UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 2 Article 3

2-1-1957

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Close Corporations—Bad Faith of Majority

"It must be conceded that closely held corporations are easily subject to abuse on the part of dominant stockholders, particularly in the direction of action designed to compel minority stockholders to sell their interest at a sacrifice."[1] Frequently these dominant stockholders are also corporation officers and directors in the close corporation and thus are in an even better position to take unfair advantage of the minority.[2] The older cases have seemingly ignored this fact,[3] but it has been recognized as important in more recent cases.[4] In line with the informal way that close corporations are run, courts tend to ignore the differing fiduciary obligations of directors, officers, or stockholders, and business men themselves do not worry about the capacity in which they make a transaction.[5] Analysis is often best made in terms of the interests of the "majority" and the "minority," and many courts rule that the "majority," when actually controlling the corporation, has a fiduciary relation to the "minority."[6] No fiduciary relation arises from the mere fact of owner-

[1] Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692, 695-696 (Sup. Ct. 1947); See Note, 35 N. C. L. Rev. — (1957) for a discussion of derivative suits and other remedies available to injured stockholders.

[2] See Bellows v. Porter, 201 F. 2d 429 (8th Cir. 1953); Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953); Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 147 Atl. 257 (1929); McCarthy v. Osborn, 223 La. 305, 65 So. 2d 776 (1953); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1953); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919); Schramme v. Cowin, 205 App. Div. 520, 199 N. Y. Supp. 98 (1st Dep't 1923); Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692 (Sup. Ct. 1947); Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951); Thurmond v Paragon Colliery Co., 82 W. Va. 49, 95 S. E. 816 (1918).

[3] See Cross v. Farmers' Elevator Co., 31 N. D. 116, 153 N. W. 279 (1915); Schramme v. Cowin, *supra* note 2; Thurmond v. Paragon Colliery Co., *supra* note 2.

[4] Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953); Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951); Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692, 695-696 (Sup. Ct. 1947) (dictum).

[5] *Cf.* Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N. C. L. Rev. 432, 453 (1956).

[6] Southern Pac. Co. v. Bogert, 250 U. S. 483 (1919); Lebold v. Inland S. S. Co., 82 F. 2d 351 (7th Cir. 1936); Hein v. Jobes, 14 F. 2d 29 (8th Cir. 1926); Consolidated Gold Mining & Milling Co. v. Gouthier, 22 Ariz. 67, 193 Pac. 1021 (1938); Thayer v. Valley Bank, 35 Ariz. 238, 276 Pac. 526 (1929); Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044 (1928); Red Bud Realty Co. v. South, 153 Ark. 380, 241 S. W. 21 (1922); Bodell v. General Gas & Elec. Corp., 15 Del. Ch. 119, 132 Atl. 442 (1926); Riley v. Callahan Mining Co., 28 Idaho 525, 155 Pac. 665 (1916); Veeser v. Robinson Hotel Co., 275 Mich. 133, 266 N. W. 54 (1936); Gaines v. Long Mfg. Co., *supra* note 4; Holub v. Jacobowitz, 123 N. J. Eq. 308, 197 Atl. 423 (1937); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919); Heller v. Boylan, 29 N. Y. S. 2d 653 (Sup. Ct. 1941); Gerdes v. Reynolds, 28 N. Y. S. 2d 622 (Sup. Ct. 1941); Levy v. Feinberg, 29 N. Y. S. 2d 550 (Sup. Ct. 1941); Singer v. Carlisle, 26 N. Y. S. 2d 172 (Sup. Ct. 1940); Dodge v. Scripps, 179 Wash. 308, 37 P. 2d 896 (1934).

ship of a majority of the shares;[7] this fiduciary obligation is less than the trust relation of directors and in essence seems to be that this group not be guilty of bad faith in exercising its control of the corporation.[8] This Note is concerned with those acts of the majority towards the minority in certain corporate transactions which "freeze out" the minority and from which courts might find the evidence of bad faith required before interference in the internal affairs of the corporation.[9] To be distinguished are illegal acts or acts not within the corporate powers which this Note does not consider.[10]

Problems connected with the issuance of shares will be discussed in the text because the courts have apparently been reluctant to find bad faith in this area, although in some instances this device has proved to be more than ordinarily well adapted to "freezing out" the minority.[11] When a minority shareholder of a close corporation is unable or unwilling[12] to purchase his pro rata share of an issue of stock, pre-emptive rights would be inadequate to protect his interests from dilution, especially in the usual case where there is no adequate market for the sale of his rights in the stock issue.[13] Also in closely held corporations the majority

[7] Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 166 N. E. 2d 848 (1952); Mairs v. Madden, 307 Mass. 378, 30 N. E. 2d 242 (1940); Levy v. American Beverage Corp., 265 App. Div. 208, 38 N. Y. S. 2d 517 (1st Dep't 1942).

[8] See cases cited note 2 *supra*.

[9] See Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1939); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919).

[10] See Macon Gas Co. v. Richter, 143 Ga. 397, 85 S. E. 112 (1915) (increase of capital stock in excess of amount provided by charter); Woodruff v. Columbus Inv. Co., 135 Ga. 215, 68 S. E. 1103 (1910) (unauthorized amendment of the charter); Edward v. Peabody Coal Co., 9 Ill. App. 2d 234, 132 N. E. 2d 549 (1956) (denial of pre-emptive rights); Amick v. Coble, 222 N. C. 484, 23 S. E. 2d 854 (1943) (withholding of dividends in violation of a statute providing for the payment of dividends from accumulated profits).

[11] *Cf.* S. B. No. 49, N. C. Gen. Assembly, Sess. 1955 § 55-46, Comment C: "It has been too often assumed that denial of pre-emptive rights is bad and that, on the other hand, the giving of a pre-emptive offer to shareholders puts the treatment of shareholders beyond attack. Actually, perhaps more 'squeezes' of shareholders (particularly the family of deceased substantial shareholder) have been engineered by use of pre-emptive rights, at far below value, than by their denial."

