inclusion in the judge's summation of the evidence of a material fact not properly before the court

* All capital cases appearing herein are designated by an asterisk (*).

[1] "It has . . . long been considered the law of this Court, that only those points which were ruled below and presented in the bill of exceptions can be heard here unless they appear upon the record proper." State v. Langford, 44 N. C. 436, 442 (1853).* We have repeatedly held that cases on appeal, in the nature of bills of exception, are understood to present only such errors as are assigned, and we cannot allow defects to be searched for and made grounds of complaint not contemplated in the appeal." Davis v. Council, 92 N. C. 725, 731 (1885). "No exceptions not . . . filed and made a part of the case or record shall be considered by this Court, other than exceptions to jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment." Rule 21, Rules of Practice in the Supreme Court of North Carolina, 221 N. C. 544, 558 (1942).

[2] "Those . . . exceptive assignments of error in the record . . . not brought forward . . . in the appellant's brief are deemed to be abandoned." Karpf v. Adams, 237 N. C. 106, 111, — S. E. 2d — (1953). "The . . . exception noted by the defendant during the trial was not referred to in his brief, and therefore is deemed abandoned." State v. Cox, 217 N. C. 177, 178, 7 S. E. 2d 473, 474 (1940). See also State v. Biggs, 224 N. C. 722, 728, 32 S. E. 2d 352, 356 (1944) in which the court repeated the applicable law that the exceptions not referred to in the brief are deemed abandoned "but we have examined each of these exceptions . . . and are unable to discover any exception which can be sustained . . . no error."

[3] "Assignments of error which are brought forward in the brief 'in support of which no reason or argument is stated or authority cited' are deemed to be abandoned." Karpf v. Adams, 237 N. C. 106, 111, — S. E. 2d — (1953). *Accord:* State v. Hightower, 236 N. C. 62, 64, 36 S. E. 2d 649, 650 (1945);* State v. Gibson, 221 N. C. 252, 255, 20 S. E. 2d 51, 53 (1942);* State v. Howil, 213 N. C. 782, 785, 197 S. E. 611, 613 (1938).

[4] An excellent short summation of the rule appears in State v. Lambe, 232 N. C. 570, 571, 61 S. E. 2d 608, 610 (1950);* "Under the appellate practice . . . in this jurisdiction, it is not incumbent upon a litigant to except at the trial to errors in the instructions of the judge as to the applicable law, or in the instructions of the judge as to the contentions of the parties with respect to such law. It is sufficient if he sets out his exceptions to errors in such instructions for the first time in his case on appeal. The rule is otherwise, however, where the judge misstates the evidence, or the contentions of the parties arising on the evidence. When that occurs, the litigant must call the attention of the judge to the misstatement at the time it is made."

[5] State v. Lambe, 232 N. C. 570, 571, 61 S. E. 2d 608, 610 (1950).*

[6] N. C. GEN. STAT. § 1-180 (1943, recompiled 1950) and annotations. "No judge. in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, . . . but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising therein."

either because it was excluded as improper or never presented at all.[7]

There are times, however, when our Court is not encumbered by these procedural requisites. For instance, when reversible error appears on the "record proper"[8] the Court will reverse irrespective of such requisites.[9] As to capital cases, although there is dicta to indicate that whenever reversible error appears anywhere on the entire record the Court will reverse in the same manner as if the error had met the requisites of procedure,[10] the decisions in point hold, nevertheless, that the Court will not recognize error on its own motion unless it appears on the "record proper."[11]

[7] This rule seems to have originated in the case of State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924),* wherein the lower court "after excluding the proposed testimony of a serious assault by deceased on the witness's (*sic*) [prisoner's] aged father 30 months before as being too remote, puts it to the jury . . . evidence to show the origin of the prisoner's malice and as tending to support the State's contention that this was murder done of a deliberate and settled purpose. . . . Like an expression of an opinion by the Court . . . the harmful impression could not well be effaced, and . . . should not be taken as waived because not presently excepted to." In State v. Isaac, 225 N. C. 310, 34 S. E. 2d 410 (1945);* State v. Wyont, 218 N. C. 505, 11 S. E. 2d 473 (1940);* and Smith v. Stanfield Hosiery Mill, Inc., 212 N. C. 661, 194 S. E. 83 (1937), the rule in State v. Love was followed. In Steelman v. Benfield, 228 N. C. 651, 654, 46 S. E. 2d 829, 832 (1948), the rule was distinguished as follows: "Exceptions to excerpts from the court's review of this and other testimony offered point out inaccurate statements of facts in evidence rather than statements of fact not shown in evidence. Hence . . . cases [as State v. Love] are not in point. . . . As the Court's attention was not called thereto and exceptions are not entered in apt time, they are not now tenable."

[8] The *record proper* in such a case shows: "1. The day on which the court convened. 2. The name of the judge who presided. 3. Organization and action of the grand jury. 4. The indictment (set out in full). 5. The impaneling and action of the petit jury. 6. The judgment. 7. Appeal entries. 8. Facts constituting abandonment of the appeal, or failure to prosecute it." State v. Watson, 208 N. C. 70, 71, 179 S. E. 455, 456 (1935).*

[9] ". . . where the error is manifest on the face of the record, even though it be not the subject of an exception, it is the duty of the Court to correct it, and it may do so of its own motion, . . ." Gibson v. Central Manufacturer's Mutual Insurance Co., 232 N. C. 712, 715, 62 S. E. 2d 320, 322 (1950). See also note 2 *supra*. The terms "record proper" and "face of the record" seem to be used interchangeably.

[10] "This exception and this assignment of error fall short of the requirement that 'when it is claimed that the findings of fact made by the trial judge are not supported by the evidence, the exceptions and the assignments of error in relation thereto must specifically and distinctly point out the alleged errors.' Since the petitioner's life hangs in the balance, we have nevertheless examined and weighed the evidence in this proceeding with the same meticulous and painstaking care we would have employed had he noted appropriate exceptions and assignments of error to all of the findings of fact adverse to him." Miller v. State, 237 N. C. 29, 44, — S. E. 2d — (1953).* See also State v. Biggs, 224 N. C. 722, 728, 32 S. E. 2d 352, 356 (1944).*

[11] ". . . exception . . . to a matter occurring in the array of the evidence and the statement of the contentions . . . comes within the general rule. We fully realize that we are dealing with a capital case, but the exceptive matter is not of such a character to take it out of this rule. . . . No error." State v. Hooks, 228 N. C. 689, 697, 47 S. E. 2d 234, 239-240 (1948).* Also see State v. Lambe, 232 N. C. 570, 61 S. E. 2d 608 (1950).*

In the recent capital case of *State v. McCoy*,[12] our Supreme Court found reversible error in the judge's summation of the evidence even though there was no objection at the trial, nor any mention of the error in the brief of the appellant. The Court gave as its reasons for reversing on its own motion: (1) that the error was within the class that does not require timely objection to reserve the point for consideration on appeal; and (2) that the Court will search the record and take cognizance of such prejudicial error on its own motion.

There seems to be sufficiently clear authority to support the first step[13] in the reasoning of the Court; for this was an inclusion by the trial judge of a material fact in the summation of the evidence which was not supported by the record. However, even though an error falls within the class that does not require timely objection to preserve it, ordinarily it must be presented in appellant's brief before it will be considered on appeal.[14] To overcome this normal obstruction the Court in the principal case stated that (a) it will examine the record for the ascertainment of reversible error in capital cases, and (b) if found, it then becomes the duty of the Court to act of its own motion on the error so found.

The principal case appears, however, to be the first instance in which our Court has interpreted the language "will examine the record for the ascertainment of reversible error" as authorizing the Court to act upon its own motion in recognizing such error in the charge. Granted that the language is sweeping, it seems doubtful that the Court using it heretofore meant it to be so inclusive. This rationale is borne out to some degree by the fact that similar language has been used in civil cases in which there seems little doubt that such examination is limited to the error appearing in the record proper or in a bill of exceptions.[15] Furthermore, nine out of ten cases relied upon by the Court in the principal case as supporting this general rule of examining the entire

[12] 236 N. C. 121, 71 S. E. 2d 921 (1952).*

[13] "The Court . . . told the jury that the State's evidence tended to show that the defendant 'stabbed him from the rear, whereupon the deceased fell to the ground.' And further that the State offered evidence to show that 'while the defendant was stabbing the deceased and while he was striking the deceased with the axe that the deceased's wife was begging the defendant not to kill her husband.'" The Court could find no testimony in the record "in support of the above quoted excerpts from the charge." State v. McCoy, 236 N. C. 121, 124, 71 S. E. 2d 921, 923 (1952).* This seems to be well within the class of error governed by the rule in State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924).

[14] The application of the rule in State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924)* has been confined to cases in which the error was adequately presented and discussed in the appellant's brief. The effect of the rule is only to say that such error is not waived "by not presently objecting." See note 7 *supra*.

[15] Livingston v. Livington, 235 N. C. 512, 515, 70 S. E. 2d 478, 480 (1952) (Civil action for personal injury: "after an examination of the entire record. . . . find no sufficient grounds to disturb the results of the trial. No error."). Also see note 2 *supra*.

record in capital cases were dismissals of incompleted appeals[16] in which nothing but the "record proper" (or "the face of the record") was before the Court. The one case cited by the Court as supporting the statement that "If upon such an examination, error is found, it then becomes the duty of the Court on its own motion to recognize and act upon the error so found"[17] said, "As is customary in capital cases, however, we have examined the record to see that no error appears upon the face thereof, such errors, if any being cognizable *sua sponte*."[18] This case was also a dismissal of an incompleted appeal and the judge's charge, not being a part of the record proper, was not before the Court.[19]

It is difficult to say what the principal case means other than that it is something definite in an area which, heretofore, was foggy. There are at least two variables which are determinative of the importance of this case. The first concerns the type of error in the charge to be considered within the realm of review by the Court on its own motion. There are several types of error that appear similar to that found in the principal case: (1) the narrow limit is error which can be classed as an erroneous inclusion of a material fact in the charge;[20] (2) more reasonably, *any* error that is not waived by failure to reserve it at the trial;[21] (3) the broad limit which includes all error in (2) above and also any error reserved but not relied upon in the appellant's brief.[22] There seems no logical reason why the broad limit is not inferable.

The second variable in the importance of the principal case exists as to the meaning of the words "if error is found it then becomes the *duty* of the Court upon its own motion to recognize and act upon the error so found." Does this really mean a duty? If it means a duty then is it not reciprocally a right of the appellant? Can the Court mean that such error is as much before it as the same error properly

[16] All cases cited on this point by the principal case affirmed the ruling of the lower court and furtherfore nine of the ten cases relied upon were petitions for dismissal of an incompleted appeal under Rule 17, Rules of Practice in the Supreme Court of North Carolina, 221 N. C. 544, 551 (1942). State v. Garner, 230 N. C. 66, 51 S. E. 2d 895 (1949);* State v. Brooks, 224 N. C. 695, 200 S. E. 426 (1938);* State v. Morrow, 220 N. C. 441, 17 S. E. 2d 507 (1941);* State v. Page, 217 N. C. 288, 7 S. E. 2d 559 (1940);* State v. Williams, 216 N. C. 740, 6 S. E. 2d 492 (1940);* State v. Moore, 216 N. C. 543, 5 S. E. 2d 719 (1939);* State v. Stovall, 214 N. C. 627, 31 S. E. 2d 754 (1944);* State v. Sermons, 212 N. C. 767, 194 S. E. 469 (1937);* and State v. Watson, 208 N. C. 70, 179 S. E. 455 (1935);* were all dismissed under Rule 17. Therefore all that appeared in these cases was the "record proper" which of course does not contain the charge and evidence of the case. State v. West, 229 N. C. 416, 50 S. E. 2d 3 (1948) is the only cited case in which there was a completed appeal and that case involved a rather summary dismissal.

[17] State v. McCoy, 236 N. C. 121, 123, 71 S. E. 2d 921, 922 (1952).*

[18] State v. Sermons, 212 N. C. 767, 768, 194 S. E. 469 (1937).*

[19] See note 9 *supra*.

[20] See note 7 *supra*.

[21] See notes 5-7 *supra*.

[22] See notes 5-7 *supra* and also note 4 *supra*.

assigned? Or does the Court, more likely, mean something less than this? A strict duty would require the Court to examine the charge as appellant's counsel, and sift out his better points. It seems questionable, at least, that the Court intends to saddle itself with such a duty, but more likely that it intends to act at its discretion in such a matter.

Even if the latter of these is the proper meaning to be attached to the principal case the solicitor is burdened with a duty heretofore unrealized—namely, to see that the evidence stated in the case on appeal supports the summation of the evidence by the trial judge with respect to all material facts in any case in which any error in the charge is urged.[23] The Court will not go beyond the record on appeal[24] and a situation in which the charge is not so supported falls within even a narrow interpretation of the principal case.

This seems of little practical significance to trial attorneys who would not conceivably rely on such in the handling of a case, and it seems academic to argue that it lessens the demand for diligence on the part of the attorney for the appellant. It is submitted, however, that the principal case is significant in that it better defines and perhaps extends the means by which the Court will reverse capital cases. It is a liberal and wise affirmance of our policy of jealously guarding the rights of persons convicted of capital felonies.

DANIEL L. BELL, JR.

Conflict of Laws—Divorce—Domicile of Military Personnel

Military personnel often face a perplexing problem in acquiring a divorce, because of the prerequisites which are peculiar to such a proceeding. Every state requires a statutory period of "residence" within its borders before a petition for divorce can be filed in its courts.[1] The word "residence," as used in these statutes, is interpreted as meaning "domicile,"[2] for "under our system of law, judicial power to grant a

[23] State v. White, 232 N. C. 385, 61 S. E. 2d 84 (1950). It seems wise to set out the whole charge where error as to any part is alleged since the court will construe the charge as a whole to determine if there is prejudicial error. Swinton v. Savoy Realty Co., 236 N. C. 723, 727, 73 S. E. 2d 785, 788 (1953). *But see* Upchurch v. Robertson, 127 N. C. 127, 129, 37 S. E. 157, 159 (1900).

[24] The court can "judicially know only what properly appears on the record." State v. Ravensford Lumber Co., 207 N. C. 47, 48, 175 S. E. 713, 714 (1934).

[1] See N. C. GEN. STAT. §50-5 (1943 Recomp. 1950), ("In any action for absolute divorce upon any of the grounds set forth in this section, allegations and proof that the plaintiff or defendant has resided in North Carolina for at least six months next preceding the filing of the complaint shall constitute compliance with the residence requirements for prosecuting any such action for divorce.") See also N. C. GEN. STAT. §50-6 (1943 Recomp. 1950), which provides for a residence of six months in North Carolina as a prerequisite for petitioning for a divorce on the basis of two years' separation.

[2] Caheen v. Caheen, 233 Ala. 494, 496, 172 So. 618 (1937); Ungermach v.

divorce—jurisdiction, strictly speaking—is founded on domicile. . . . The domicile of one spouse within a state gives power to that state . . . to dissolve a marriage wheresoever contracted."[3]

It is well, therefore, to briefly note the distinction between residence and domicile. Residence means living in a certain locality. A domicile requires a living in a locality with the intent to make such a place home.[4] Thus intention is a most important factor in any determination of domicile. There must be a concurrence of the act of residence and the intent that the place shall become home.[5] A person may have one or more residences, but on the other hand, a person can have but one domicile. It is evident, therefore, that a domicile is not lost until a new one is acquired, for everyone must at all times have a domicile somewhere.[6] If residence is colorable, it is insufficient to give local courts jurisdiction to entertain a bill for divorce.[7]

Another settled rule as to domicile is particularly pertinent to military personnel.[8] That rule is that "a person cannot acquire a domicile of choice by any act done under legal or physical compusion."[9] Domicile, therefore, requires a freedom of will—an exercise of volition or freedom of choice not prescribed or dictated by any external necessity.[10] Since military personnel are ordered to their stations, it is ordinarily impossible for them to acquire a domicile in the jurisdiction where their post is located.[11] This is well illustrated in the leading case of *Harris*

Ungermach, 61 Cal. 2d 29, 142 P. 2d 99 (1943); Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595 (1895); Johnson v. Johnson, 381 Ill. 362, 45 N. E. 2d 625 (1942); Bryant v. Bryant, 228 N. C. 287, 45 S. E. 2d 572 (1947); Smith v. Smith, 194 Miss. 431, 12 So. 2d 428 (1943); Root v. Root, 57 R. I. 436, 190 Atl. 450 (1937); Connolly v. Connolly, 33 S. D. 346, 146 N. W. 581 (1914). In some instances actual residence may be an added requirement. See article, *infra*.