[12] See Bennett v. Breuil Petroleum Corp., 99 A. 2d 236, 240 (Del. Ch. 1953): "But defendants say plaintiff has not been injured, even assuming that the price is grossly inadequate, because he is being offered his pro rata share of the additional shares. This argument is wide of the mark. I say this because plaintiff has the right not to purchase as well as the right to purchase. But his right not to purchase is seriously impaired if the stock is worth substantially more than its issuing price. Any other purchase at that price obviously dilutes his interest and impairs the value of his original holdings."

[13] See Bellows v. Porter, 201 F. 2d 429 (8th Cir. 1953); Bennett v. Breuil Petroleum Corp., *supra* note 12; Jones v. Concord & M. R. R., 67 N. H. 234, 30 Atl. 614 (1892); Schramme v. Cowin, 205 App. Div. 520, 199 N. Y. Supp. 98 (1st Dep't 1923); Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951); Cross v. Farmers' Elevator Co., 31 N. D. 116, 153 N. W. 279 (1915); Thurmond v. Paragon Colliery Co., 82 W. Va. 49, 95 S. E. 816 (1918).

A majority conceivably might attempt to prove that a share issuance would not injure a minority by showing the presence of an adequate market for the sale of the minority's rights in the issue. If this were permitted by the court, perhaps the

can effectively deprive the minority of the profits of the corporation by withholding dividends and paying themselves excessive salaries.[14] Corporate dissolution, reorganization, and other transactions which have been used as "freeze out" devices will not be treated at length because they are often complicated by detailed statutory regulation and dissimilar fact situations.[15] The cases selected have been picked mainly because it is thought they could be more readily compared with each other and perhaps would reveal some of the basic anatomy of bad faith.

The control of the corporation by the majority in a manner which injures the minority interest is not alone enough for the courts to find a bad faith motive in the absence of other specific evidentiary facts tending to show bad faith.[16] Thus it becomes important to examine the cases in this area to determine what actual factors present led to the decision that bad faith was or was not present.

The sufficiency of the business reason for the majority action may well be a determining factor.[17] If it is shown that a transaction causing gain to majority and loss to minority did not realize any substantial advantage for the corporation itself, the lack of a sound business reason may be fairly apparent.[18] And even when there is an actual or colorable gain to the corporation on the transaction, the fact that the same benefit could have been achieved by a means fairer to the minority makes the propriety of the majority's motive at least questionable.[19] This may have

majority could cloud the issue sufficiently for a finding of an adequate market to be made even when there is not one. In such an event, there would seem to be little recourse for a plaintiff.

[14] See Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F. 2d 817 (4th Cir. 1933); Whittemore v. Continental Mills, 98 F. Supp. 387 (S. D. Me. 1951); W. Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N. E. 2d 656 (1940); Flemming v. Heffner & Flemming, 263 Mich. 561, 248 N. W. 900 (1933); Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218 (1892); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1939); Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061 (1904); Jones v. Van Heusen Charles Co., 230 App. Div. 694, 246 N. Y. Supp. 204 (3d Dep't 1930); Nebel v. Nebel, 241 N. C. 491, 85 S. E. 2d 876 (1955); Gaines v. Long Mfg. Co., 234 N. C. 331, 67 S. E. 2d 355 (1951); Patton v. Nicholas, 154 Tex. 385, 279 S. W. 2d 848 (1955); Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 Pac. 941 (1926).

[15] N. C. GEN. STAT. § 55-113 (b) [eff. July 1, 1957] (Supp. 1955) may soon cover these types of situations.

[16] Bellows v. Porter, 201 F. 2d 429 (8th Cir. 1953); Jones v. Concord & M. R. R., 67 N. H. 234, 30 Atl. 614 (1892); Schramme v. Cowin, 205 App. Div. 520, 199 N. Y. Supp. 98 (1st Dep't 1923); Cross v. Farmers' Elevator Co., 31 N. D. 116, 153 N. W. 179 (1915); Thurmond v. Paragon Colliery Co., 82 W. Va. 49, 95 S. E. 816 (1918).

[17] See Atlantic Refining Co. v. Hodgman, 13 F. 2d 781 (3d Cir. 1926).

[18] See Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951) (the stock issuance would reduce the book value of plaintiff's stock from about $50,000 to about $800, and facts were alleged which tended to show that the stock issuance was unnecessary); Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 Pac. 941 (1926) (loss of dividends to nonworking stockholders by paying working stockholders twice as much as working nonstockholders, although most of working stockholders did the same sort of routine work as working nonstockholders).

[19] See Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953). Plaintiff admitted that the corporation was not in good financial shape, but he

been a factor persuading the court to find in favor of the plaintiff in *Gaines v. Long Manufacturing Co.*[20] There, the majority, which had been withholding dividends, proposed to reduce the corporate debt in a fashion which "froze out" the plaintiff minority stockholder. The plaintiff countered with two alternative resolutions of his own. These set out detailed plans, consistant with sound business practice, for achieving the debt reduction in a manner which would preserve all of the stockholders' respective interests in the corporation and also allow a dividend to be paid.

When the motive for the issuance of stock is questioned the apparent necessity for new financing seems to be of primary importance. If some good business reason for new financing can be found, the court may be strongly influenced to say this falls within the business discretion of the majority and dismiss any injury suffered by the minority as an incidental hazard of business.[21] There must be more than a mere allegation of bad faith; facts tending to show bad faith must be alleged and proved. Nor is the fact that the necessity for refinancing arises out of a debt owed by the corporation to the majority, in itself, evidence of bad faith.[22] Of course if the issuance of shares which depletes plaintiff's interest is apparently unnecessary for new financing, this would seem to be strong evidence of bad faith.[23]

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contended that although he was not denied pre-emptive rights, the newly authorized stock was issued for the purpose of forcing him out. He sought cancellation of the stock. An amendment to the certificate of incorporation had lowered the par value of the stock and doubled the number of authorized shares. The defendant majority stockholders purchased the entire issue at par. Plaintiff claimed that the par value was less than one-sixth of its fair value. Defendant's motion to dismiss and for summary judgment was denied. It seems that the majority could have been fairer to the minority without damaging their own interests by purchasing the stock at a higher price.