[3] Williams v. State of North Carolina, 325 U. S. 226, 228 (1945).

[4] Zimmerman v. Zimmerman, 175 Ore. 585, 155 P. 2d 293 (1943). RESTATEMENT CONFLICT OF LAWS § 9 (1934) gives the following definition: "Domicile is the place with which a person has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law."

[5] Bryant v. Bryant, 228 N. C. 287, 45 S. E. 2d 572 (1947).

[6] Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240 (1919); Hannon v. Grizzard, 89 N. C. 115 (1883). In the latter case plaintiff, domiciled in North Carolina, took a position in Washington, D. C., returning to his home in North Carolina whenever possible. *Held*, for purposes of satisfying the qualifications required of electors and persons holding office, that plaintiff is domiciled in North Carolina.

[7] Albee v. Albee, 141 Ill. 550, 31 N. E. 153 (1892).

[8] Stevens v. Allen, 139 La. 658, 71 So. 936 (1916); Hoffman v. Hoffman, 162 Pa. Super. 22, 56 A. 2d 362 (1948).

[9] RESTATEMENT, CONFLICT OF LAWS §21 (1934). This section is quoted in cases too numerous to cite.

[10] Nobuo Hiramatsu v. Phillips, 50 F. Supp. 167 (S. D. Calif. 1943). (Diversity of citizenship was in question. The plaintiff was a Japanese-American evacuee.)

[11] RESTATEMENT, CONFLICT OF LAWS, § 21, comment c (1934). "A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicile there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere.

v. Harris.[12] In that case the plaintiff lived in Iowa until he was appointed to the United States Military Academy. After graduation, he returned to Iowa. Since that time, on orders from the government, he lived at various camps and stations including the Philippine Islands and the Panama Canal Zone as an officer in the United States Army. While stationed in Massachusetts, he petitioned for divorce. It was held that the plaintiff was still domiciled in Iowa.[13] It is apparently settled that if an officer or enlisted man occupies quarters assigned to, or provided for him on the military post he cannot acquire a domicile there, even though he has expressed the affirmative intent of always regarding that post or fort as his home.[14] This is true even though his family may be living with him.[15] Thus it is apparent that a serviceman, in petitioning for a divorce, must, in the usual case, do so in the state where he was inducted, for that state will ordinarily be his domicile. The factors of time, distance, financial expense and necessary witnesses may combine to defeat his attempts to successfully acquire a divorce. If the state of his domicile has the unique statutory requirement of both domicile *and bona fide residence* for a certain length of time preceding the petitioning, it may be impossible for him to acquire a divorce while he is in the service.[16]

"Illustrations:

2. A's domicil is X. As an officer in the army, A is required to live in that part of Y devoted to the purposes of an army post, his family being permitted to reside and residing there with him. A is still domiciled in X."

[12] 205 Ia. 108, 215 N. W. 661 (1927), noted in 13 IA. L. REV. 347 (1928); 26 MICH. L. REV. 571 (1928).

[13] *Id.* The plaintiff petitioned for divorce in Iowa under a code provision of Iowa giving jurisdiction in divorce to the district court of the county in which "either party resides." In this case the plaintiff petitioned in the proper jurisdiction, but in the usual instance the plaintiff attempts to acquire a divorce in the jurisdiction where he is stationed. Mohr v. Mohr, 206 Ark. 1094, 178 S. W. 2d 502 (1944); Stevens v. Allen, 139 La. 658, 71 So. 936 (1916); Smith v. Smith, 194 Miss. 431, 12 So. 2d 428 (1943).

Squire v. Vaquez, 52 Ga. App. 790, 184 S. E. 629 (1936) involved an action for distribution of the estate of the deceased who died in V.A. hospital in Augusta, Ga. Parents of deceased were domiciled in Puerto Rico. He enlisted in the army in 1918, and it was not shown that he changed his domicile after enlistment. *Held,* deceased was domiciled in Puerto Rico." A persons' domicile is not changed merely by his enlistment in the army, and his transfer or assignment by military order to another jurisdiction."

In Dicks v. Dicks, 177 Ga. 379, 170 S. E. 245 (1933), the court placed some emphasis on the fact that the federal government has power to exercise exclusive legislation over military reservations purchased by the United States, and that military personnel cannot acquire a domicil thereon unless permitted so to do by the United States. Other courts place no emphasis on this point.

[14] Dicks v. Dicks, 177 Ga. 379, 170 S. E. 245 (1933); Pendleton v. Pendleton, 109 Kan. 600, 201 Pac. 62 (1921); Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926); Zimmerman v. Zimmerman, 175 Ore. 585, 155 P. 2d 293 (1945). *Cf.* Beasley v. Beasley, 93 N. H. 447, 43 A. 2d 154 (1945). This would not apply to retired military personnel who are permitted to live on a military reservation, for they are not under compulsion.

[15] RESTATEMENT, CONFLICT OF LAWS § 21 comment c (1934).

[16] VA. CODE § 20-97 (1950), Hiles v. Hiles, 164 Va. 131, 178 S. E. 913 (1935).

This does not mean that a serviceman may never be able to acquire a domicile in the jurisdiction where he is on duty. Where, therefore, the serviceman is allowed to live with his family off the post, some courts have held that he may acquire a domicile there providing—and the proviso is a big one—that he can prove both the act and intent to acquire a home there.[17] Thus in an Idaho case an enlisted man, who was married in Virginia, was transferred to Idaho. He was granted permission to live in Boise while he was stationed nearby. He rented a room in Boise and expressed an intention to make Boise his home, and to return there upon release from the service. The Idaho court held that, under the facts of the case, the plaintiff had established by sufficient independent evidence that he had acquired a domicile in Idaho.[18] A court will be hesitant to believe evidence of this nature, therefore it is established that the intention to acquire a new domicile, by military personnel, must be shown by the clearest and most unequivocal proof.[19]

Some states have given statutory relief to the serviceman's problem. Kansas, for example, has passed a statute which reads:

> A plaintiff in an action for divorce must have been an actual resident in good faith of the state for one year next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed, unless the action is brought in the county where the defendant resides or may be summoned. *Provided,* that any person who has been a resident on any United States Army Post or military reservation within the State of Kansas for one year next preceding the filing of the petition may bring an action for divorce

(Both elements of domicile and bona fide residence are required for the period of time. "To have been an actual bona fide resident within purview of this statute, means to have been in this state for the required period with a permanent abode.")

See also Mo. REV. STAT. § 1517 (1950), Hays v. Hays, 221 Mo. App. 516, 282 S. W. 57 (1926).

[17] Percy v. Percy, 188 Cal. 768, 207 Pac. 369 (1922); Hawkins v. Winstead, 65 Idaho 12, 138 P. 2d 972 (1943); St. John v. St. John, 291 Ky. 363, 163 S. W. 2d 820 (1942); Burgan v. Burgan, 207 La. 1057, 22 So. 2d 649 (1945); Struble v. Struble, 177 S. W. 2d 279 (Tex. Civ. App. 1943); Kankelborg v. Kankelborg, 199 Wash. 259, 90 P. 2d 1018 (1939); RESTATEMENT, CONFLICT OF LAWS, § 21, comment c (1934): "If, however, he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives.

"Illustrations:

"

. . . .

3. A's domicil is X. A is an Army officer stationed at Y. He is permitted to live outside the Army post. A marries a resident of Y, purchases a house in Y and lives there with his family with the intention of making it his home. A acquires a domicil of choice in Y."

[18] Hawkins v. Winstead, 65 Idaho 12, 138 P. 2d 972 (1943).

[19] Kensil v. Pickens, 25 F. Supp. 455 (W. D. Tex. 1938); Ex parte White, 228 Fed. 88 (D. N. H. 1915).

in any county adjacent to said United States Army Post or Military reservation.[20]

North Carolina has a substantial military population. Whether our legislature, like Kansas, would like to liberalize the usual rule of domicile as to that population, requires considerations both political and sociological in nature. At any rate, the serviceman's problem illustrates but one of the strange results of the present divorce laws, having domicile as a requirement.[21]

H. WILLIAM ASHLAW

Constitutional Law—Delegation of Legislative Authority to Individuals*

In *Wilcher v. Sharpe*[1] the North Carolina Supreme Court was called upon to decide the constitutionality of a city ordinance prohibiting the erection of gins or mills "within the corporate limits of the town without the consent of all property owners in three hundred feet of the proposed site of building." The court held the ordinance invalid stating that where the effectiveness of an ordinance determining the use of property for a lawful purpose is conditioned upon the assent of private persons, such as owners of adjacent property, it is an unconstitutional grant of legislative power to private individuals.

This decision is in agreement with the often quoted rule that the power conferred by the constitution upon the legislature to make laws cannot be delegated by that body to individuals.[2]

In one of the earliest North Carolina cases considering this question, *Shaw v. Kennedy*,[3] where the town constable was given discretionary power to "take up and sell all hogs running at large on the city street,"

[20] KAN. GEN. STAT. § 60-1502 (1949). See also FLA. STAT. ANN. §21966 (1943); GA. CODE § 30-107 (1943); OKLA. STAT. tit. 12, § 1272 (1951).

[21] See Baer, *The Aftermath of Williams vs. State of North Carolina*, 28 N. C. L. REV. 265 (1950).

* The author is here primarily concerned with the status of the law as to the delegation of legislative authority to individuals in North Carolina. Reference to official groups is made only where it appears as a link in the chain of the development of this law by the court. Reference should be made, in conjunction with this article, to Note, 7 NCL REV. 315 (1929) where the delegation of legislative authority resulting from zoning ordinances is discussed.

[1] 236 N. C. 308, 72 S. E. 2d 662 (1952); *accord*, Eubank v. Richmond, 226 U. S. 137 (1912); State of Washington *ex rel* Seattle Title Trust Co. v. Roberge, 278 U. S. 116 (1928); Willis v. Town of Woodruff, 200 S. C. 266, 20 S. E. 2d 699 (1942). *Contra:* Whitaker v. Green River Coal Co., 276 Ky. 43, 122 S. W. 2d 1012, 1016 (1938); State *ex rel* Standard Oil Co. v. Combs, 129 Ohio St. 251, 194 N. E. 875 (1935); City of Spokane v. Camp, 50 Wash. 554, 97 P. 770 (1908).

[2] N. C. CONST. Art. I § 8, Art. II §1; Cox v. City of Kinston, 217 N. C. 391, 8 S. E. 2d 252 (1940). See I COOLEY'S CONSTITUTIONAL LIMITATIONS, 434 (1927); 11 AM. JUR., *Legislatures to Individuals*, 221; 70 ALR 1064.

[3] 4 N. C. 591 (1817); *accord*, People *ex rel* Bernat v. Bicek, 405 Ill. 510, 91 N. E. 2d 588 (1950); McCown v. Gose, 244 Ky. 402, 51 S. W. 2d 251 (1932).

the court said the ordinance was not in accord with the "laws of the land" and held the ordinance invalid seemingly on the grounds that it conferred arbitrary powers upon the constable. The court did not mention directly the fact that it granted legislative authority to an individual, but this may be taken to be the true meaning of the phrase "laws of the land." In 1853, however, in *Hill v. Bonner*[4] the court by way of deliberate dictum stated that any act tending to grant the people legislative authority would be void. Then in *Thompson v. Floyd* (1855)[5] the court stated, "The General Assembly can delegate any portion of its legislative functions to any man or set of men, acting either in an individual or corporate capacity." The court was very careful to continue its discussion, however, by pointing out that the individuals concerned by the act in question were acting merely as agents of the legislature to carry out its desired functions, and could not in any way "alter or amend the law in the slightest particular."[6] But the court at no time mentioned the dictum in the *Hill* case.

Four years later in *Manly v. City of Raleigh*[7] the court upheld an act of the legislature extending the city limits of Raleigh, which depended upon the approval of the mayor and commissioners for its becoming effective, and cited the language in the *Thompson* case in reaching its conclusion that the law did not violate the constitution.[8] The court further conclusively intimated that similar laws depending for validity on their acceptance by any individuals or groups of individuals, would not be unconstitutional.

By 1887 the trend toward liberal construction of the rule prohibiting delegation of legislative authority to individuals seemed well established.[9] In *State v. Yopp*[10] the court held valid a statute forbidding

[4] 44 N. C. 257 (1853); *accord,* Patterson v. Jefferson County, 238 Ala. 442, 191 S. E. 681 (1939); See Daigh v. Schaffer, 23 Cal. App. 2d 449, 73 P. 2d 927 (1937), (holding a grant of judicial authority to an individual invalid).

[5] 47 N. C. 313, 315 (1855); *cf.* Cody v. City of Detroit, 289 Mich. 499, 286 N. W. 805 (1939) (where the court held the consent of an individual being used for no greater purpose than to waive a restriction which legislative authority created, is within constitutional limitations).

[6] The statute in question made it possible for a majority of the the Justices of the Peace in Robeson County by agreement to abolish jury trials by the county courts within their county—remarkably similar to the grant declared unconstitutional in the principal case.

[7] 57 N. C. 370 (1859); *cf.* Yick Wo v. Hopkins, 118 U. S. 356 (1886) (where the court states: "The very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life at the will of another is intolerable.").

[8] The court, however, in reference to Hill v. Bonner, at p. 377, stated in speaking of this type legislation: "although it may be an abuse of power greatly to be deprecated as tending to subvert the principles of our representative form of government, still the power has been granted, and it is not the province of one branch of the government to correct the supposed abuses of the other."

[9] Cain v. Commissioners, 86 N. C. 8 (1882); State v. Chambers, 93 N. C. 600 (1885) (recognizing the validity of contingent legislation depending on majority approval by voters before becoming enforceable law). *Cf.* N. C. GEN. STAT. 518-

the use of certain type vehicles on a Wilmington company road without "the express permission of the superintendent of said road," saying this was a police regulation and the superintendent an agent of the law. The statute contained no criteria for the exercise of this discretion, and the court, taking for granted that it would be used "honestly, fairly, reasonably and without prejudice," would likely have held it unconstitutional had there appeared an abuse of the power granted.[11] The apparent question of delegation of legislative authority to individuals was not discussed.

In 1892 the famous case of *State v. Tenant*[12] decided the constitutionality of an Asheville ordinance prohibiting the "building, addition to, or improvement upon" any building in the city without first obtaining the permission of the city aldermen. The ordinance was held invalid as subjecting "the right of property to the despotic will of aldermen."[13] This decision would indicate a reversion on the part of the court to its original view requiring strict interpretation of the rule against delegation of legislative authority, if the circumstances in the case under consideration did not differ essentially from those found expressing the more liberal attitude of the court. In the immediate case the aldermen had refused an Asheville hospital permission to enlarge its facilities without stating reasons for so doing. The court relied on this apparent "abuse of discretion" as a grounds for reaching its desired conclusion. A similar decision would no doubt have resulted had the aldermen been "private individuals" as was dealt with in the principal case.

At this same term, in *State v. Barringer,*[14] a statute prohibiting the manufacture of. liquor within three miles of Barium Springs Orphanage without the written consent of the Orphanage superintendent was held valid, the court rationalizing and saying that even if that portion of the statute requiring the superintendent's consent were in-

61 (granting option as to the operation of county liquor stores to majority of voters in county to be affected).

[10] 97 N. C. 477, 482, 2 S. E. 458 (1887); *cf.* City of Cairo v. Coleman, 53 Ill. App. 680 (1894); Bill v. City of Goshen, 117 Ind. 221, 20 N. E. 115 (1889); Town of Trenton v. Clayton, 50 Mo. App. 535 (1892) (ordinances granting mayor or other official arbitrary power to approve or withhold licenses were held invalid).