[20] 234 N. C. 331, 67 S. E. 2d 355 (1951); Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951) (connected case).

[21] See Bellows v. Porter, 201 F. 2d 429 (8th Cir. 1953). Here the corporation had operated at a net loss in two recent years. Defendant majority stockholder purchased the entire issue of new stock, in payment releasing a large debt owed to him by the corporation. Plaintiff minority stockholder was not denied pre-emptive rights, but alleged he was financially unable to purchase his pro rata share and that the purpose of the issuance was to deplete the book value of his stock. In Schramme v. Cowin, 205 App. Div. 520, 199 N. Y. Supp. 98 (1923) plaintiff was not denied pre-emptive rights. The corporate assets consisted of vacant lots, and the corporation was indebted to the majority stockholders. Plaintiff claimed the stock increase was for the purpose of depleting his interest in the corporation, and that it was known to defendants that he was unable to purchase his pro rata share. A directed verdict for the defendant was affirmed.

[22] Cases cited note 21 *supra*.

[23] See Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951). The majority stockholders passed a resolution authorizing the issuance of the unissued authorized capital stock for the purpose of paying a debt of Long Mfg. Co. to Long Supply Co., a corporation wholly owned and controlled by the individual defendants. Plaintiff minority stockholder alleged that the resolution was passed in bad faith to destroy the value of his shares. Also facts were alleged which tended to show that the assets of Long Mfg. Co. were sufficient to pay the indebtedness to Long Supply Co. and have sufficient working capital left. The court affirmed an

Where bad faith in the withholding of dividends is charged, the same business reason criterion can be applied; there is an examination of the corporation's financial structure to determine whether a surplus existed from which a dividend could be paid.[24] Just as the existence of a debt owed by the corporation to the majority is not enough by itself, the finding of an adequate surplus alone is not sufficient evidence of bad faith.[25] However, where a surplus exists bad faith may be more easily found if there is other evidence pointing to improper motivation.[26]

An examination of the prior relations between the minority and the majority plus the history of the dealings of the majority with the corporation may reveal evidence of an improper motive for the actions of the majority which damaged the minority interest. This evidence can be divided into two classifications: evidence of an attitude of hostility towards the minority, and evidence of prior activities of the majority which, though not openly hostile, were unfair to the minority.

There are numerous ways the majority can express a hostile attitude towards the minority. Strained relations and the previous effort of the majority to buy out the minority are indications of the majority's hostility.[27] The adoption of an amendment of the by-laws for the purpose of forcing plaintiff to resign as officer has been used as evidence to sway the court to find bad faith.[28] And in one case the court was influenced by a letter written by defendant which was susceptible of the interpretation that he would use his power as the majority stockholder to the detriment of plaintiffs, and by evidence of oral declarations to the effect that he would not pay dividends as long as plaintiffs were

order overruling the demurrer and continuing the temporary injunction against the issuance of stock until final determination.

[24] See Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1939); Anderson v. W. J. Dyre & Bro., 94 Minn. 30, 101 N. W. 1061 (1904); Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692 (Sup. Ct. 1947); Gaines v. Long Mfg. Co., 234 N. C. 331, 67 S. E 2d 355 (1951); Patton v Nicholas, 154 Tex. 385, 279 S. W. 2d 848 (1955).

[25] Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692 (Sup. Ct. 1947); Jones v. Costlow, 349 Pa. 136, 36 A. 2d 460 (1944); Keough v. St. Paul Milk Co., 205 Minn. 96, 118, 285 N. W. 809, 821 (1935) (dictum).

[26] See Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1939); Jones v. Van Heusen Charles Co., 230 App. Div. 694, 246 N. Y. Supp. 204 (3d Dep't 1930); Patton v. Nicholas, 154 Tex. 385, 279 S. W. 2d 848 (1955). In Gottfried v. Gottfried, 197 Misc. 562, 73 N. Y. S. 2d 692, 695 (Sup. Ct. 1947) it was said: "There are no infallible distinguishing ear-marks of bad faith. The following facts are relevant to the issue of bad faith and are admissible in evidence: Intense hostility of the controlling faction against the minority; exclusion of the minority from employment by the corporation; high salaries, or bonuses or corporate loans made to the officers in control; the fact that the majority group may be subject to high personal income taxes if substantial dividends are paid; the existence of a desire by the controlling directors to acquire the minority stock interests as cheaply as possible. But if they are not motivating causes they do not constitute bad faith as a matter of law."

[27] See Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953).

[28] Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919) (corporate dissolution).

stockholders and of the circulation of letters among corporation employees charging plaintiffs with petty faults.[29]

Falling in the other category, that of acts which though not clearly hostile, are illegal or unfair to the minority, would be the payment to defendant majority stockholders of salaries in excess of their worth,[30] and conversion of corporate property by a majority stockholder.[31] Also the sale of stock at a par value less than the fair value would be unfair to a minority unable to purchase its pro rata share, and reduction of par shortly before the sale would be some evidence of a deliberate intention to be unfair.[32] It is interesting to note that, except in *Bennett v. Breuil Petroleum Corp.*,[33] neither of the two classifications of evidence above mentioned seem to have been used in determining the existence of bad faith in the cases where pre-emptive rights had not been denied.[34]

An extensive loss to the minority, especially when coupled with a gain to the majority, is probably enough to raise a logical doubt as to the likelihood of there being a sufficient business reason for the transaction causing the loss. Apart from this, however, the plight of a greatly injured plaintiff might also have a psychological impact on a finder of fact. A judge or juror could conceivably be more easily persuaded that the majority was motivated by bad faith when the damage to the minority is unusually serious. This suggests that when the courts in the older cases refused to interfere in the internal affairs of the corporation, saying that if plaintiff could not exercise his pre-emptive rights he could sell them,[35] they sensed the inequity in allowing such injury to be without judicial remedy and felt a need to justify their decisions.

A basic fact to consider has been the general refusal of the courts to interfere in corporate business. This appears to have been one of policy. Perhaps the courts felt that a bad faith motive was too intangible[36] to

[29] Patton v. Nicholas, 154 Tex. 385, 279 S. W. 2d 848 (1955) (withholding of dividends).