[11] State v. Austin, 114 N. C. 855, 19 S. E. 919 (1894); State v. Hundley, 195 N. C. 377, 142 S. E. 330 (1928) (emphasizing the importance of prohibiting the abuse of discretion allowed in city ordinances). *Accord,* Duffy v. Hurley, 402 Ill. 562, 85 N. E. 2d 26 (1949).

[12] 110 N. C. 609, 14 S. E. 387 (1892).

[13] *Accord,* Kellerman v. City of Philadelphia, 139 Pa. Super. 569, 13 A. 2d 84 (1940). *Cf.* Thorpe v. Mayor, 13 Ga. App. 767, 79 S. E. 949 (1913) (where the court held ordinance granting city official power to refuse or grant a license at his discretion to be valid, but warned against the "unreasonable" use of such discretion).

[14] 110 N. C. 525, 14 S. E. 781 (1892). *Cf.* Beacon Liquors v. Martin, 279

valid, this would not mean the entire statute was bad; thus the prohibition would be effective and the same result, as to the manufacturer, reached.[15] During this year the court also drew the distinction between a grant of "power to adopt rules and regulations to carry into effect a law already passed" and a grant of "power to pass a law,"[16] but this distinction was not mentioned in the *Barringer* case.

In 1916 the court in *State v. Bass*[17] held an ordinance unconstitutional which prohibited any person from building a privy or stable in closer proximity to his neighbor's house than his own. Although the court quoted with approval the words of the Attorney General describing the ordinance as a grant of legislative authority to individuals by the town commissioners, the ordinance was held invalid principally on the grounds that it did not operate equally on all people. Following this decision in 1925 the court restated the general rule that legislative authority cannot be delegated, but the power to determine some fact or state of things upon which the law makes or intends to make its own action depend is valid.[18]

However, in the well reasoned case of *Bizzel v. City of Goldsboro*[19] the court once again found a seeming abuse of discretion on the part of city aldermen. City ordinances prohibiting the erection of gasoline filling stations without first obtaining the consent of the board of aldermen were held invalid as failing to prescribe a uniform rule for the granting of such permits and thus permitting discrimination against some property owners. The question of improper delegation of legislative authority to individuals was not discussed; the court apparently

---

Ky. 468, 131 S. W. 2d 446 (1939) (where court reached same result on basis that legislation involved was contingent, and present social complexities warrant more liberal holdings concerning the delegation of legislative authority to individuals).

[15] It is interesting to note the similarity between the statute then under consideration and G. S. 116-42 (1794) and G. S. 116-43 (1824). These more encompassing sections, which have apparently gone uncontested to the present day, require the consent of the University president to "set up, maintain or keep in Chapel Hill, or within five miles thereof" any public billiard table, bowling alley, etc., or to operate any other games of chance or skill, or ". . . exhibit . . . any dramatic recitation, . . . or any concert, serenade or performance in music, singing or dancing. . . ."

[16] Atlantic Express Co. v. Railroad, 111 N. C. 463, 16 S. E. 393 (1892). See also, Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149 (1907); State v. Railroad, 141 N. C. 846 (1906).

[17] 171 N. C. 780, 87 S. E. 972 (1916); *accord,* City of St. Louis v. Russell, 116 Mo. 248, 228 S. W. 470 (1893). *Contra,* City of Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853 (1895).

[18] Durham Provision Company v. Daves, 190 N. C. 7, 128 S. E. 593 (1925); State v. Garner, 158 N. C. 630, 74 S. E. 458 (1912); *cf.* Hollingsworth v. State Board of Barber Examiners, 217 Ind. 373, 28 N. E. 2d 64 (1940); Revne v. Trade Commission, 192 P. 2d 563 (Utah, 1948) (where statutes providing for minimum price agreements and opening and closing hour agreements between barbers upon approval by 80% of the barbers concerned were held invalid).

[19] 192 N. C. 348, 135 S. E. 50 (1926).

conceding the authority of city officials to enforce similar requirements providing they were not discriminatory. In a strong and able dissent Chief Justice Stacy, who was of the opinion that no constitutional boundary had been invaded, reasoned that discretionary powers were a necessity in our increasingly complex society. This dissent, of course, reaffirms the doctrine expressed in *State v. Yopp* sanctioning discretionary power in officials.

Ely Lilly Co. v. Saunders,[20] decided in 1929, held price fixing contracts between wholesalers and retailers valid and held the statute involved to "delegate nothing" saying it was complete upon leaving the hands of the legislature. The court quoted with approval 11 Am. Jur., p. 933, as follows: "The statute is not a delegation of power to private persons to control the disposition of property of others, because the restriction, already imposed with the knowledge of the prospective reseller runs with the acquisition of the purchased property and conditions it." A strong dissent by Justice Barnhill, however, seems to present a valid criticism that this is an improper delegation of authority.

In 1948, *James v. Sutton*[21] decided that the statutory zoning power of a governing body of a municipality cannot be delegated to a board of adjustment; therefore, a decision by the lower court that a "nonconforming use" could be made of certain property, if approved by the board, was held in error, the court feeling that this would empower the board to amend or change, rather than abide by, the law.

Thus the status of the North Carolina law concerning the grant of legislative authority to individuals seems to be far from settled and inflexible. Although the principal case unequivocally states that legislative authority will not be delegated to "private individuals," it is questionable as to what extent "private" may be taken. The earlier North Carolina cases approving the apparent use of legislative authority by an Orphanage superintendent, or the superintendent of a company roadway were not, as appears from the reported case, considered by the court in the principal decision. It would seem difficult, to say the least, to adjudge such persons as other than private individuals. Further, where the legislative grant has been to officials rather than "private" persons, the court has generally upheld the grant unless an abuse of the power granted is shown; or, as in the principal case, the court believes an opposite result would be more desirable after consideration of the circumstances involved. The court in the past, as it probably

[20] 216 N. C. 163, 177, 4 S. E. 2d 528 (1939).

[21] 229 N. C. 515, 50 S. E. 2d 300 (1948); *accord*, 226 N. C. 107, 37 S. E. 2d 128 (1946). *But see*, Washington v. Hammond, 76 N. C. 33 (1877) (where court says municipal ordinances must be "in harmony with the general laws of the state."). *Cf.* Goreib v. Fox, 145 Va. 554, 134 S. E. 914 (1927), *cert granted*, 274 U. S. 603 (1927) (where court approved and lauded the grant of "some discretion" to city officials).

will in the future, has, along with other principal jurisdictions, engaged quite frequently and adeptly in the art of verbal rationalization to achieve an equitable end despite the general rule against the delegation of legislative authority to an individual.

LACY H. THORNBURG

Criminal Law—Former Jeopardy—Effect of Mistrial Resulting from Prosecutor's Inability to Proceed

Where the state's principal witnesses refused to testify on the ground of self-incrimination, the trial court declared a mistrial over the defendant's objection. Subsequently, when the state was able to procure the testimony of the witnesses the defendant was tried by a new jury and convicted of unlawful secret assault over his objection that he had been in jeopardy at the first trial. The North Carolina Supreme Court affirmed[1] the conviction and certiorari was granted by the United States Supreme Court wherein it was held in a five to two decision that the declaring of a mistrial and requiring the defendant to be presented to another jury, in accordance with North Carolina practice, was not a violation of the due process clause of the Federal Constitution.[2]

The Federal[3] and most state[4] constitutions guarantee that a person shall not twice be in jeopardy for the same offense. In those states where the constitution is silent, former jeopardy is a part of the common law,[5] but it is not one of the privileges and immunities protected by the Fourteenth Amendment.[6] By the greater weight of authority jeopardy attaches within the constitutional provision or the common law at the time a proper jury is impaneled and sworn to hear the evidence.[7] Discharge of the jury thereafter absent manifest legal necessity for so

[1] State v. Brock, 234 N. C. 390, 67 S. E. 2d 282 (1951).
[2] Brock v. State of North Carolina, 73 S. Ct. 349 (1953).
[3] U. S. CONST. AMEND V.
[4] 1 BISHOP, CRIMINAL LAW §981 (9th ed. 1923).
[5] The Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont do not contain prohibitions against double jeopardy; however, each of these states has the prohibition as part of its common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). Eight states, because of specific constitutional provisions, hold that there must be an acquittal or conviction before jeopardy attaches. See A. L. I., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.
[6] In Palko v. State of Connecticut, 302 U. S. 319 (1937), the state appealed pursuant to a Connecticut statute whereupon a reversal for errors of law was obtained. It was held that the statute was constitutional since the due process clause of the Fourteenth Amendment does not protect an individual against double jeopardy in a prosecution by a state. Hence, the Connecticut statute here in question does not necessarily violate the Fourteenth Amendment because a similar act of the federal government would violate the Fifth Amendment.
[7] 22 C. J. S. *Criminal Law* § 241 n. 64 (1940).

doing, is equivalent to an acquittal and to thereafter subject the defendant to another trial constitutes double jeopardy.[8] It is generally conceded, however, that the trial court may discharge the jury without working a dismissal of the defendant in such instances, where, in the sound discretion of the trial judge, there is manifest necessity for the act or the ends of public justice would otherwise be defeated.[9] The discretion is not absolute, and will be reviewed where its abuse appears.[10] The so-called exceptions[11] to the prohibition against double jeopardy embrace cases where the trial is halted due to causes beyond the court's control[12] and generally have to do with the physical condition of the judge,[13]

[8] No necessity for discharge of the jury was shown where the trial judge became incensed with the defendant's attorney during the trial. State v. Whitman, 93 Utah 557, 74 P. 2d 696 (1937); *cf.* State *ex rel.* Wilson v. Lewis, 55 So. 2d 118 (Fla. 1951). No necessity for discharge was shown where the extent of the juror's illness was not revealed. Commonwealth v. Baker et al., 280 Ky. 165, 132 S. W. 2d 766 (1939). Discharge on the prosecutor's motion that the defendant had not been arraigned supported a plea of former jeopardy and discharge of the jury amounted to an acquittal of the defendant. State *ex. rel.* Ryan v. McNeil 141 Fla. 329, 193 So. 67 (1940); *accord,* Griffin v. State, 28 Ga. App. 767, 113 S. E. 66 (1922). There was no necessity for the trial judge's action in discharing the jury on information which would disqualify one of the jurors without examining said juror in open court. Yarbrough v. State, 210 P. 2d 375 (Okla. 1951); *accord,* People v. Parker, 145 Mich. 488, 108 N. W. 999 (1906). Illness of the district attorney and the absence of a witness for the state "is no grounds upon which in the exercise of sound diecretion, a court can . . . properly discharge a jury, without consent of the defendant after the jury has been sworn and the trial commenced." United States v. Watson, 28 Fed. Cas. 499, 501, No. 16,651 (D. C. N. Y. 1868); Murray v. State, 210 Ala. 603, 98 So. 871 (1924). See cases cited in notes 17-23 *infra,* to the effect that the want of preparation on the part of the prosecution does not constitute a showing of necessity.

[9] State *ex rel.* Larkins v. Lewis, 54 So. 2d 199 (Fla. 1951) (Defendant's misconduct); United States *ex rel.* De Frates v. Ryan, 181 F. 2d 1001 (1950); Eetter v. State, 185 Tenn. 218, 205 S. W. 2d 1 (1947); People v. Schepp, 231 Mich. 260, 203 N. W. 882 (1925); State v. Palmieri, 46 N. E. 2d 318, 322 (Ohio Ct. of App. 1938), *appeal dismissed,* 135 Ohio St. 30, 18 N. E. 2d 985 (1939) (Misconduct of defendant's attorney): "On the other hand, it is perfectly well settled, that where the state intervenes without such necessity, and prevents a verdict, the accused cannot be subjected to a further trial . . ." Justice Story stated the rule in United States v. Perez, 9 Wheat. 579 (U. S. 1824): "We think in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, there is manifest necessity for the act, or the ends of justice would otherwise be defeated. They are to exercise a sound discretion on the subject; *and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious reasons. . . .*" (Italics added.)

[10] See note 8 *supra.*

[11] *Cf.* State v. Palmieri, 46 N. E. 2d 318, 322 (Ohio Ct. of App. 1938), *appeal dismissed,* 135 Ohio St. 30, 18 N. E. 2d 985 (1939) (Dictum): "Strickly speaking, there can be no such thing as an exception to a constitutional guaranty that a person shall not twice be put in jeopardy for the same offense."

[12] State v. Colendine, 8 Iowa 288 (1859). See, A. L. I., *Administration of the Criminal Law,* Commentary to § 7, pp. 79-87 (Proposed Final draft for 1935) for a listing of cases where there was proper discharge of the jury.

[13] United States v. Bigelow, 3 Mack 393, 401 (D. C. 1884) (Dictum); State v. Bell. 81 N. C. 591, 594 (1879) (Dictum).

jurors,[14] or prisoner,[15] or with some highly prejudicial conduct on the part of the defense at the trial.[16]

By the greater weight of authority, the discharge of the jury on account of the inability of the prosecution to proceed because of matters affecting witnesses is not sufficient ground upon which a court can properly discharge the jury and hold the defendant for a second trial.[17] Discharge of the jury by the court is a bar to further prosecution and is equivalent to dismissal where such discharge is allowed for the reason that the prosecutor discovers that his evidence is insufficient to gain a conviction,[18] or a witness for the state is not present in court,[19] or the state's witness is incompetent to testify because of infancy,[20] or because

[14] United States v. Bigelow, 3 Mack 393, 401 (D. C. 1884) (Dictum); State v. Scruggs, 115 N. C. 805, 20 S. E. 720 (1894).

[15] United States v. Bigelow, 3 Mack 393, 401 (D. C. 1884) (Dictum); State v. Garrigues, 2 N. C. 241, 242 (1795) ("If the prisoner be a woman and be taken in labour").

[16] State v. Palmieri, 46 N. E. 2d 318 (Ohio Ct. of App. 1938), *appeal dismissed*, 135 Ohio St. 30, 18 N. E. 2d 985 (1939).

[17] Where the district attorney entered trial of the case without sufficient evidence to convict, the court said: "An examination of the cases cited has disclosed the fact that no court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of the jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case." Cornero v. United States, 48 F. 2d 69, 71 (9th Cir. 1931). See Note, 74 A. L. R. 803 (1931). This case was questioned in Wade v. Hunter, 336 U. S. 684 (1949), however, the fact situations involved in the two cases are substantially different.

[18] In State *ex rel.* Manning v. Hines, 153 Fla. 711, 15 So. 2d 613 (1943), the court advised the prosecutor that the state's evidence was insufficient whereupon a mistrial was allowed. On appeal, the defendant was dismissed, the court finding that the trial judge had the power to declare a mistrial only in cases of *urgent necessity* or with the defendant's consent. Gillespie v. State, 168 Ind. 298, 80 N. E. 829 (1907) (Prosecutor failed to establish that any relationship existed between the defendant and one of the jurors); State v. Webster, 206 Mo. 558, 105 S. W. 705 (1907) (It appeared that the State's witness, upon whose affidavit the prosecution was based, had no knowledge of the alleged crime); Klock v. People, 2 Park. Crim. Rep. 676 (N. Y. 1856) (Prosecution proceeded without essential record evidence); Villareal v. State, 82 Tex. Cr. 327, 199 S. W. 642 (1917) (State's principal witness "surprised" the prosecutor with unsatisfactory testimony); People v. Gehlbred, 70 N. Y. S. 2d 819, 272 App. Div. 914 (1947).

[19] In State v. Richardson, 47 S. C. 166, 170-171, 25 S. E. 220, 222 (1896), the prosecutor inadvertently allowed his witness to go home during the trial. The court said: "It would be a fearful thing to vest in the prosecuting officer the power to stop the trial after it has commenced, simply because such officer found that he was unable to establish the charge, by reason of the absence of a witness." In State v. Little, 120 W. Va. 213, 197 S. E. 626 (1938), the state's witnesses failed to return from lunch wherupon a juror was withdrawn over the defendant's objection. On appeal from a conviction at a subsequent trial, the court found that no necessity existed for the trial court's action since the jury might have been committed to the sheriff's custody while the prosecutor made a diligent search for the absent witnesses. Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511 (1828) (Prosecutor's plea of surprise is of no avail where he has not shown diligence to obtain the state's witnesses for the trial); State *ex rel.* Meador v. Williams, 117 Mo. App. 564, 92 S. W. 151 (1906); Allen v. State, 52 Fla. 1, 41 So. 593 (1906).

[20] In Hipple v. State, 80 Tex. 531, 191 S. W. 1150 (1917), in the prosecution

the district attorney was ill without any showing that he was unable to conduct the case,[21] or where the prosecutor believes he can be better prepared on another day,[22] or for many other reasons[23] not attributable to any fault of the defense as this is not the type of necessity which authorizes the court to exercise its discretion.[24] There is authority, however, that in some instances the absence of a witness will permit discharge of a jury without barring a subsequent retrial of the defendant.[25] A notable case in this respect is *Wade v. Hunter*[26] where a general court-martial withdrew the charges against the accused because of the absence of witnesses and because of the intervening tactical situation.[27] Even under these compelling facts three dissenting justices were of the opinion *"that the harassment of the defendant from being*

for the alleged rape of a three year old girl, the state depended on the testimony of the child who the court determined to be incompetent to testify. The trial court granted the State's motion to withdraw the jury with the consent of the defendant's counsel. On appeal from a conviction at a subsequent trial, the court dismissed the defendant since (1) the incompetency of a three year old child to testify is not such an unexpected occurrence that no reasonable diligence could have anticipated, and (2) the consent of the defendant's counsel to discharge the jury after jeopardy has attached, nor the failure of the accused to protest, will bar a plea of former jeopardy on a subsequent trial.

[21] United States v. Watson, 28 Fed. Cas. 499, 501, No. 16,651 (D. C. N. Y. 1868). The court therein said: ". . . No case to be found in the books has any such reason as is spread upon the record in this case been admitted in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and impaneled to try an indictment . . . *If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."* (Italics added.)

[22] People v. Barrett, 2 Caines 304, 308-309, 2 Am. Dec. 239, 241 (N. Y. 1805). The prosecutor was unable to prove the contents of a note since he had neglected to give the defense notice to produce such note. The court concluded: "To discharge a jury under such circumstances would be liable to great abuse and oppression. If the prosecutor disliked the jury . . . or hoped to find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might at anytime obtain his end, if, by solely the want of proof, after a jury was sworn, he could get rid of them."

[23] State v. Colendine, 8 Iowa 288 (1859) (Name of the State's witness was not indorsed on the indictment). In State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 437, 23 So. 2d 484, 485 (1945), the trial judge became convinced that one of the defendant's witnesses was committing perjury and a mistrial was ordered. The appellate court held this action to be error since the credibility of witneses is for the jury. The court added: "If there were no other witnesses to sustain the state's case then it was a plain case where the prosecution could not make out a case. The apparent reason for halting the trial was the likelihood of the case terminating unfavorable to the State."

[24] People *ex rel.* Stabile v. Warden of City Prison of the City of New York, 202 N. Y. 138, 95 N. E. 729 (1911). *Cf.* State v. Nelson, 7 Ala. 610 (1845) (Prosecutor had no testimony on a collateral issue raised subsequent to the defendant's plea of not guilty).

[25] There is authority to the effect that a discharge of a jury for even an improper cause is not equivalent to a verdict. United States v. Bigelow, 3 Mack 393 (D. C. 1884); Savell v. State, 150 Ala. 97, 43 So. 201 (1907); *compare* State v. Parker, 66 Iowa 586, 24 N. W. 225 (1885), *with* State v. Falconer, 70 Iowa 416, 30 N. W. 655 (1886); Reg. v. Charlesworth, 1 B & S 460 (1861); Reg. v. Winsor, L. R. 1 Q. B. 289 (1866).

[26] 336 U. S. 684 (1949), *rehearing denied*, 337 U. S. 921 (1949); Comment, 23 Temp L. Q. 149 (1949-1950).

[27] The trial of petitioner (charged with having raped a German girl) was

repeatedly tried is not less because the army is advancing." In *U. S. v. Coolidge,*[28] the prosecutor claimed to be surprised by his principal witness' refusal to take an oath because of his religious belief and it was held that the defendant could be tried again. The court distinguished the case from the general rule since the refusal of a witness to be sworn is such an unusual occurrence that the prosecutor should not be expected to have foreseen it. It is submitted that these two cases are not authority in contravention of the general rule since the court may order a new trial where there exists urgent emergency which diligence could not have averted.

The principal case represents a remarkable deviation from established precedent as is noted by the vigorous dissent of Chief Justice Vinson[29] who forsees its result to mean that "the state is free, if the prosecution thinks a conviction cannot be won from the jury on the testimony at trial, to stop the trial and insist he be tried on another day when it has stronger men on the field." The majority of the court justified its conclusion on (1) the inapplicability of the Fifth[30] and Fourteenth Amendments,[31] and (2) the rule of discretion as applied in North Carolina.

North Carolina is one of five states whose constitution makes no provision prohibiting double jeopardy; however, the common law of North Carolina does so prohibit.[32] North Carolina, as do the great majority of the jurisdictions, holds that jeopardy attaches at the time the jury is impaneled and sworn.[33] Notwithstanding accord in basic principle, the application of the prohibition against double jeopardy in North Carolina is distinctly different from that as applied in the majority of American jurisdictions with respect to withdrawal of submission from the jury. The rule in effect provides that the trial judge possesses the discretion to declare a mistrial wherever he believes it proper in furtherance of justice and a plea of former jeopardy is no bar

---

commenced in the combat zone in Germany. After a continuance had been allowed to permit the hearing of other witnesses, a change in the tactical situation made prompt trial impossible and the charges were transferred to another headquarters where petitioner was tried and convicted by a new court martial. It is further noted that the charges were withdrawn by the action of the court martial and not the trial counsel (prosecution).

[28] 25 Fed. Cas. 622, No. 14,858 (Mass C. C. 1815).

[29] "For the first time in the history of this court, it is urged that the state could grant a mistrial in order that it might present a stronger case at some later trial and, in so doing, avoid a plea of former jeopardy in the second trial." Brock v. State of North Carolina, 73 S. Ct. 349, 352 (1953).

[30] Palko v. State of Connecticut. 302 U. S. 319 (1937) (see note 6 *supra*); Twining v. State of New Jersey, 211 U. S. 78 (1908).

[31] Palko v. State of Connecticut, 302 U. S. 319 (1937).

[32] See Note 5 *supra.*

[33] State v. Bell, 205 N. C. 225, 171 S. E. 50 (1933); 22 C. J. S., *Criminal Law* § 241 (1940).

on a subsequent prosecution.[34] In all cases involving misdemeanors and felonies less than capital such exercise of discretion is not the subject of review.[35] With respect to capital felonies, the trial judge is required to make a finding of facts showing necessity for discharge of the jury and his action in declaring a mistrial is subject to review on appeal,[36] since, in North Carolina, all capital cases are examined by the Supreme Court.[37] *Necessity* is liberally construed and includes in addition to cases of *physical necessity;* the necessity for *doing justice.*[38] The North Carolina decisions apply these rules allowing the trial court's discretion to declare a mistrial without respect to what provoked his action, and unless the crime charged is a capital felony, such action is not reviewable.[39] The jury may be dismissed without prejudice to the state's rights to again bring the defendant to trial where one of the jurors has become disqualified,[40] or where the jury is unable to agree on a verdict,[41] or the term of court ends before the trial is concluded,[42] or where physical necessity such as illness or intoxication halts the trial,[43] or where the indictment is defective,[44] or where the prosecutor was informed by the court that his evidence was insufficient to gain

[34] State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Ellis, 200 N. C. 77, 156 S. E. 157 (1930); State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914); State v. Bass, 82 N. C. 571, 575 (1880): "We hold therefore on a review of the cases in our reports, that his Honor has discretion to dissolve the jury and hold the defendants for a new jury, *and the security for the proper exercise of his discretion rests not on the power of this court to review and reverse the judge, but on his responsibility under his oath of office*" (Italics added.).

[35] The trial judge need not find the facts showing the necessity, nor is his action reviewable. Notwithstanding the rule, the North Carolina Supreme Court would review the trial court's action under circumstances establishing "gross" abuse. State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914).

[36] State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Prince, 63 N. C. 529 (1869).

[37] State v. McCoy, 236 N. C. 121, 71 S. E. 2d 921 (1952).

[38] In State v. Weaver, 35 N. C. 204 (1891), the defendant was on trial for a misdemeanor. The trial judge was of the opinion that the State's evidence was insufficient to gain a conviction so the jury was withdrawn and the defendant was subsequently brought back and convicted. This was held to be proper since *in the trial judge's discretion it was necessary to the ends of justice.* See, State v. Cain, 175 N. C. 825, 829, 95 S. E. 930, 931-932 (1918); State v. Beal, 199 N. C. 278, 295, 154 S. E. 604, 614 (1930). *But cf.* State v. Garriques, 2 N. C. 241 (1795); *In Re Spier,* 12 N. C. 491 (1828) (Urgent and overruling necessity).

[39] See Note 36 *supra.*

[40] State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918) (Juror had told the solicitor on the voir dire examination that he could convict for murder in the first degree on circumstantial evidence, and after the trial had commenced, he stated that he could not so convict).

[41] State v. Bass, 82 N. C. 570 (1880) (Good summary and history of the North Carolina rule); State v. McGinsey, 80 N. C. 377 (1879); State v. Johnson, 75 N. C. 123 (1876).

[42] State v. Tilletson, 52 N. C. 114 (1859).

[43] State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905).

[44] State v. Ellis, 200 N. C. 77, 156 S. E. 157 (1930); State v. Drakeford, 162 N. C. 667, 78 S. E. 308 (1913).

a conviction,[45] or where the solicitor had failed to give notice for the production of documentary evidence which he deemed essential to the establishment of the state's case,[46] and finally, the circumstances of the present case, where the state procured a mistrial in order to obtain the testimony of witnesses not available at the trial.

The principal case is wholly consistent with prior North Carolina decisions; however, here for the first time, the Supreme Court of the United States has affirmed the application of the North Carolina rule of discretion in an extreme case. Should a case with similar facts come before the North Carolina court again, it is submitted that the present procedure should be re-examined to assure that the fundamental rights of the defendant are not violated.

JAMES T. HEDRICK

Insurance—Accident Policies—Construction of "Accidental Means" in Policy

Deceased was insured under a health and accident policy the pertinent clauses of which provided indemnity against ". . . bodily injuries sustained . . . through purely accidental means . . . independently and exclusively of disease and all other causes. . ."[1] On the date of his death he was employed by a roofing company and engaged in shingling a house. Following a brief rest in the shade he ascended a ladder carrying a 70-pound bundle of shingles, reached the top, and in attempting to move the bundle higher on the roof, collapsed and slumped over it. Minutes later he was dead. The coroner's report showed death to have resulted from acute coronary occlusion antecedently produced by heat exhaustion.

In beneficiary's action on the policy the jury found that (1) death resulted from bodily injuries, (2) such injuries resulted in death independently and exclusively of disease and all other causes, (3) such injuries resulted through purely accidental means, and (4) death was not caused solely by coronary occlusion but that heat exhaustion and

[45] In State v. Dove, 222 N. C. 162, 22 S. E. 2d 231 (1942), the solicitor moved to be permitted to offer additional evidence at a later trial *since such evidence was not then available.* The trial court ordered a mistrial over the defendant's objection. On appeal, the action was affirmed, and, since the ordering of a mistrial in cases of felonies less than capital is discretionary, the appeal is premature. State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914); State v. Weaver, 35 N. C. 204 (1891).

[46] In State v. Collins, 115 N. C. 716, 20 S. E. 452 (1894), the solicitor requested the withdrawal of a juror and time allowed to serve the defendant with notice to produce an order which the solicitor deemed essential to the state's case. The withdrawal was ordered and this action was affirmed on appeal since a mistrial in a case not capital is a matter of discretion.

[1] 109 N. E. 2d 649 (Ohio 1952).

coronary occlusion contributed to cause death. These findings were affirmed by a divided court in *Hammer v. Mutual Benefit Health and Accident Ass'n.*[2]

And so arise again the oft-litigated and much disputed questions of the line of demarcation between injury and disease, and of the interpretation to be given the term "accidental means"[3] in an accident[4] insurance policy. These questions have plagued the courts for over sixty years. The authorities have taken hopelessly irreconcilable positions; consequently it is deemed necessary that a general analysis of the applicable law be propounded.

Accidental Injury as Contrasted with Disease.[5] It frequently occurs that deceased suffered what is admittedly an "accident" within the meaning of that term,[6] but the result is further complicated by reason of a previously existing and independent disease, or by a disease which is directly produced by the accident. Such cases fall within one of four categories, following:

(1) "When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death."[7] Thus, where deceased suffered coronary occlusion due to the strained position of his body as he wielded a blowtorch on a tank, recovery was allowed on the theory that the accident, *i.e.,* strain, produced the diseased condition, *i.e.,* coronary occlusion.[8]

(2) "When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause."[9] Accordingly, recovery was allowed where

[2] Hammer v. Mutual Ben. Health and Acc. Ass'n., *supra* note 1.

[3] The vast majority of cases examined involved policies containing the clauses, "accidental means" or "external, violent, and accidental means." Such policies do not insure against mere accidental injury or death, but rather injury or death effected through "accidental means."

[4] Some of the cases herein cited involve the construction of similar clauses in the accident provisions (double indemnity) of *life* insurance policies.

[5] The policies under consideration do not purport to insure against bodily injuries caused by disease.

[6] "An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1940).

[7] Penn v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life and Acc. Ins. Co., 193 N. C. 485, 137 S. E. 430 (1937); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 404 (1941).

[8] Metropolitan Casualty Ins. Co. v. Fairchild, 215 Ark. 416, 220 S. W. 2d 803 (1949).

[9] Penn v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life Ins. Co., 193 N. C. 485, 137 S. E. 430 (1927); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 403 (1941).

death resulted from brain concussion following a fall, although deceased was afflicted with nephritis (inflammation of the kidneys) at the time.[10]

(3) "When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes."[11] Recovery has been denied under this rule where deceased had previously suffered a severe attack of angina pectoris, then suffered a second and fatal one due to sudden strain;[12] and where adhesions, present for twenty years following an appendectomy, were aggravated by a blow in the side incurred when deceased fell.[13] The courts in both cases found that the previously existing conditions cooperated with the accidents to cause death.

(4) When a pathological condition itself caused the accident which resulted in injury or death, at least one opinion has intimated that the accident alone is to be considered the cause of the injury or death.[14] Thus, if one subject to dizzy spells suffers one and fractures his skull in a resulting fall, the fall alone will be considered the cause of the injury or death. However, this latter category has not generally been treated by the majority decisions.

Thus it can readily be seen that the facts in each particular case assume paramount importance, with the ultimate determination of liability or lack thereof dependent in large measure upon acceptance or rejection of expert medical testimony.

External, Violent, and Accidental Means. It must be remembered that the overwhelming majority of policies insure against not merely accidental injury or death, but rather injury or death effected solely through external, violent, and accidental means.[15] Hence the interpretations assume importance. This clause is less susceptible of analysis

[10] Bristol v. Mutual Ben. Health and Acc. Ass'n., 305 Mich. 145, 9 N. W. 2d 38 (1943); *accord,* North American Acc. Ins. Co. v. Allentharp, 164 F. 2d 9 (10th Cir. 1947) (action for disability benefits).