[30] See Jones v. Van Heusen Charles Co., 230 App. Div. 694, 246 N. Y. Supp. 204 (3d Dep't 1930) (withholding of dividends).

[31] See Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N. W. 809 (1939) (withholding of dividends).

[32] Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953) (issuance of shares).

[33] 99 A. 2d 236 (Del. Ch. 1953).

[34] It may be that such evidence of prior relations was not available, but it is also possible that the attorneys for the plaintiffs did not stress this kind of evidence in their statement of the facts on appeal. At least the reported opinions did not stress this evidence.

[35] See Jones v. Concord & M. R. R., 67 N. H. 234, 240, 30 Atl. 614, 617 (1892); Schramme v. Cowin, 205 App. Div. 520, 199 N. Y. Supp. 98, 100 (1st Dep't 1923).

[36] See Cross v. Farmers' Elevator Co., 31 N. D. 116, 126, 153 N. W. 279, 281 (1915): "His proposition, however, is that, if the motive of the directors of a corporation in selling the balance of the unsold capital stock or in taking subscriptions thereto is to take the control from one who holds the majority of the shares before such sale, such sale is fraudulent and may be set aside, even though such stock is sold at par, and the money therefor is collected. This proposition is to us a novel one, and has no support whatever in principle or in the authorities." While this

justify interference unless the facts virtually indicated a palpable fraud,[37] and that to hold otherwise would increase litigation, unduly harass those controlling the corporation, and impede the growth of industry. An early test was advanced in *Gamble v. Queens County Water Co.*:[38]

> "Their action . . . must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation, and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of the minority."

This test suggests that the fortunes of the minority stockholders used to be tied to the fortunes of the corporation, but it ignores the possibility that the interest of the minority in the corporation might be destroyed without damaging the corporation.

Courts are understandably reluctant to interfere in the internal affairs of a corporation.[39] There are business risks incident to stock ownership which the minority assume in becoming stockholders.[40] The success of a corporation depends to a considerable extent on the business discretion of those in control, and courts will not substitute for it their own judgment even to protect the minority from bad judgment unless it is great enough to indicate bad faith.[41] And the old view of bad faith has apparently been adhered to in *Bellows v. Porter*,[42] wherein the minority stockholder sought damages for the dilution of the book value of his stock. The court affirmed a directed verdict for the defendant majority stockholder, and quoted language from *Gamble v. Queens County Water Co.*[43] indicating that when the act is within the powers of the corporation a court will not interfere in favor of the minority unless the action of the majority is opposed to the interests of the corporation itself. In answer to plaintiff's contention that he was financially unable to purchase any of the additional stock, the court quoted from an old case, *Schramme v. Cowin*,[44] to the effect that if the plaintiff could not exercise his pre-emptive rights he could sell them.

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pertains to an injury done to a majority by the directors rather than an injury to a minority by a majority, the analogy seems appropriate.

[37] See Essex v. Essex, 141 Mich. 200, 104 N. W. 622 (1905).

[38] 123 N. Y. 91, 98, 25 N. E. 201, 202 (1890).

[39] See Waldrop v. Martin, 237 Ala. 556, 188 So. 59 (1939).

[40] See case cited note 39 *supra*.

[41] Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 147 Atl. 257 (1929); Robinson v. Pittsburgh Oil Refining Corp., 14 Del. Ch. 193, 126 Atl. 46 (1924); Allied Chemical & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 64, 122 Atl. 142 (1923).

[42] 201 F. 2d 429 (8th Cir. 1953).

[43] 123 N. Y. at 99, 25 N. E. at 202.

[44] 205 App. Div. 520, 199 N. Y. Supp. 98 (1st Dep't 1923).

Some courts, however, have become less reluctant to find bad faith than they formerly were. In two cases[45] involving the issuance of stock the courts found evidence of bad faith even though the minority stockholders were not denied the opportunity to purchase their pro rata share. In one of these, *Bennett v. Breuil Petroleum Corp.*, the impracticality of borrowing on pre-emptive rights in the stock issue of a closely held corporation was recognized, and the reasoning would seem to apply also to sale of pre-emptive rights. The court also found that the price for which the new issue of stock was sold amounted to constructive fraud although it was sold at the par value. This appears to be a departure from the old common-law pre-emptive rights doctrine which said that stockholders have the right to purchase their pro rata share of new stock at par when it is sold for cash.[46] The purpose of this doctrine was to protect the stockholders' interest in maintaining their proportionate share of the stock,[47] but in closely held corporations it is likely to injure the minority stockholders when they are unable to take their pro rata share by permitting the majority to take the entire issue at an inadequate par price.[48]

Assume that the majority of a closely held corporation decides to issue the additional shares, which in quantity greatly exceed the authorized shares outstanding. Assume also that the fair value of the shares greatly exceeds the par value, and that the minority stockholder is not actually denied pre-emptive rights, but is unwilling or cannot afford to exercise them. The majority thus purchases the entire issue at par, paying for the stock by releasing a debt owed to it by the corporation. The interest of the minority in the corporation has been seriously depleted with a resulting gain to the majority.

The cases[49] indicate that in the above hypothetical situation the courts probably would not interfere with this transaction unless it appeared that new financing was apparently unnecessary or the majority stockholders had been improvident enough to disclose previously an intention to "freeze out" the minority. It is difficult to justify the argument that this type of loss is a business risk which the minority should be forced to assume. It is surely an unnecessary loss if the corporation could be refinanced by selling the stock at a higher price, and this will be true although the corporation may need refinancing. An unnecessary loss to the minority resulting in gain to the majority would in itself logically

[45] Bennett v. Breuil Petroleum Corp., 99 A. 2d 236 (Del. Ch. 1953); Gaines v. Long Mfg. Co., 234 N. C. 340, 67 S. E. 2d 350 (1951).

[46] See Annot., 52 A. L. R. 220, 239 (1928).

[47] See Note, 41 VA. L. REV. 77 (1955).

[48] *But cf.* N. C. GEN STAT. § 55-56 (b) [eff. July 1, 1957] (Supp. 1955): ". . . . Nothing herein is meant to give a shareholder the pre-emptive right to buy shares at a price determined by their par value."