[11] Penn. v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life Ins. Co., 193 N. C. 485, 137 S. E. 430 (1927); Prudential Ins. Co. v. Gaines, 271 Ky. 496, 112 S. W. 2d 666 (1938); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); McQuade v. Prudential Ins. Co., 166 Misc. 524, 2 N. Y. S. 2d 647 (1938); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE §403 (1941). *Contra:* Preston v. Aetna Life Ins. Co., 174 F. 2d 10 (7th Cir. 1949); Brooks v. Metropolitan Life Ins. Co., 27 Cal. 305, 163 P. 2d 689 (1945); Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71, 19 N. E. 2d 420 (1939).

[12] Schroeder v. Police and Firemen's Ins. Ass'n., 300 Ill. App. 375, 21 N. E. 2d 16 (1939).

[13] Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948).

[14] *See* Browning v. Equitable Life Assur. Soc., 94 Utah 532, 554, 72 P. 2d 1060, 1070 (1937) (dissenting opinion wherein the writer reasons that ". . . the chain of cause and effect should start from and not before the injury.").

[15] See note 3, *supra.*

than that previously considered, one court frankly stating that there are about as many different constructions of it as there are companies writing this type insurance.[16] Comparatively speaking, the terms "external" and "violent" cause little trouble,[17] the major difficulty centering around the definition or interpretation to be given the term "accidental means." This has proven true as predicted in the staid comment of Mr. Justice Cardozo, dissenting in *Landress v. Phoenix Mutual Life Insurance Co.*,[18] that "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog."

Nevertheless, the courts have taken opposite positions, the majority holding that there is a distinction between accidental means and accidental results, and that *both* elements are requisites for recovery under such a policy.[19] In other words, not only must the injury or death be accidental, but also the means which produced that result must be accidental. These courts recognize the rule that a contract is to be construed most strongly against the party preparing it, but refuse to extend unambiguous terminology in favor of the insured. Among their reasons are the fact that accidental injury or death alone is not insured against,[20] and that the low cost premiums generally prevailing in this field make extension of coverage unjust.[21]

Under the majority rule decisions it is held that where the insured does a voluntary and intended act in the manner in which he intended, there can be no recovery in the event of accidental injury or death, the means in such case not being accidental.[22] Closely akin to this rule are three qualifications on it. *First.* Even if insured's act be voluntary, the means employed can still be accidental if he proceeded with ignorance of a material fact.[23] Thus, where deceased engaged in an

[16] *See* Browning v. Equitable Life Assur. Soc., 94 Utah 532, 560, 72 P. 2d 1060, 1073 (1937) (concurring opinion).

[17] 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 393 (1941); VANCE, INSURANCE 879 (2d ed. 1930).

[18] 291 U. S. 491, 499 (1934) (Mr. Justice Cardozo went on to say, "When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, *and hence by accidental means.*" (Italics supplied.)

[19] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); United States Mut. Acc. Ass'n. v. Barry, 131 U. S. 100 (1889); Inter-Ocean Casualty Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941); Scott v. Aetna Life Ins. Co., 208 N. C. 160, 179 S. E. 434 (1935); New Amsterdam Casualty Co. v. Johnson, 91 Ohio St. 155, 110 N. E. 475 (1914).

[20] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); Szymanska v. Equitable Life Ins. Co., 7 W. W. Harr. (Del.) 272, 183 Atl. 309 (1936); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941).

[21] John Hancock Mut. Life Ins. Co. v. Plummer, 181 Md. 140, 28 A. 2d 856 (1942).

[22] See note 19, *supra*.

[23] Pope v. Prudential Ins. Co., 29 F. 2d 185 (6th Cir. 1928) (by implication); Provident Life and Acc. Ins. Co. v. Maddox 184 Tenn. 70, 195 S. W. 2d 536 (1946).

affray with a policeman not in uniform, ignorant of the officer's status, beneficiary was allowed recovery for her husband's ensuing death.[24] *Second.* Where injury or death is not the natural, probable, or expected result of insured's voluntary act, but nevertheless occurs, the means will be held accidental.[25] So where deceased, the aggressor in a fist fight, received a fractured skull when knocked to the pavement, insurer was held liable.[26] *Third.* Where some *vis major* or misadventure enters the voluntary act undertaken by insured, this too will constitute the means accidental.[27] Accordingly, recovery was allowed where deceased died from brain inflammation following the puncture of a pimple on his lip, the *vis major* being the driving of germs beneath the skin during the voluntary act of puncturing the pimple.[28]

On the other hand, several courts, though recognizing the difference between the terms "means" and "results," have flatly and frankly refused to draw any legal distinction between them.[29] Consequently, where there has been an accidental injury or death, and notwithstanding the means effectuating it, insured or his beneficiary is allowed recovery even though the policy expressly provided that in order to recover, such injury or death must have been effected solely through external, violent, and accidental means. The rationale behind these decisions is that the public for whom the policies are written do not understand such super-

[24] Provident Life and Acc. Ins. Co. v. Maddox, *supra* note 23.

[25] United States Mut. Acc. Ass'n. v. Barry, 131 U. S. 100 (1889); Inter-Ocean Cas. Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933); Rooney v. Mutual Ben. Health and Acc. Ass'n. 74 Cal. App. 2d 885, 170 P. 2d 72 (1946); Akins v. Illinois Bankers Life Assur. Co., 166 Kan. 648, 203 P. 2d 180 (1949); Pyramid Life Ins. Co. v. Milner, 289 Ky. 249, 158 S. W. 2d 429 (1942); Pacific Mut. Life Ins. Co. v. Fagan, 292 Ky. 533, 166 S. W. 2d 1007 (1942); North Amer. Acc. Ins. Co. v. Henderson, 180 Miss. 894, 177 So. 528 (1937); Korfin v. Continental Cas. Co., 5 N. J. 154, 74 A. 2d 312 (1950); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941); Goethe v. New York Life Ins. Co., 183 S. C. 199, 190 S. E. 451 (1937); McMahon v. Mutual Ben. Health and Acc. Ass'n., 33 Wash. 2d 415, 206 P. 2d 292 (1949).

[26] Rooney v. Mutual Ben. Health and Acc. Ass'n., *supra* note 25.

[27] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); Smith v. Aetna Life Ins. Co., 24 Tenn. App. 570, 147 S. W. 2d 1058 (1940); Provident Life and Acc. Ins. Co. v. Wallace, 23 Tenn. App. 697, 137 S. W. 2d 888 (1939); Stone v. Fidelity and Casualty Co., 133 Tenn. 672, 182 S. W. 252 (1916); Pacific Mut. Life Ins. Co. v. Schlakzug, 143 Tex. 264, 183 S. W. 2d 709 (1944); International Travelers' Ass'n. v. Francis, 119 Tex. 1, 23 S. W. 2d 282 (1930).

[28] Lewis v. Ocean Acc. and Guaranty Co., 224 N. Y. 18, 120 N. E. 56 (1918).

[29] Murphy v. Travelers' Ins. Co., 141 Neb. 41, 2 N. W. 2d 576 (1942); Caffaro v. Metropolitan Life Ins. Co., 14 N. J. Misc. 167, 183 Atl. 200 (1936); Burr v. Commercial Travelers' Mut. Acc. Ass'n., 295 N. Y. 294, 67 N. E. 2d 248 (1946), noted in 13 BROOKLYN L. REV. 65 (1947); Mansbacher v. Prudential Ins. Co., 273 N. Y. 140, 7 N. E. 2d 18 (1937); Maryland Cas. Co. v. Hazen, 182 Okla. 623, 79 P. 2d 577 (1938); Provident Life and Acc. Ins. Co. v. Green, 172 Okla. 591, 46 P. 2d 372 (1935); O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. 2d 707 (1944); Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N. W. 2d 588 (1948).

refinements;[30] the distinction is illogical;[31] and the clauses are not readily distinguishable.[32]

The *Hammer* case falls within the majority rule both as regards injury contrasted with disease, and as to the distinction placed on the term accidental means. The court there held heat exhaustion to be an injury rather than a disease,[33] and found the accidental means in the *rays* of the sun rather than in the heat exhaustion itself.

Disregarding any possible social justification, it is submitted that, in view of the freedom of the parties to contract as they will, and the unambiguous language of the policies, the rules adopted by the majority decisions are those most consonant with settled legal principles.

HAL W. BROADFOOT

Judgment—Vacation Because of Surprise or Excusable Neglect

G. S. 1-220 provides, in part, that:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. . . ."

In 1883, Justice Ashe noted the great number of appeals based on the above statute, commenting, ". . . and still they come."[1] The statement is appropriate at the present time.[2] As the appeals are "still coming," a brief recapitulation of cases in which the statute is involved seems to be in order.

The relief provided by the terms of G. S. 1-220 must be sought by a motion in the cause and cannot be had in an independent action.[3]

[30] Burr v. Commercial Travelers' Mut. Acc. Ass'n., 295 N. Y. 294, 301, 67 N. E. 2d 248, 251 (1946) ("Our guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract. . . .").

[31] Murphy v. Travelers' Ins. Co., 141 Neb. 41, 48, 2 N. W. 2d 576, 580 (1942) (". . . the distinction between accidental result and accidental means cannot be said to exist.").

[32] Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N. W. 2d 588 (1948); Miser v. Iowa State Traveling Men's Ass'n., 223 Iowa 662, 273 N. W. 155 (1937); Lickleider v. Iowa State Traveling Men's Ass'n., 184 Iowa 423, 429, 166 N. W. 363, 366 (1918) (". . . the meaning of these words in law differs in no essential respect from the meaning attributed to them in popular speech.").

[33] The bulk of American authorities refuse to apply a pathological definition to the term, "sunstroke," holding instead that same is an accident within the meaning of an insurance policy. Lower v. Metropolitan Life Ins. Co., 111 N. J. L. 426, 168 Atl. 592 (1933); Continental Casualty Co. v. Clark, 70 Okla. 187, 173 P. 453 (1918); Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017 (1921); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 447 (1941). *Contra:* Dozier v. Fidelity and Casualty Co., 46 Fed. 446 (C. C. W. D. Mo. 1891).

[1] Kivett v. Wynne, 89 N. C. 39, 41 (1883).

[2] Over 175 cases involving relief sought under the statute have been decided since 1883, an average of more than two cases per year.

[3] Ins. Co. v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); Walker v. Gurley, 83 N. C. 429 (1880).

The statute applies only to judgments which are in all respects regular and according to the course and practice of the court,[4] and therefore has no application to irregular judgments.[5] Nor does it apply to judgments rendered during the term at which the motion is made.[6] The statute is applicable whether the judgment is by default or based upon a verdict.[7] The motion to set aside has been entertained by justices of the peace,[8] county courts,[9] and recorders' courts,[10] as well as by the superior courts.[11] A judge cannot hear a motion under the statute outside the county in which the judgment or order sought to be set aside was rendered, except by consent of the parties.[12] However, where the judge in the county of hearing finds as a fact that the case was continued by consent to be heard out of the original county, this finding is conclusive on appeal.[13]

There are three conditions precedent to relief under the statute:[14] (1) a showing of mistake, inadvertence, surprise or excusable neglect,[15] (2) a showing of a meritorious defense and (3) a motion to set aside,

[4] Gough v. Bell, 180 N. C. 268, 104 S. E. 535 (1920).

[5] Hood v. Stewart, 209 N. C. 424, 184 S. E. 36 (1936); Cox v. Boyden, 167 N. C. 320, 83 S. E. 246 (1914); Massie v. Hainey, 165 N. C. 174, 81 S. E. 135 (1914); Becton v. Dunn, 137 N. C. 559, 50 S. E. 289 (1905). Neglect before judgment does not necessarily bar the right to have an irregular judgment vacated on motion. Snow Hill Livestock Co. v. Atkinson, 189 N. C. 250, 126 S. E. 610 (1925).

[6] Gold v. Maxwell, 172 N. C. 149, 90 S. E. 115 (1916); McCullock v. Doak, 68 N. C. 267 (1873) (Orders and judgments are *in fieri* during the term and subject to control of the judge).

[7] Formerly it was held that the statute had no application to judgments such as necessarily followed a verdict. Brown v. Rhinehart, 112 N. C. 772, 16 S. E. 840 (1893). This was changed by PUBLIC LAWS OF 1893, ch. 81, which inserted the word "verdict" in the statute. Now, both the verdict and judgment may be vacated for excusable neglect. Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).

[8] Finlayson v. Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).

[9] Radeker v. Royal Pines Park, Inc., 207 N. C. 209, 176 S. E. 285 (1934); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903).

[10] Taylor v. Gentry, 192 N. C. 503, 135 S. E. 327 (1926).

[11] The Clerk of the Superior Court has power under G. S. 1-220 to set aside judgments rendered by him and appeal may be had to the judge. The judge has concurrent power with the clerk on motions to set aside judgments rendered by the clerk. Moody v. Howell, 229 N. C. 198, 49 S. E. 2d 233 (1948).

[12] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918); Godwin v. Monds, 101 N. C. 354, 7 S. E. 793 (1888); McNeil v. Hodges, 99 N. C. 248, 6 S. E. 127 (1888).

[13] Gaster v. Thomas, 188 N. C. 346, 124 S. E. 609 (1924) (The finding must be supported by competent evidence).

[14] Fellos v. Allen, 202 N. C. 375, 162 S. E. 905 (1932).

[15] Although the statute specifies four distinct grounds for relief, the bulk of the cases has been concerned with "excusable neglect." The scope of this note is limited to cases of surprise and excusable neglect under the statute. For cases involving "mistake" see Rierson v. York, 227 N. C. 575, 42 S. E. 2d 902 (1947); Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930); Lerch v. Mckinne, 187 N. C. 419, 122 S. E. 9 (1924); Mann v. Hall, 163 N. C. 50, 79 S. E. 437 (1913); Phifer v. Travellers Ins. Co., 123 N. C. 405, 31 S. E. 715 (1898); Skinner v. Terry, 107 N. C. 103, 12 S. E. 118 (1890); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

made within one year after notice of the judgment, order, verdict or other proceeding.

Though relief under the statute is sought most frequently by defendants,[16] plaintiffs have on occasion utilized the terms of the section in seeking to vacate a judgment on a counterclaim,[17] a judgment of nonsuit,[18] or a judgment based upon a verdict.[19] The conditions precedent are the same for a plaintiff as for a defendant except that, instead of showing a meritorious defense to the cause of action, a plaintiff must show a meritorious cause of action,[20] or in case of a counterclaim, a meritorious defense to the counterclaim.[21]

Surprise

The "surprise" contemplated by the statute is not surprise at some action taken by the court,[22] but where an attorney withdraws from a case without notice to his client, the action of the attorney constitutes surprise to the client within the meaning of the statute.[23] The burden is on the party seeking to set aside the judgment to show lack of notice of the attorney's withdrawal,[24] and a meritorious defense must be shown.[25] Withdrawal of the attorney does not always amount to surprise. Thus, where the party is present and is notified in open court by the judge that he must obtain other counsel before the next term of court, there is no surprise.[26]

Excusable neglect

Since each case involving an attempt to set aside a judgment, order, verdict or other proceeding by reason of excusable neglect is determined by its particular circumstances,[27] the distinction between cases of excusable neglect and inexcusable neglect is difficult to enounce. The court has formulated two basic propositions: A warning that, "When a man has a case in court, the best thing he an do is to attend to it,"[28] and a standard that, "The least that can be expected of a

[16] Generally, where no answer is filed or if an answer is filed, where no appearance is made by defendant or his attorney.

[17] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951); Bradford v. Coit, 77 N. C. 72 (1877).

[18] Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896).

[19] Graver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[20] Turner v. Southeastern Grain and Livestock Co., 190 N. C. 331, 129 S. E. 725 (1925).

[21] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951).

[22] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945).

[23] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950): Roediger v. Sapos, 217 N. C. 95, 6 S. E. 2d 801 (1939); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).

[24] Roediger v. Sapos, 217 N. C. 95, 6 S. E. 2d 801 (1939).

[25] *Ibid.*

[26] Baer v. McCall, 212 N. C. 389, 193 S. E. 406 (1937).

[27] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Henry v. Clayton, 85 N. C. 372 (1881).

[28] Pepper v. Clegg, 132 N. C. 312, 316, 43 S. E. 906, 907 (1903).

person having a suit in Court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business."[29] In order to determine what a "man of ordinary prudence" does when he is involved in a lawsuit, resort must be had to specific cases.[30]

(1) *Physical condition of movant*

Mere forgetfulness of the party in default is not a sufficient ground for setting aside a judgment,[31] even where the party is old and feeble,[32] or where he is a physician whose time has been subjected to heavy wartime demands.[33] Sickness in and of itself is an insufficient ground,[34] as is physical fatigue brought about by business worries and large business interests.[35] The court apparently considers as sufficient grounds physical condition such as would render the party *non compos mentis*[36] or at least legally unfit to attend to business.[37]

(2) *Neglect of service*

A party must not ignore service. If he thinks he has been served by mistake, he must ascertain whether or not he is the proper party. Failure to do so constitutes inexcusable neglect.[38] Inaction due to a mistaken belief that the summons is "some notice or paper" in a suit already pending between the same parties will not be excused.[39] The result is the same where the party served mistakenly believes that a complaint must be served on him before any action can be taken in the case.[40]

(3) *Employment of attorney*

Since a party generally directs his interest in a proceeding through an attorney, he should employ or at least consult counsel as to his case.[41]

[29] Sluder v. Rollins, 76 N. C. 271, 272 (1877).

[30] Henceforth, in the discussion of neglect, it is assumed that in all cases there has been some default in the legal proceeding due to the neglect of the party moving under G.S. 1-220, or his attorney.

[31] McDowell v. Justice, 167 N. C. 493, 83 S. E. 803 (1914) (defendant called at office of clerk several times, asking for the complaint in the case of "J. J. Bailey v. Justice." There was no such case.).

[32] Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914) (Defendants were approximately 76 years of age, feeble and "hard of hearing").

[33] Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945).

[34] Jernigan v. Jernigan, 179 N. C. 237, 102 S. E. 310 (1920).

[35] Hales-Bryant Lumber Co. v. Blue, 170 N. C. 1, 86 S. E. 724 (1915) (defendant's affidavits, made by doctors, tended to show that defendant had been in such physical condition as to neglect business matters; while plaintiff's affidavits tended to show that defendant was director of two banks, a good business man, and capable of looking after his own affairs).

[36] Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914).

[37] Hales-Bryant Lumber Co. v. Blue, 170 N. C. 1, 86 S. E. 724 (1915).

[38] Depriest v. Patterson, 85 N. C. 376 (1881).

[39] Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); White v. Snow, 71 N. C. 232 (1874).

[40] Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

[41] Holland v. Edgecombe Benevolent Ass'n., 176 N. C. 86, 97 S. E. 150 (1918); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

He is not giving his case the proper care when he simply writes letters of inquiry as to the extent of the claim against him, deriving no definite information from replies to the letters.[42] Where a party's attention to the litigation consists of writing to an attorney to request that he handle the case, after which he makes no further inquiry, his neglect is inexcusable.[43] The same result follows where the litigant merely "speaks to" an attorney without more.[44] Even when an attorney is retained, if the employment takes place so late that the attorney cannot appear before judgment, the neglect of the party is inexcusable.[45]

A litigant may not abandon his case simply because he employs counsel,[46] for the employment in and of itself is insufficient to constitute excusable neglect.[47] He must apprise the attorney of facts constituting his defense to the action.[48] He must be available in order to appear at the trial,[49] and may not willfully absent himself intending not to appear unless he is notified to do so by his attorney.[50] However, if the party leaves the court or remains away on the advice of his attorney that it is "needless for him to go,"[51] that "nothing more will be done" during the term,[52] that he is "no longer required"[53] or that he "need not concern himself until he is further advised,"[54] his neglect is excusable. When a party does appear in court, he must take notice of what occurs there.[55]

Formerly, the cases held that neglect of a party was inexcusable unless he employed an attorney who ordinarily practiced in the court where the action was instituted or one who especially engaged to go there.[56] If the party employed a non-local attorney, he had to see that

[42] Governor *ex rel.* Trustees of University of North Carolina v. Lassiter, 83 N. C. 38 (1880).
[43] Burke v. Stokely, 65 N. C. 569 (1871).
[44] Simonton v. Lanier, 71 N. C. 498 (1874).
[45] Finlayson v. The American Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).
[46] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903); Roberts v. Allman, 106 N. C. 391, 11 S. E. 424 (1890).
[47] Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925); Boing v. Raleigh & Gaston R. R. Co., 88 N. C. 62 (1883).
[48] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476 (1897).
[49] Henry v. Clayton, 85 N. C. 372 (1881); Sluder v. Rollins, 76 N. C. 271 (1877).
[50] Cobb v. O'Hagan, 81 N. C. 293 (1879); Bradford v. Coit, 77 N. C. 72 (1877).
[51] Ellington v. Wicker, 87 N. C. 14 (1882).
[52] English v. English, 87 N. C. 497 (1882).
[53] Pickens v. Fox, 90 N. C. 369 (1884).
[54] Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Edwards v. Butler, 186 N. C. 200, 119 S. E. 7 (1923).
[55] Carter v. Anderson, 208 N. C. 529, 181 S. E. 750 (1935) (Party was in court with counsel when continuance was denied. Both left without any definite agreement with adversary party or with the court, and failed to appear at the trial).
[56] Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437.

the non-local attorney attended court and "stayed on guard for him."[57] In *Helderman v. Mills Co.*,[58] the court abrogated the requirement of employment of local counsel and indicated that a party could safely rely on a non-local attorney of high character and professional standing.[59] The present requirement seems to be that the party must (1) employ reputable, skilled and competent counsel and (2) impart to counsel facts constituting his defense.[60]

Where the defaulting party is chargeable with notice that his attorney will be unable to conduct his case, inaction will amount to inexcusable neglect. The party may be chargeable with notice that his attorney has died,[61] left the state,[62] joined the army,[63] or is too ill to handle the litigation.[64]

(4) *Effect of negotiations and deception*

Where the parties, or their attorneys, have engaged in negotiations, contemplating a settlement of the action, or the defaulting party has been reasonably misled by some statement of the other party or his attorney, neglect of the action may be excusable. Where a settlement was pending and it is shown that, except for excusable delay in notifying the adversary party of any acceptance of the proposed settlement, a judgment would not have resulted, a motion to set aside may be granted.[65] The motion may not be granted however, where an offer of settlement has been expressly withdrawn.[66] The result is the same where the defaulting party is notified that judgment will be taken

130 S. E. 12 (1925); Ham v. Person, 173 N. C. 72, 91 S. E. 605 (1917); McKeel Hardware Co. v. Buhmann, 159 N. C. 511, 75 S. E. 731 (1912); Stockton v. Wolverine Gold Mining Co., 144 N. C. 595, 57 S. E. 335 (1907); Osborn v. Leach, 133 N. C. 428, 45 S. E. 783 (1903); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903); Manning v. Roanoke and Tar River R. R. Co., 122 N. C. 824, 28 S. E. 963 (1898).

[57] McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[58] 192 N. C. 626, 135 S. E. 627 (1926).

[59] *Ibid.*

[60] Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).

[61] Queen v. Gloucester Lumber Co., 170 N. C. 501, 87 S. E. 325 (1915) (Attorney retired and died seven months before judgment was rendered. Party did not employ other counsel until service of execution under the judgment); Simpson v. Brown, 117 N. C. 482, 23 S. E. 441 (1895); Kivett v. Wynne, 89 N. C. 39 (1883) (Attorney died three weeks prior to trial. He was a public figure; his death received much notoriety. Party did not employ other counsel, nor did he appear at the trial).

[62] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918) (Attorney ceased connection with case and moved to Colorado, intending to reside there permanently).

[63] Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919) (Defendant paid no attention to case when attorney had left the county to join the army two months before judgment).

[64] Holland v. Edgecombe Benevolent Ass'n, 176 N. C. 86, 97 S. E. 150 (1918) (Attorney confined to hospital under the care of the party. Party made no inquiry as to the state of the action).

[65] Cagle v. Williamson, 200 N. C. 727, 158 S. E. 391 (1931) (Neglect in notification, if any, was that of attorney and not that of party).

[66] Gray v. King, 180 N. C. 667, 104 S. E. 646 (1920).

unless an answer is filed,[67] or unless payment, upon terms previously agreed on, is made.[68]

The defaulting party cannot safely rely on the advice of a neighbor,[69] or upon the promise of the adversary party that judgment will not be taken, where the promise is not filed or brought to the attention of the court.[70] However, if the party is reasonably misled by his adversary's attorney, his resulting neglect might be held to be excusable.[71] But the reliance must be reasonable. For example, where plaintiff's attorney merely informs defendant that the plaintiff has an incontestable cause of action, the judgment will not be set aside.[72] Also, the defaulting party must be diligent.[73] If the defendant is reasonably misled, it is immaterial whether or not the misleading is intentional.[74]

(5) *Neglect of agent*

In General: As a general rule, in cases of simple agency, the inexcusable neglect of an agent is imputable to a principal moving to set aside.[75] The agent may be the movant's grantor,[76] co-defendant,[77] business manager,[78] general agent,[79] local agent,[80] surety[81] or insurance carrier.[82] However, the agent's neglect will not be imputed to the principal unless the agent is a "responsible agent."[83] A distinction is made between agents of a foreign corporation who are such because of a contractual relationship and those who are merely process agents due to operation of law. The court will not hold as a matter of law that the neglect of the latter is imputable to the corporation.[84]

[67] Union Guano Co. v. Middlesex Supply Co., 181 N. C. 210, 106 S. E. 832 (1921).

[68] Perkins v. Sharp, 191 N. C. 224, 131 S. E. 584 (1926).

[69] Mauney v. Gidney, 88 N. C. 200 (1883) (The neighbor stated that he had consulted counsel and that no defense was available to defendant).

[70] LeDuc v. Slocomb, 124 N. C. 347, 32 S. E. 726 (1899).

[71] Union Guano Co. v. Hearne, 172 N. C. 398, 90 S. E. 420 (1916) (Where plaintiff's attorney intimated that judgment would be sought against defendants' separate balances on a single contract, when, in fact, the action was instituted against defendants jointly, charging them with fraudulent misapplication).

[72] Mauney v. Gidney, 88 N. C. 200 (1883).

[73] Kerchner v. Baker, 82 N. C. 169 (1880) (plaintiff's attorney agreed iwth defendant's attorney that no action would be taken without notice to defendant or his attorney, but plaintiff's attorney died and plaintiff recovered judgment. Defendant never made any inquiry concerning the action).

[74] Union Guano Co. v. Hearne, 172 N. C. 398, 90 S. E. 420 (1916) (The earlier case of Mauney v. Gidney, 88 N. C. 200 (1883) apparently made artifice by the plaintiff an essential ingredient).

[75] Morris v. Liverpool Ins. Co., 131 N. C. 212, 42 S. E. 577 (1902); Finlayson v. The Amercian Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).

[76] Norwood v. King, 86 N. C. 80 (1882).

[77] Bank of Statesville v. Foote, 77 N. C. 131 (1877).

[78] Pate v. Pittman Hospital, 234 N. C. 637, 68 S. E. 2d 288 (1951).

[79] Stallings v. Spruill, 176 N. C. 121, 96 S. E. 890 (1918).

[80] Hershey Corp. v. Atlantic Coastline R. R. Co., 203 N. C. 184, 165 S. E. 550 (1932).

[81] Elramy v. Abeyounis, 189 N. C. 278, 126 S. E. 743 (1925).

[82] Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952).

[83] Pate v. Pittman Hospital, 234 N. C. 637, 68 S. E. 2d 288 (1951).

[84] Townsend v. Carolina Coach Co., 231 N. C. 81, 56 S. E. 2d 39 (1949) (The

Attorney—Client: Ordinarily, a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care.[85] However, where an attorney is not performing his professional duties, but is doing some act that the client can and should perform, then the attorney is a mere agent of the client and his neglect is imputable.[86] Thus, where the client employs counsel, not to appear in the case, but merely to select counsel who will appear, neglect of the first attorney in failing to employ counsel is imputable to the client.[87] But if the "selecting" attorney reasonably believes that he has employed counsel and repeatedly assures the client that he has, his neglect is not imputable to the client.[88]

Husband-wife: Where a husband is acting as agent for his wife in handling her interest in litigation, his neglect is not imputable to her,[89] whether the action is against husband and wife jointly,[90] or against the wife alone.[91] In legal contemplation, the wife is inclined to trust her interest in an adversary suit to her husband and failure of the husband to employ counsel and attend to the suit is deemed to make her consequent failure to defend a case of excusable neglect.[92]

Meritorious defense

In order to set aside under G. S. 1-220 a party must show *both* excusable neglect and a meritorious defense,[93] for the court has said

"agent" here had no contractual relationship with the defaulting defendant. She was an employee of lessees of a bus station and merely sold tickets for the defendant, therefore she came within the definition of a "person receiving money" under N. C. GEN. STAT. § 1-97 (1) (1943), making her defendant's agent for service of process. The court held that she was not the type agent whose neglect is imputable to defendant for purposes of G. S. 1-220. The court uses language that seems to indicate a liberal attitude toward defendants seeking to set aside in circumstances such as appeared in this case. ". . . no officer or agent, *charged with the duty of defending actions against the corporation* (italics added) knew of the existence of the suit until after judgment had been taken." Townsend v. Carolina Coach Co. *supra* at p. 84, 56 S. E. 2d at p. 41).

[85] Rierson v. York, 227 N. C. 575. 42 S. E. 2d 902 (1947); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Grandy v. Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Schiele v. North State Fire Ins. Co., 171 N. C. 426, 88 S. E. 764 (1916); Griel v. Vernon, 65 N. C. 76 (1871).

[86] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916).

[87] Kerr v. Joint Stock Bank, 205 N. C. 410, 171 S. E. 367 (1933); Pailin v. Cedar Works, 193 N. C. 256, 136 S. E. 635 (1927); Manning v. Roanoke and Tar River R. R., 122 N. C. 824, 28 S. E. 963 (1898). This situation frequently arises where a business firm employs a general counsel whose duties include assigning litigation to attorneys at the location of the action.

[88] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1927). For a discussion of the rule of non-imputation of attorney's neglect to client, see 26 N. C. L. REV. 84 (1947).

[89] Nicholson v. Cox, 83 N. C. 48 (1880).

[90] Wachovia Bank and Trust Co. v. Turner, 202 N. C. 162, 162 S. E. 221 (1931); Morris Plan Industrial Bank v. Turner, 202 N. C. 165, 162 S. E. 222 (1931); Farmers Nat. Bank and Trust Co. v. Turner, 202 N. C. 166, 162 S. E. 223 (1931).

[91] Sikes v. Weatherly, 110 N. C. 131, 14 S. E. 511 (1892).

[92] Nicholson v. Cox, 83 N. C. 48 (1880).

[93] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949); Garrett v.

that "It would be idle to vacate a judgment where there is no real or substantial defense on the merits."[94] Of course, in the absence of a showing of excusable neglect, any question of meritorious defense becomes immaterial.[95] Some examples of meritorious defense are release,[96] want of service,[97] denial of plaintiff's title or title in defendant by adverse possession[98] and breach of the contract sued upon.[99] Also, an allegation of actual notice to plaintiff of the retirement of defendant from a partnership prior to an extension of credit by the plaintiff to the partnership is considered a sufficient averment of a meritorious defense.[100] However, a technical defense, such as the statute of limitations, is not meritorious.[101] As a general rule, a meritorious defense is one that goes to the intrinsic merit of the case and is founded in good conscience.[102]

Time of motion

A party seeking relief under G. S. 1-220 must present his motion within one year.[103] The statute does not apply to cases where service is by publication.[104] Therefore, since a party who is personally served or who is in court by voluntary appearance has notice of all that occurs in court,[105] the one year period runs from the date of the rendition of the judgment. By this is meant the actual date of rendition and not the first day of the term during which the judgment was rendered.[106]

Procedure on the motion

A party seeking to set aside a judgment under G. S. 1-220 must file affidavits, along with an application to set aside the judgment, with the court. Notice of motion is given to the adversary party, who may submit counter-affidavits. The court then hears the motion on the affi-

Trent, 216 N. C. 162, 4 S. E. 2d 319 (1939); Woody v. Privett, 199 N. C. 378, 154 S. E. 625 (1930); Battle v. Mercer, 187 N. C. 437, 122 S. E. 4 (1924); Crumpler v. Hines, 174 N. C. 283, 93 S. E. 780 (1917); Minton v. Hughes, 158 N. C. 587, 73 S. E. 810 (1912); Bank of Statesville v. Foote, 77 N. C. 131 (1877).