[49] See note 13 *supra*.

tend to indicate bad faith as the primary motive for the majority's selling itself the stock.

The ease with which the majority of a close corporation can "freeze out" the minority in the above hypothetical situation as well as in many other seemingly valid corporation transactions leads to the conclusion that a change in the law may be desirable to protect the interests of the minority. One remedy might be to allow a minority stockholder in a close corporation appropriate legal relief upon his proof that the corporate transaction in question, engineered by the majority, is one which means gain to the majority at the expense of a loss by the minority. As an extra safeguard, the minority plaintiff should possibly be required to make a sworn allegation that there is no sufficient business reason for the action of the majority and that the motivation for the transaction is a bad-faith one designed to "freeze out" the minority. However, the minority should not be forced to prove this negative allegation; rather, the contrasting presence of a sufficient business reason and good faith should be an affirmative defense for the majority in this action.[50]

The change suggested above is a radical departure from the present case law as outlined in this Note, and is a change which surely can be effected only by legislation. It is believed that this new remedy would prevent many of the "freeze outs" which now go unredressed without unduly impairing the efficiency of corporation management.

GASTON H. GAGE

Corporations—Shareholders' Derivative and Direct Actions—Individual Recovery

In recent case of *Watson v. Button*,[1] the former owner of one half of a corporation's stock brought suit against the corporation's former general manager who had owned the other one half of the stock to recover the amonut misappropriated by the former general manager prior to their sale of the corporation to its present owners. The plaintiff and defendant had agreed to be jointly liable for the corporate debts, and, as a term of the sale, the general manager secured a release from the purchasers discharging him from any claims and demands existing against him in favor

[50] *Cf.* S. B. No. 49, N. C. Gen. Assembly, Sess. 1955 § 55-46 (h) (not enacted), which refers to a shareholder's remedy for the dilution of his holdings by the issuance of shares at an inadequate price. This omitted subsection of the proposed Business Corporation Act would have put on defendant majority the burden of proving that the offering price of shares is fair if the complaining minority show all of the following: (1) the absence of a ready and adequate market for the sale of shareholders' offer rights; (2) notification by the complaining shareholder to the corporation in writing of his inability to purchase his pro rata share and of his belief that the offer price is low enough to unfairly dilute his holdings; (3) evidence tending to show previous efforts by the directors, officers, or dominant shareholders to purchase his shares.

[1] 235 F. 2d 235 (9th Cir. 1956).

of the corporation. The misappropriation was discovered after the sale.

The court recognized that, as a general rule, any cause of action for misappropriation of corporation assets by a director belongs to the corporation and not to its shareholders. The reasons for this rule are: it prevents a multiplicity of suits; it protects corporate creditors by putting the proceeds of the recovery back into the corporation treasury; and it protects all shareholders equally by increasing the value of their shares. However, the court allowed recovery by the plaintiff in an individual action because the reasons for the general rule did not exist in this case. There could be no multiplicity of suits since there were only two shareholders; creditors would not be prejudiced because the plaintiff and defendant were obligated by agreement to be jointly liable for the corporate debts; and a recovery by the corporation would not benefit the injured former shareholder because the plaintiff and defendant had sold their shares.

Few rules of corporation law are more generally recognized and applied than the one relied upon by the defendant in this case: a shareholder has no direct, individual right of action against corporate officers for wrongs to the corporation merely because his investment has been depreciated in value due to their misconduct.[2] The rule has been defended by the courts for a number of reasons.[3] The shareholder's remedy is by a derivative suit in equity if the corporation management fails or wrongfully refuses to bring suit on the corporate right of action. The basis of equitable relief was found in the absence of any adequate remedy at law.[4] The proceeds of such a suit go to the corporation, which increase its assets, and, thus, increase the value of the shareholder's stock.

However, in at least two general classes of cases, the shareholder has been allowed to recover directly. First, in a number of cases where a shareholder has brought a derivative action for the benefit of the corporation, courts have denied the usual relief to the corporation and granted recovery directly to the injured shareholder. In *Brown v. DeYoung*,[5] a minority of injured shareholders brought a derivative suit against the

[2] See Annot., 167 A. L. R. 279 (1947).

[3] Mente & Co. v. Louisiana State Rice Milling Co., 176 La. 475, 146 So. 28 (1933) (The primary injury is to the corporation and only incidental to the shareholders; no "privity" between the wrongdoer and the shareholder exists); Green v. Victor Talking Machine Co., 24 F. 2d 378 (2d Cir.), *cert. denied*, 278 U. S. 602 (1928) (recovery by the corporation will protect all shareholders equally and remedy the injury to the shares); Wells v. Dane, 101 Me. 67, 63 Atl. 728 (1905) (multiplicity of suits); White v. First Nat'l Bank, 252 Pa. 205, 97 Atl. 403 (1916) (recovery by the shareholder may result in double liability on the part of the defendant since the corporation may also have a cause of action); Dorrah v. Pemiscot County Bank, 213 Mo. App. 541, 256 S. W. 560 (1923) (for protection of creditors); BALLENTINE, CORPORATIONS § 143 (rev. ed. 1946) (confused damage problems, and extending the duty of management beyond that owed the corporate entity).

[4] BALLENTINE, CORPORATIONS § 145 (rev. ed. 1946).

[5] 167 Ill. 549, 47 N. E. 863 (1897).

corporation and its officers for excessive salaries paid to the officers with the consent of the majority shareholders. The court said that the proper course in these suits, to compel restoration to the corporation of moneys improperly appropriated, may very well be, as a general rule, to require that the misappropriated funds be paid to the corporation rather than to the injured shareholders personally. Yet where the effect of such a decree is to benefit the shareholders who assented to and participated in the misappropriation of the funds, as well as to benefit shareholders innocent of complicity in the transaction, the court held that the decree should be so framed as to benefit only the innocent shareholder. Complete and perfect relief to those who are entitled to it is all that ever ought to be given in equity.