[94] Cayton v. Clark, 212 N. C. 374, 375, 193 S. E. 404 (1937).

[95] Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952).

[96] Sircey v. Hans Rees' Sons, 155 W. C. 296, 71 S. E. 310 (1911).

[97] Monroe v. Niven, 221 N. C. 362, 20 S. E. 2d 311 (1942).

[98] Duffer v. Brunson, 188 N. C. 789, 125 S. E. 619 (1924).

[99] Everett v. Johnson, 219 N. C. 540, 14 S. E. 2d 250 (1941).

[100] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949). See notes 111-114 *infra* for further indications as to what constitutes a meritorious defense.

[101] Wyche v. Ross, 119 N. C. 174, 25 S. E. 878 (1896).

[102] 1 FREEMAN, LAW OF JUDGMENTS § 286 (5th ed. 1925).

[103] Gordon v. Pintsch Gas Co., 178 N. C. 435, 100 S. E. 878 (1919); Currie v. Golconda Mining and Milling Co., 157 N. C. 209, 72 S. E. 980 (1911); Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581 (1904).

[104] Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648 (1926).

[105] Roberts v. Allman, 106 N. C. 391, 11 S. E. 424 (1890); McLean v. McLean, 84 N. C. 365 (1881).

[106] Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184 (1919). (The rule of judgments "relating back" to the first day of the term is not applicable.)

davits.[107] The circumstances alleged as constituting surprise, mistake, inadvertence or excusable neglect must of necessity be set forth in the affidavits as they will not appear in any other records of the case.

(1) *Showing a meritorious defense*

In the absence of an answer, a meritorious defense must be alleged by affidavits.[108] The allegations in the affidavit must be definite.[109] Facts, not conclusions of law, must be alleged.[110] Where a verified answer denying the material allegations of the complaint is filed and is a part of the record, it may be sufficient to show a meritorious defense.[111] If the plaintiff is the movant, his complaint may be sufficient to show a meritorious defense to a counterclaim.[112] Where a case goes on to trial, after the former judgment has been set aside on motion, and the defendant wins the case, this is held to be ". . . a very fair test of good defense."[113] Other records on which a finding of meritorious defense may be established are a judgment of the case on a former trial and an opinion of the Supreme Court on a former appeal.[114]

It is only necessary to *allege* facts constituting a meritorious defense or a meritorious cause of action. The facts alleged do not have to be conclusive, but they must show a prima facie defense or cause of action.[115] The judge does not determine the truth or falsity of the defense,[116] thus there may be a sufficient allegation of meritorious defense even though, in fact, there is no defense.[117]

(2) *Findings of fact and conclusions*

The court hearing the motion should find the facts as to surprise or excusable neglect and as to the matter of a meritorious defense or cause of action. However, the judge is not required to find facts, in the ab-

[107] McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE § 655 (1929).
[108] Fellos v. Allen, 202 N. C. 375, 162 S. E. 905 (1932). Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).
[109] Montague v. Lumpkins, 178 N. C. 270, 100 S. E. 417 (1919).
[110] Hooks v. Neighbors, 211 N. C. 382, 190 S. E. 236 (1937).
[111] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950); Cagle v. Williamson, 200 N. C. 727, 158 S. E. 391 (1931); Gallins v. Globe-Rutgers Fire Ins. Co., 174 N. C. 553, 94 S. E. 300 (1917). See Chosen Confections Inc. v. Johnson, 218 N. C. 500, 11 S. E. 2d 472 (1940), where defense was shown by answer. Although the answer was ordered stricken, it was preserved in the record by an exception.
[112] Godwin v. Brickhouse, 220 N. C. 40, 16 S. E. 2d 403 (1941). *Cf.* Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946).
[113] Sircey v. Hans Rees' Sons, 155 N. C. 296, 299, 71 S. E. 310, 311 (1911).
[114] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950).
[115] Crumpler v. Hines, 174 N. C. 283, 93 S. E. 780 (1917).
[116] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915).
[117] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949). *But see,* Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946), where the court said that although the allegations of a verified complaint may be used as evidence of a cause of action or defense, the allegations are not conclusive or irrebuttable and

sence of a request to do so.[118] If a request is made, it is error for the judge to refuse to find facts.[119] Therefore, one of two courses may be taken. If the judge does not find facts, it will be presumed on review that he found such facts as would support his ruling.[120] If the judge does find facts, the facts found are conclusive on review,[121] except in the following cases: (1) where there is an exception that there is no evidence to support the facts,[122] (2) where there is an exception that the judge failed to find material facts,[123] (3) where there is an exception that the judge considered facts not material[124] and (4) where the judge found facts under a misapprehension of the law or the facts.[125]

Upon the facts found, the judge determines whether or not there is surprise or excusable neglect and a meritorious defense or cause of action.[126] From this, either party may appeal.[127] Unless the judge concludes correctly that there was both excusable neglect (or surprise) and a meritorious defense, he is without power to set aside the judgment.[128] If he concludes that there was both excusable neglect or surprise and a meritorious defense, then he may, in his discretion, set aside the judgment.[129] This exercise of discretion is not reviewable except in case of abuse[130] or misapprehension of power to set aside.[131]

---

will not override a finding of the judge made on conflicting testimony that there is no cause of action or defense.

[118] Holcomb v. Holcomb, 192 N. C. 504, 135 S. E. 287 (1926).

[119] *Ibid.*

[120] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Holcomb v. Holcomb, 192 N. C. 504, 135 S. E. 287 (1926); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[121] Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Clayton v. Adams, 206 N. C. 920, 175 S. E. 185 (1934); Crye v. Stoltz, 193 N. C. 802, 138 S. E. 167 (1927); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 W. E. 706 (1919); Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917); Marion v. Tilley, 119 N. C. 473, 26 S. E. 26 (1896); Weil v. Woodard, 104 N. C. 94, 10 S. E. 129 (1889); Branch v. Walker, 92 N. C. 91 (1885).

[122] Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917); Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269 (1899) and cases cited there.

[123] Beaufort Lumber Co., v. Cottingham, *supra* note 122.

[124] Gorman v. Yorke, 214 N. C. 524, 199 S. E. 729 (1938).

[125] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950); Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949); Marsh v. Griffin, 123 N. C. 660, 31 S. E. 840 (1898); Where this occurs, the case will be remanded for a proper finding of facts. Coley v. Dalrymple, 225 N. C. 67, 33 S. E. 2d 477 (1945).

[126] Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917).

[127] Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919).

[128] Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919); Stockton v. Wolverine Gold Mining Co., 144 N. C. 595, 57 S. E. 335 (1907); Manning v. Roanoke and Tar River R. R., 122 N. C. 824, 28 S. E. 963 (1898); Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896).

[129] Garner v. Quakenbush, 187 N. C. 603, 122 S. E. 474 (1924).

[130] Wyche v. Ross, 119 N. C. 174, 25 S. E. 878 (1896).

[131] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Albertson v. Terry, 108 N. C. 75, 12 S. E. 892 (1891) (The burden is on the movant to show that the judge is not exercising discretion. The party should request specification of grounds of decision and assign error).

(3) *Exceptions*

In order to insure a complete review of the trial court's action on motions under G. S. 1-220, the following request and exceptions should be considered: (1) a request that the trial judge find facts, with an exception if the request is refused,[132] (2) exceptions to individual findings of fact,[133] and (3) exceptions to conclusions of the judge as to surprise or excusable neglect and meritorious defense.[134] Also, the question of what is presented for review by the following exceptions should be recognized. A "broadside" exception presents for review only the question of whether or not the facts found by the judge support his judgment.[135] A general exception to the findings of fact on which the judgment of the trial court rests, *i.e.* "a shot at the covey," will not be considered on appeal.[136] An exception to the judgment below presents only two questions: Whether the facts found support the judgment and whether errors of law appear on the face of the record.[137]

JOHN R. MONTGOMERY, JR.

Trusts—Constructive Trust—Recovery of Proceeds of Wrongful Disclosure of Confidential Information

Defendant, a geologist, was employed full time by the plaintiff to secure and classify geological data for use in locating and acquiring oil properties. The information was highly confidential. Upon discovery that defendant had been divulging parts of this information to confederates, who through its use were able to secure valuable oil interests for themselves and for defendant, an action was begun to impress a constructive trust on the interests thus secured. It was held that defendant had breached his fiduciary duty to his employer in divulging this information, and it was decreed that defendant and his confederates held the interests and profits therefrom as constructive trustees for the plaintiff.[1]

Defined broadly, a constructive trust is a remedial device used to compel one who holds property wrongfully acquired or retained to

[132] McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).
[133] Radeker v. Royal Pines Park, Inc., 207 N. C. 209, 176 S. E. 285 (1934); Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950). (Exceptions must be to *individual* findings of fact, as a general exception to findings will not be considered on appeal.) See cases cited *supra* notes 121-124.
[134] Southern Butane Gas Corp. v. Bullard, 232 N. C. 730, 62 S. E. 2d 335 (1950).
[135] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951).
[136] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950).
[137] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949).

[1] Hunter v. Shell Oil Company, 198 F. 2d 485 (5th Cir. 1952); *accord*, Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937), approved in 25 VA. L. REV. 848 (1939); Ohio Oil Company v. Sharpe, 135 F. 2d 303 (5th Cir. 1943) reversing 45 F. Supp. 969 (D. C. Okla. 1942), approved in 41 MICH. L. REV. 747 (1943).

transfer it to the one who is entitled to it.[2] It no longer obtains of doubt that this remedy will be used against one who has acquired property through violation of his fiduciary obligation not to divulge confidential information belonging to his employer,[3] and to third parties who have received and used this information with notice.[4] Another, and perhaps more widely used device of equity to prevent revelation and use of confidential information, is the injunction.[5] Basically the same rules apply to both, the difference being whereas the constructive trust is restitutional, the injunction is preventive. It is not unusual to see the two used in conjunction.[6] The injunction, as so used, is not a recent innovation. It was used as early as 1820 when Lord Eldon enjoined the use of secret veterinary formulae by a third party, where the secret had been acquired by an employee.[7]

The rule that one in a fiduciary capacity is disabled from revealing the secrets belonging to his employer is deceptively simple. In applying the rule, however, three main problems of construction arise, namely: (1) What information is secret and confidential; (2) When is an employee in a confidential or fiduciary capacity; and (3) What is the duration of the disability? Due to the wide diversity of employer-employee relationhips, and the myriad types of information with which they are concerned, it is impossible to give an answer that is more than a wide generalization. It is suggested that whether or not information is

[2] Engelstein v. Mintz, 345 Ill. 48, 177 N. E. 746 (1931); 3 BOGERT, TRUSTS AND TRUSTEES, § 471 (1946).

[3] Harrison v. Craver, 188 Mo. 590, 87 S. W. 962 (1905) ("Assuming the fiduciary relation it is an elementary law not needing citation of authority that an employee . . . may not seize benefits with both hands, coming and going.").

[4] Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937), RESTATEMENT, RESTITUTION, § 201 (1939).

[5] Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12 (1889); 2 STORY, EQUITY JURISPRUDENCE, § 1283 (1918) ("Courts of equity will restrain a party from making disclosures of secrets communicated to him in the course of a confidential employment; and it matters not, . . . , whether the secret be a secret of trade, or secret to title, or any other secret of the party important to his interests.").

After its disclosure equity will enjoin its use by third parties. Stewart v. Hook, 118 Ga. 445, 45 S. E. 369 (1903); Elaterite Paint and Mfg. Company v. S. E. Frost Company, 105 Minn. 239, 117 N. W. 338 (1906); Vulcan Detinning Company v. American Can Company, 75 N. J. Eq. 542, 73 Atl. 603 (Err. & App. 1909).

[6] Consolidated Boiler Company v. Bogue Elec. Co., 141 N. J. Eq. 550, 58 A. 2d 759 (Ch. 1948); Vulcan Detinning Company v. American Can Company, 75 N. J. Eq. 542, 73 Atl. 603 (Err. & App. 1909).

[7] Yovatt v. Winyard, 1 J. & W. 394, 37 Eng. Rep. 425 (1820). In an earlier case, Newberry v. James, 2 Mer. 446, 35 Eng. Rep. 1011 (1817), Lord Eldon refused to grant an injunction, saying: "If the art and method were a secret, the court could not without having it disclosed ascertain whether it had been infringed." This has been handled in the American courts by taking the evidence in the presence of the parties only, and sealing it for later use for determining if the decree of the court has been violated. Taylor Iron Company v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186 (Err. & App. 1908). Such disclosure does not act as a waiver of the secret. Stone v. Goss, 65 N. J. Eq. 756, 55 Atl. 736 (Err. & App. 1903).

secret is a fact which must be proven.[8] It is not necessary, however, that the information be an absolute secret.[9] Ordinarily the term "confidential information" is understood to mean a secret process or formula, tool, compound or mechanism known only to its owner and those of his employees in whom it is necessary to confide for its profitable utilization, in contradistinction to "mere privacy" with which a business is usually cloaked.[10] Once it is accepted that it is a wise public policy to protect such secrets, it does no violence to the idea to extend the protection to other types of information which are peculiar to, and essential to the owner's business. Authorities disagree as to whether this protection should be extended so as to include customer lists.[11] It has been held that where physical lists are used, they are included, but where the knowledge is in the employee's memory, it is not, and cannot be the property of the employer, and is excluded.[12] Illustrative, but not limitative of the generalized types of information which have been held to be confidential are geological data,[13] customer lists,[14] office methods and techniques,[15] credit ratings,[16] future stock trading plans,[17] production methods and manufacturing processes,[18] business oppportunities,[19] chemical formulae,[20] insurance debits and expiration dates,[21] and a code system showing cost and selling prices of merchandise.[22] The mere fact that the owner considers it to be secret is not controlling, and though it be in fact secret, it must have a relationship to the activity of the em-

[8] Sanitas Nut Food Company v. Cemer, 134 Mich. 370, 96 N. W. 454 (1903); Newark Cleaning and Dye Works v. Gross, 97 N. J. Eq. 406, 128 Atl. 789 (Ch. 1925) (An injunction will not lie in the absence of the actual proof of the secrecy of the knowledge in question).

[9] Vulcan Detinning Company v. American Can Company, 75 N. J. Eq. 542, 73 Atl. 603 (Err. & App. 1909).

[10] National Tube Company v. Eastern Tube Company, 23 Ohio Cir. Ct. 468 (1902).

[11] Held to be trade secrets: Mackenchnie Bread Company v. Huber, 213 Pac. 285 (Cal. App. 1923); Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180 (1913); Witkop and Holmes v. Boyce, 61 Misc. 126, 112 N. Y. Supp. 1076 (Sup. Ct. 1900). Not trade secrets: El Dorado Laundry Company v. Ford, 174 Ark. 104, 294 S. W. 393 (1927); Fulton Grand Laundry Company v. Johnson, 140 Mo. 359, 117 Atl. 753 (1922).

[12] Garst v. Scott, 114 Kan. 676, 220 Pac. 277 (1923). (If the list is obtained by mere observation it is not secret.). Fulton Grand Laundry v. Johnson, 140 Mo. 359, 117 Atl. 753 (1922).

[13] See note 1 *supra.*

[14] McKenchnie Bread Company v. Huber, 213 Pac. 285 (Cal. App. 1923); Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180 (1913); Witkop and Holmes v. Boyce, 61 Misc. 126, 112 N. Y. Supp. 874 (Sup. Ct. 1908).

[15] Tolman v. Mulcahy, 119 App. Div. 42, 103 N. Y. Supp. 936 (1907).

[16] Friedman v. Stewart Credit Corp., 26 N. Y. S. 2d 529 (Sup. Ct. 1939).