In *Matthews v. Headley Chocolate Co.*,[6] minority shareholders brought a derivative suit to recover excessive salaries paid to directors and officers. The majority shareholders had sold their shares and the buyers and the minority shareholders maintained the suit. The court held that subsequent shareholders, assignees of the wrongdoers, cannot recover, since they had lost nothing. But suit can be maintained in the name of the corporation for the benefit of minority shareholders, and recovery will be granted to the extent of their proportionate injury.

In *Joyce v. Congdon*,[7] a derivative suit was brought against officers and directors who were also majority shareholders, to cancel certain stock purchased with corporate funds and distributed to the majority shareholders. The court held that although recovery will generally go to the corporation, and not to the minority shareholders personally, if such recovery would result in a shareholder's receiving a portion thereof to which he was not entitled, equity will look beyond the corporate entity and decree the recovery to the individual shareholders entitled thereto.

And in *Alexander v. Quality Leather Goods Corp.*,[8] a derivative suit was brought against the corporation's officers for injuries to the minority shareholders when the corporation was dissolved through fraud. The court held that although this is a derivative suit, in which judgment is sought for the corporation, where only one shareholder is interested in a derivative suit, and all creditors have been paid, the court will give judgment to the shareholder instead of the corporation because there is no reason why the court cannot select the parties who are entitled to benefit, and withhold beneficial results from those guilty of fraud or culpably negligent.

In the recent case of *Perlman v. Feldmann*,[9] minority shareholders brought a derivative suit against a former dominant shareholder and

[6] 130 Md. 523, 100 Atl. 645 (1917).
[7] 114 Wash. 239, 195 Pac. 29 (1921).
[8] 150 Misc. 577, 269 N. Y. Supp. 499 (Sup. Ct. 1934).
[9] 219 F. 2d 173 (2nd Cir. 1955).

principal officer of the corporation to recover personal profits from the sale of controlling stock which resulted in the corporation's loss of the right to control distribution of the product in a period of shortage. The minority shareholders sought to recover their share of the profits in the sale. The court allowed recovery directly to the minority shareholders because a recovery by the corporation would only subject the defendants to a greater total liability, from which culpable parties would be benefitted.

The effect of the decisions in the first class of cases seems to create a "hybrid" of the derivative suit and the personal action which could be technically called a derivative suit with direct recovery to the injured shareholders. The courts seem to be justified in giving such an equitable recovery because the conventional derivative action, in which the corporation retains the proceeds of the judgment, while giving the complaining shareholder an adequate remedy, allows unjust enrichment of the wrongdoers.[10]

The second class of cases consists of at least three situations in which the injured shareholder is allowed to maintain an individual action in his own behalf, whether the corporation has a separate right of action or not.

(1) Where the injury to the corporation is also a direct and personal injury to the shareholder, resulting in a depreciation in the value of his shares, courts have held that this personal tort gives rise to an individual right of action. The fact that the corporation's assets have been injured does not preclude the shareholder's suit if he was injured by: fraudulent representations inducing him to form a corporation which failed by reason of the fraud;[11] dissemination of false statements about the corporation, to depreciate the value of the plaintiff's shares so the corporate officers could buy it from him at a low price;[12] or inducing voluntary bankruptcy by fraud.[13] Probably, in any case where the directors' acts amount to a tort against the shareholder, injury to the corporation will be no defense to his individual action.

(2) Where there is some special relationship between the plaintiff shareholder and the wrongdoer, arising out of fiduciary or contractual agreements, independent of the normal shareholder and director relationship, individual suits have been allowed because of a breach of such agreements. For example, in *Ritchie v. McMullen,*[14] where the director

[10] There does not appear to be any provision in the present North Carolina Statutes or in the proposed 1957 Corporation Code dealing with this problem.

[11] Sutter v. General Petroleum Corp., 28 Cal. 2d 525, 170 P. 2d 898 (1946).

[12] Coronado Development Corp. v. Millikin, 175 Misc. 1, 22 N. Y. S. 2d 670 (Sup. Ct. 1940).

[13] Adams v. Clark, 239 N. Y. 403, 146 N. E. 642 (1925).

[14] 70 Fed. 522 (6th Cir. 1897); See also, Kono v. Roeth, 237 App. Div. 252, 260 N. Y. Supp. 662 (1st Dept. 1932); (where there was a breach of a personal con-

was a pledgee of the injured shareholder's stock, his misconduct resulting in a depreciation in the value of the plaintiff's shares, amounted to a breach of the pledge agreement and an individual suit was allowed.

(3) If the plaintiff has parted with his shares *because* of the misconduct of the directors, an individual suit is allowed for the fraud or coercion that induced him to part with his stock. A derivative suit is no longer possible since he is no longer a shareholder, and he could not benefit from another shareholder's derivative suit which would give the proceeds to the corporation of which he is no longer a member. In *Von Au v. Magenheimer*,[15] the defendants took excessive salaries, refused to pay dividends, and committed waste, as a part of a successful attempt to force the plaintiff to sell his shares. An individual action by the injured ex-shareholder was allowed. Other cases allow an individual suit where the plaintiff is forced to sell his shares.[16] The economic coercion or fraud used by the defendants in these cases amounts to a personal wrong against the plaintiff, separate and distinct from the wrong against the corporation, and the courts allow an individual suit, and the fact that the corporation has a right of action also, is no defense to the injured party's suit.

The principal case does not come directly within either of the two classes of cases that have allowed personal recovery by the shareholder. It seems to create another situation in which an individual suit is proper; i.e., when the shareholder has parted with his shares without knowledge of the wrongdoing (if he had parted with his shares because of the wrongful acts, it could be classified as a case under the second class), and the reasons for the general rule do not exist, individual suit by the injured party is proper. The results of the principal case, and of the cases in both of the classes cited herein, seem to be desirable and relatively free from theoretical difficulty.

The real objection to permitting a shareholder to recover directly for his proportionate share of the damage inflicted upon the corporation of which he is a member is not that the injury was done to the corporate entity rather than to him, but that the result of such recovery is a return

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tract), General Rubber Co. v. Benedict, 215 N. Y. 18, 109 N. E. 96 (1915); Camp v. Gress, 250 U. S. 308 (1919); Rogers v. Penobscot Mining Co., 154 Fed. 606 (8th Cir. 1907).

[15] 126 App. Div. 257, 110 N. Y. Supp. 629 (2nd. Dept. 1908), *aff'd*, 196 N. Y. 510, 89 N. E. 1114 (1909).

[16] Hammer v. Werner, 239 App. Div. 38, 265 N. Y. Supp. 172 (2d. Dept. 1933) (directors purchased treasury stock without letting plaintiff participate in the purchase price on a pro rata basis, at an inadequate price, forcing the price of the shares down, and the plaintiff sold); Stinnett v. Paramount-Famous Lasky Corp., 37 S. W. 2d 145 (Tex. Com. App. 1931) (directors formed a conspiracy to boycott the corporation for the purpose and with the result of forcing plaintiff to sell his shares).

of corporation assets to shareholders without first satisfying corporate creditors.[17] The ultimate problem before the courts is how to protect the interests of all the parties involved: the corporation, its creditors, and its shareholders. Where there is a loss or destruction of corporate assets as a result of misconduct of directors and officers, the claims of creditors must be given first consideration, but recovery should be permitted to the extent necessary to protect innocent shareholders.

The court said in *Brown v. DeYoung*,[18] "Perhaps for the reason that no such case was ever before complained of, we have been referred to no authority, and know of none, for affording certain relief to the innocent shareholder without giving the culpable one what he is not entitled to, as would be the result if the money be decreed to be paid, generally, into the corporate treasury. But the lengthening reach of equity into the manifold intricacies of modern business should not be drawn back simply for lack of authoritative decision to guide us, where reason and every equitable consideration point the way with so much clearness."

From the above, it can be seen that courts have refused to be restrained by lack of precedents where inequitable results would be reached if they followed the general rule. Many variations of the circumstances in the above cases may arise in the future in which shareholders will have been defrauded by directors and officers. If the courts will be guided more by equitable principles than by general rules, the injured parties will be able to receive a more complete and perfect relief.

Whether or not it would be wise to allow an individual suit, or to require a derivative suit, is not clear in all circumstances. An individual action should not be disallowed because the corporation has a separate right of action, when the wrongful acts of the directors amount to a separate and distinct injury to both the corporation and the shareholder. But if the injury to the corporation's assets could be said to be an injury to the shareholder only in his capacity as a shareholder, it seems that the derivative suit (which gives direct recovery to the shareholder if necessary), is the best solution to the problem, unless, as in the principal case, the shareholder has parted with his shares without knowledge of the directors' wrongful acts. In case of the latter situation, there seems to be no reason for not allowing an individual suit if creditors are not prejudiced, and the complaining shareholders are the only ones injured by the misconduct.

RICHARD R. LEE

[17] STEVENS, CORPORATIONS § 167, at 792 (2d ed. 1949).
[18] 167 Ill. 549, at 558, 47 N. E. 863, at 866 (1897).

Criminal Law—Aiding and Abetting—Presence as a Factor

State v. Ham[1] raised an interesting question in a relatively undefined area of the criminal law: Under what circumstances may one who performs no overt act of assistance be guilty of aiding and abetting?

In the principal case an affray between two groups of women, known as the Teaster group[2] and the Church group,[3] resulted in homicide. The defendant drove the Teaster group in his automobile to visit a prison camp, where they first encountered the Church group. During the visit the two groups were openly hostile and on leaving the camp a member of the Church group declared they would "waylay" the defendant's group down the road. Later in the day the evidence showed that the Church group had stopped beside a narrow road to let some people out when the Teaster group arrived on the scene. Defendant's testimony was that he stopped the car because of rocks in the road, but on stopping, the women with him, including his wife, jumped out of the car and proceeded to attack the Church group. In the course of the fight one of the Church women was killed. It is clear that the defendant did not take an active part in the fracas, but after the deceased was hit the defendant said, "Girls, you all get in the car and let's go." All but one obeyed and she obeyed when defendant said, 'you done killed one and you had better get in here." The evidence is conflicting, as to whether the defendant was in his car or standing outside during the fight.

On these facts the lower court found the defendant guilty of manslaughter as an aider and abetter. On appeal, the Supreme Court reversed, holding that the defense's motion for a non-suit should have been allowed, saying mere presence at the scene of the crime without any active participation is insufficient to constitute a person an aider and abettor.

By the Supreme Court's decision that the evidence in this case was insufficient to go to the jury the legal question is thus raised; as a matter of law, would it be possible under all the circumstances in this case to find the defendant guilty of aiding and abetting.

Black's Law Dictionary[4] defines to aid and abet as: "Help, assist or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission." It comprehends all assistance rendered by words, acts, encouragement, support or presence, actual or constructive, to render assistance if necessary.[5] If there is actual participation, *i.e.*, an overt act, on the part of the defendant, this is clearly assistance, and renders him guilty, and in such cases there is little need to inquire into the more neb-

[1] 238 N. C. 94, 76 S. E. 2d 346 (1953).
[2] The Teaster group constituted the defendants.
[3] The Church group constituted the state's witnesses.
[4] Quoting State v. Lord, 42 N. M. 638, 84 P. 2d 80 (1938).
[5] State v. Davis, 191 Iowa 720, 183 N. W. 314 (1921).

ulous concept of whether the principal was "encouraged" by the act of the defendant.[6]