[17] Brophy v. Cities Service Corp., 70 A. 2d 5 (Del. Ch. 1949).

[18] State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948); Irving Iron Works v. Kerlow Steel Flooring Co., 103 N. J. Eq. 240, 143 Atl. 145 (Ch. 1928).

[19] Volk Company v. Fleschner Bros., 60 N. Y. S. 2d 244 (Sup. Ct. 1945).

[20] Marcalus Mfg. Co. v. Sullivan, 142 N. J. Eq. 434, 60 A. 2d 330 (Ch. 1948); Eastman Company v. Reichenback, 20 N. Y. Supp. 110 (Sup. Ct. 1892).

[21] Morrison v. Woodbury, 105 Kan. 617, 185 Pac. 735 (1919).

[22] Simmons Hardware Company v. Waibel, 1 S. D. 488, 47 N. W. 814 (1891).

ployer.[23] A fortiori, information which is of a nature known generally to the trade, or which is readily obtainable elsewhere is not confidential.

While a mere employee is not usually thought to be in a fiduciary relation to his employer, if he comes into possession of secrets relating to his employer's business, he occupies a position of trust analogous in most respects to that of a fiduciary and is governed accordingly.[24] This rule has been applied to a secretary who learned his employer's future stock trading plans;[25] to a book-keeper privy to the company's loan procedures;[26] to a store manager in possession of customer credit ratings;[27] industrial chemists in possession of secret formulae;[28] an engineer supervising production methods;[29] to route salesmen in possession of customer lists.[30] It has also been applied to insurance agents,[31] and to a tannery employee who knew his employer's secret process for making leather.[32] In an interesting early case it was applied to a student who was enjoined from publishing his professor's lectures for outside sale.[33]

The duty not to divulge confidential information is said to be contractual. Courts differ as to whether the contract must be express[34] or may be implied from the nature of the employment.[35] The basis for the protection is said to be the employer's property right therein,[36] and in some cases, as in customer lists, it is spoken of as "good-will" belonging to the business.[37] This duty is said to exist after the termina-

[23] Young v. Bradley, 142 F. 2d 658 (6th Cir. 1944).
[24] Brophy v. Cities Service Corp., 70 A. 2d 5 (Del. Ch. 1949).
[25] Brophy v. Cities Service Corp., 70 A. 2d 5 (Del. Ch. 1949) (constructive trust).
[26] Tolman v. Mulcahy, 119 App. Div. 42, 103 N. Y. Supp. 936 (1907) (injunction).
[27] Friedman v. Stewart Credit Corp., 26 N. Y. S. 2d 529 (Sup. Ct. 1939) (injunction).
[28] See note 20 *supra.*
[29] State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948); Irving Iron Works v. Kerlow Steel Flooring Co., 103 N. J. Eq. 240, 143 Atl. 145 (Ch. 1928) (constructive trust).
[30] See note 14 *supra.*
[31] Morrison v. Woodbury, 105 Kan. 617, 185 Pac. 735 (1919) (injunction).
[32] Solomon v. Hertz, 40 N. J. Eq. 400, 2 Atl. 379 (Err. & App. 1886) (injunction).
[33] Abernethy v. Hutchinson, 3 L. J. O. S. 209 (1825) (injunction).
[34] Fulton Grand Laundry v. Johnson, 140 Md. 359, 117 Atl. 753 (1922)
[35] ("There is an implied contract."). Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180 (1913). ("But an employee cannot be prevented from using his skill, knowledge or experience even if gained during his employment. . . . If he is not informed that the process (or information) is secret, he cannot be said to have impliedly undertaken anything in connection with the secrecy of the process.") 187 L. T. 301 (1939).
[36] Du Pont Powder Company v. Masland, 244 U. S. 100 (1917) ("The word 'property' as applied to trade secrets is an unanalysed expression of certain secondary consequences of the primary fact that the law makes some elementary requirements of good faith.").
[37] Colonial Laundries v. Henry, 138 Atl. 47 (R. I. 1927).

tion of the employment as well as during its continuance.[38] If held otherwise the employer would be at the mercy of an unscrupulous employee, who on receipt of a given trade secret could decamp with impunity. While authorities are generally silent as to how long this duty continues after the termination of the employment, it is reasonable to assume that the duty will be said to exist as long as revelation or use of such information has the power to harm the owner.[39]

In the principal case it was urged, unsuccessfully, that defendant's loyalty was relaxed as to information of areas in which the plaintiff was no longer interested. The court intimated that such defense might be made if it could be proven that such areas of interest had been abandoned. It has been held, however, that the employee may not be the judge of what his employer may or may not be interested,[40] and a constructive trust has been decreed as to property of a type only occasionally purchased by the plaintiff, where there was no showing that he would have in fact purchased the property.[41]

The extension of the rule[42] to the more mundane kind of employees and to the less technical types of information is a salutary example of the development of the conscience of business.[43]

JOSEPH P. HENNESSEE

Venue—Waiver Under Non-Resident Motorist Statutes

B of Texas was injured by the allegedly negligent operation of an automobile by A of New York in the State of Vermont. Service was made on the Commissioner of Motor Vehicles in accordance with the provisions of the Vermont non-resident motorist statute,[1] and suit commenced in the federal district court sitting in Vermont. The court denied defendant's motion to dismiss for failure to satisfy the federal

[38] Wooley's Laundry v. Silva, 304 Mass. 383, 23 N. E. 2d 899 (1939); State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948).

[39] It has been held, however, that it is not necessary that the owner should have suffered any actual loss. Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).

[40] Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).

[41] Whitten v. Wright, 206 Minn. 423, 289 N. W. 509 (1940).

[42] See notes 3 through 6 *supra*.

[43] But see, *Simpson, Equity, Annual Survey of American Law*, 839 (1946). ("In view of the ease with which any business practice can be labeled 'confidential,' and of the fact that enforcement of covenants not to compete by employees is justified only where the interest of the former employer materially outweighs both the public interest in free competition and in the dissemination of useful knowledge, and the employee's interest in being able to learn and apply his skill to his own advantage, all these decisions (as to confidential information) seem dubious. Certainly the tendency which they manifest cannot be extended if freedom of individual enterprise is to be preserved. A fictional extension of the 'trade secret' concept should not be allowed to become the tool of monopoly.").

[1] VT. REV. STAT. § 428 (1947), as amended Vt. Public Acts, 1951, § 209.

venue requirement that except as otherwise provided by law, a civil action in which the jurisdiction is based only on diversity of citizenship may be brought only in the judicial district where all plaintiffs or all defendants reside;[2] holding that by A's action in using the highways of the State of Vermont he was deemed to have appointed the Commissioner of Motor Vehicles as his agent for the receipt of process, and such statutory appointment also constituted a consent to the venue of the federal court in that district.[3]

Since the non-resident motorist statutes were held constitutional[4] if they provided for notice to the non-resident,[5] the federal courts have been confronted with the problem of whether the non-resident operating his vehicle in a state with a non-resident motorist statute thereby waives his federal venue privilege. The weight of authority[6] is that such action constitutes a waiver, the courts having found the situation analogous to that of a foreign corporation,[7] and thereby having a basis for the application of the rule of the *Neirbo* case[8] which held that the appointment by a foreign corporation of a statutory agent for the service of process was a consent to suit in the federal as well as in the state courts of a state.

The rationale of these decisions is that the general venue statute is not a limitation on the jurisdiction of the federal courts,[9] but merely a privilege accorded to the defendant which he may waive or[10] to which he may consent, either expressly or impliedly.[11] As the *Neirbo* case held that the appointment of an agent for process by a foreign corporation in accordance with state law constituted a consent to the venue of the federal courts of the district, it would follow that an individual may also waive his non-resident immunity by the statutory

[2] 28 U. S. C. A. § 1391(a) (Supp. 1950).
[3] Jacobson v. Schuman, 105 F. Supp. 483 (D. Vt. 1952).
[4] Hess v. Pawloski, 274 U. S. 352 (1927).
[5] Wuchter v. Pizzuti, 276 U. S. 13 (1928).
[6] Oberding v. Illinois Central Ry., 201 F. 2d 582 (6th Cir. 1953); Archambeau v. Emerson, 108 F. Supp. 28 (W. D. Mich. 1952); Garcia v. Fausto, 97 F. Supp. 583 (E. D. Mo. 1951); Burnett v. Swenson, 95 F. Supp. 529 (W. D. Okla. 1951); Kostamo v. Brorby, 95 F. Supp. 806 (D. Neb. 1951); Urso v. Scales, 90 F. Supp. 653 (E. D. Pa. 1950); Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945); Krueger v. Hider, 48 F. Supp. 708 (E. D. S. C. 1943); Williams v. James, 34 F. Supp. 61 (W. D. La. 1940); O'Donnell v. Slade, 5 F. Supp. 265 (M. D. Pa. 1933). *Contra:* Martin v. Fischbach Trucking Co., 183 F. 2d 53 (1st Cir. 1950); Waters v. Plyborn, 93 F. Supp. 651 (E. D. Tenn. 1950).
[7] Urso v. Scales, 90 F. Supp. 653, 655 (E. D. Pa. 1950).
[8] Neirbo v. Bethlehem Steel Corp., 308 U. S. 165 (1939); 128 A. L. R. 1437 (1940).
[9] Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 549 (2d Cir. 1914).
[10] It would seem that the word "consent" would imply an affirmative action as opposed to the negative character of "waiver"; however, the courts seem to use the terms interchangeably in discussing this problem.
[11] Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177, 179 (1929).

appointment of an agent on whom process may be served.[12]

It has been contended that if the *Neirbo* decision is based on the conception that an express appointment of a statutory agent for service of process (and thereby impliedly contemplating suit in that district) constitutes a consent to be sued in both the federal and local courts of a state, this line of reasoning is not applicable to the non-resident motorist.[13] In the latter case there is neither conscious nor voluntary consent.[14] Nevertheless, in deciding in accordance with the terms of a Virginia statute[15] that a foreign corporation without the actual appointment of an agent for process was deemed to have appointed such agent by doing business within the state, Judge Parker stated: "There is a distinction between express and implied consent, but this consent has relation to the origin of the cause of action, not to the effect on venue . . . there is no reason for any distinction between express and implied waiver, however, when it comes to the waiver of venue. . . ."[16]

A distinguishing characteristic of the *Neirbo* case and the non-resident motorist case has been based also on the nature of the parties.[17] A corporation, lacking the rights of a natural person, accepts the burden of a statutory agent and the accompanying result of venue waiver in order to obtain a privilege. An individual, on the other hand, has a constitutional right to pass freely from state to state, and the non-resident motorist statute imposes both an abridgement of his constitutional right and a burden on him. This abridgement has been found justified by the police power of the state,[18] and it is questionable whether the necessity to answer for wrongs committed within a state can properly be considered a "burden" rather than a just responsibility; the pervading purpose of the non-resident motorist statutes is the protection of those injured, not the advantage and ease of the non-resident tortfeasor.[19]

[12] Krueger v. Hider, 48 F. Supp. 708, 710 (E. D. S. C. 1943); O'Donnell v. Slade, 5 F. Supp. 265, 268 (M. D. Pa. 1933).

[13] Martin v. Fischbach Trucking Co., 183 F. 2d 53, 55, 56 (1st Cir. 1947).

[14] Conceding that the non-resident motorist is, in actuality, ignorant of the legal consequences of his use of the roads of a sister state, all persons are presumed to know the law. Kostamo v. Brorby, 95 F. Supp. 806, 808 (D. Neb. 1951). It would seem, however, that the "consent" in both situations is a legal fiction employed by the courts to obtain what they deem to be a just end. As stated by Learned Hand, J.: "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court for purposes of justice, treats it as if it had . . . the limits of that consent are as independent of any actual intent as the consent itself . . ." Smolik v. Philadelphia & Reading Coal & Iron Co., 22 Fed. 148, 151 (S. D. N. Y. 1915).

[15] VA. CODE § 3846a (1-4) (Supp. 1948), comparable to the North Carolina Resident Process Act, N. C. GEN. STAT. § 55-38 (1943, recompiled 1950).

[16] Knott Corp. v. Furman, 163 F. 2d 199, 204 (4th Cir. 1947).

[17] Waters v. Plyborn, 93 F. Supp. 651, 652 (E. D. Tenn. 1950).

[18] Kane v. New Jersey, 242 U. S. 160, 167 (1916).

[19] Davis v. Warren, 35 F. Supp. 689 (E. D. Wis. 1940).

If the non-resident plaintiff is refused access to the federal court sitting in the state where the injury occurred, he may bring suit in the state of his residence, in that of the defendant, or in the state court of the state in which the tort occurred. The first of these possibilities is ordinarily precluded by an inability to obtain service on the defendant; normally, the second would subject the plaintiff to additional expense and difficulty. In respect to the third alternative, the federal court may be preferable for many reasons, such as the uniform and relatively simpler procedure and less crowded court calendars.[20]

If the case is tried in a federal forum, it ordinarily would be to the ultimate benefit of both parties, plaintiff and defendant, to have adjudication by the federal court situated in the state where the injury occurred. By the general rule, tort liability is governed by the law of the situs of the tort;[21] therefore, many of the complexities arising from the conflicts of laws would be avoided. In allowing suit in the federal court of the situs, witnesses would be within a reasonable distance and the jury enabled to determine the case without dependence on the relatively unsatisfactory use of depositions.

The primary objection to be made of the confused status of this phase of the law is to the danger inherent in an arbitrary decision that the defendant has, or has not, waived his federal venue privilege without due consideration of the ". . . estimate of conveniences which would result from requiring (him) to defend where (he) has been sued."[22]

In 1948, the *Neirbo* rule was incorporated into statute,[23] providing a partial cure for the venue problems involving foreign corporations. There should be comparable legislative action to elucidate the non-resident motorist statute situations. It is submitted that a statute should be enacted providing that the non-resident motorist statutes should operate as consent to federal venue subject to the approval of the court based on a due consideration of the elements of justice and fair play as embodied in the doctrine of *forum non-conveniens*.[24] To a great

[20] In many of the cases in which the non-resident plaintiff commences suit against the non-resident defendant in the state court of the state in which the tort occurred, the defendant may have the right of removal from the state court to the federal court of the district, and if he exercises this right, the alleged wrongdoer is accorded an opportunity denied the innocent. There is no apparent purpose of justice to be served by such a holding. Knott Corp. v. Furman, 163 F. 2d 199, 205 (4th Cir. 1947); Burnett v. Swanson, 95 F. Supp. 524, 525 (W. D. Okla. 1951).

[21] GOODRICH, CONFLICTS OF LAWS 260 *et seq.* (3d ed. 1949); RESTATEMENT, CONFLICTS § 378 *et seq.* (1934).

[22] Learned Hand, J., in discussing the analogous problem of the "presence" of a foreign corporation. Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141 (2d Cir. 1930).

[23] 28 U. S. C. A. § 1391(c) (Supp. 1950); and similar state statutes, note 15 *supra*.

[24] 28 U. S. C. A. § 1404 (1950).

extent, such a procedure would terminate the confusion existant in an area where the courts seeking to enforce the literal language of Federal Rule 1 that the federal rules ". . . should be construed to secure the just, inexpensive, and speedy determination of every action,"[25] are hampered by the literal meaning of the venue statute, and have been forced to resort to a nebulous legal fiction which could conceivably violate our ". . . traditional notions of fair play and substantial justice. . . ."[26]

ALYCE S. FORSYTH

[25] FED. R. CIV. P. 1.

[26] A test applied by some courts in the determination of the "presence" of a foreign corporation. See: International Shoe Co. v. State of Washington, 326 U. S. 310, 316 (1945); 161 A. L. R. 1057 (1946); Milliken v. Meyer, 311 U. S. 457, 463 (1940); MacDonald v. Mabee, 243 U. S. 90, 91 (1916). According to L. Hand, J., in Kilpatrick v. Tex. & Pac. Ry., 166 F. 2d 788, 791 (2d Cir. 1948), the issue of corporate presence is "indistinguishable" from that of *forum non conveniens.*