The more interesting and the more controversial area of aiding and abetting however is where the defendant performs no overt act, but is held criminally responsible because of his presence at the scene in conjunction with: events prior to the commission of the crime, or an express or implied understanding between the defendant and the actual perpetrator, or because of his relationship with the perpetrator. In the many cases which have found criminal responsibility even though the defendant performed no overt act, some one or more of the above factors, it is submitted, have been found to exist. At the outset, however, it would be well to distinguish this line of cases which have found the defendant guilty as an aider and abettor from those cases which have found the defendant guilty of an independent crime and not as a participant in the crime of the perpetrator. For example, in *State v. Trott*[7] the two defendants, in a drunken condition, caused a serious automobile accident in which a young girl was killed. Before the accident the defendant, who owned the car, having become too drunk to drive, placed the other defendant in control. At the time of the accident the owner was in the back seat. In finding him guilty of murder in the second degree along with the driver of the car, the court did not base its decision on the grounds of aiding and abetting, but rather found the defendant criminally responsible of an independent crime because of his own wanton and reckless disregard of the lives of others. An Australian case[8] in point makes this very distinction with an opposite result. The defendant stood on a river bank and watched his wife drown their two children and herself. The court said that while the husband was perhaps guilty of an independent crime, he was certainly guilty as a participator in the murders committed by his wife. The court concluded that the accused's moral duty to save his children, his legal control over his wife, and his moral duty to exercise that control were all elements which gave to the father's presence the quality of participation. Thus the court held that by his deliberate abstention from taking steps to save his family and by giving encouragement and authority of his presence and approval to his wife's act, he was guilty of aiding and abetting.

Although there do not appear to be any American decisions which place upon an acused such a positive duty as did the Australian court, there are cases in many jurisdictions, including North Carolina, which

[6] People v. Roberts, 211 Mich. 187, 178 N. W. 690 (1920); State v. Noeninger, 108 Mo. 166, 18 S. W. 990 (1892); Watson v. State, 21 Lex. App. 598, 1 S. W. 451 (1886).

[7] 190 N. C. 674, 130 S. E. 627 (1925); See also Moreland v. State, 164 Ga. 467, 139 S. E. 77 (1927).

[8] Rex. v. Russell, 1933 V. L. R. 59 (Austr. 1932), See *Comment* 47 HARV. LAW REV. 531 (1934).

emphasize many of the factors present in that case as tending to show a defendant's complicity in a crime. In a North Carolina case[9] defendants Ray and Chase were first cousins and good friends. The two were together when an altercation occurred between Ray and deceased. Ray shot at deceased, injuring him slightly, and threatened to kill him later. It doesn't appear that Chase did or said anything at this time. Later the two defendants were again together when by chance they met deceased on the street. The evidence conflicts as to who spoke first, but both being armed, they attempted to shoot it out, at which time Ray shot and killed deceased. On this occasion Chase had moved out of the way to the center of the street; and again it does not appear whether he said or did anything. The question was then raised, from these facts was there sufficient evidence to be submitted to the jury on the guilt of Chase as an aider and abettor? The court, answering in the affirmative, considered these factors: The close relationship and association of the two defendants, the defendant's awareness of Ray's attitude toward deceased, having been present at the first encounter, and finally the fact that defendant was present and in a position to have assisted Ray if such had been necessary. The court held that these circumstances consist of more than a mere conjecture or suspicion of guilt and constitute evidence of sufficient definite probative value to justify its submission to the jury.

In *State v. Tyndall,*[10] defendants Howard and Tyndall went to one Jones' store with the avowed purpose, as expressed by Howard, of settling with Jones for reporting a whiskey still to the police. While at the store Howard accused, cursed and threatened Jones. Tyndall did and said nothing but was present throughout the incident. The court was equivocal as to whether or not Tyndall was guilty of a forcible trespass, as it found Howard to be, but concluded that Tyndall was at least guilty of aiding and abetting Howard. Here it was not Tyndall's presence alone which caused the court to fasten criminal responsibility, but it was the fact that he accompained Howard knowing full well of his intent. It was this that gave to Tyndall's action that aspect of encouragement which constitutes aiding and abetting. This principle is further illustrated in *State v. Ochoa*[11] where the New Mexico court held that the defendant, a member of a mob, aided and abetted the person or persons who actually killed the sheriff. The court said that to render one an aider and abettor there should be evidence of his knowledge of the intention or purpose of the principal to commit the offense; and that aiding and abetting may be shown by acts, conduct, words, signs, or any means sufficient to incite, encourage or instigate the commission of the offense

[9] State v. Ray, 212 N. C. 725, 194 S. E. 482 (1938).
[10] 192 N. C. 559, 135 S. E. 451 (1926).
[11] 41 N. M. 589, 72 P. 2d 609 (1937).

or to express the defendant's support or approval. This the court concluded was a question for the jury.

In a recent Missouri case[12] the defendant and two others picked up complainant, a Negro man, who wished to be taken to his "bossman." According to the complainant, the three agreed to take him for one dollar. When the four were returning to town, the defendant was sitting in the front seat with the complainant. Suddenly one of the boys in the back seat hit complaint over the head; defendant stopped the car and the two boys in the back proceeded to knock complainant onto the highway. Defendant did nothing at this time, but said, "just because you took his money don't kill him." Defendant contended this affair was not prearranged and that he did not participate in it. He asserted that he was nothing more than a mere by-stander. The court however held that presence of one at the commission of a felony by another is evidence to be considered in determining whether he was guilty of aiding and abetting, and presence, companionship and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred. There are other cases to the same effect.[13]

Following the same line of reasoning, an Illinois court,[14] in discussing the evidence against defendant, a party to the crime, said, ". . . of course, an innocent spectator is not criminally responsible because he happens to see another commit a crime, but if the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his countenance and approval, and was thereby aiding and abetting the same."[15] Such a situation was recognized in *State v. Jarrell*[16] where an argument had arisen over passage in a narrow road. The defendant Hicks jumped out of his buggy and stabbed the deceased. Defendant Jarrell actually did nothing

[12] State v. Corbin, 353 Mo. 1154, 186 S. W. 2d 469 (1955).

[13] In a fairly recent California case complainant met defendant and a stranger in a certain tavern. The three left together for the purpose of getting a drink. After having gone some distance down the street the unidentified man suddenly asked complainant for his wallet. Under protest the victim finally handed it over telling the defendant that this was a serious offense. At that instant the stranger raised his hand and this was the last complainant remembered. Throughout the entire altercation between the victim and his assailant the defendant stood some feet away and did nothing, except possibly to serve as a lookout. The defendant contended he was only present whereupon the court held that presence of a defendant at the commission of a felony by another is evidence to be considered together with all the circumstances immediately preceding, attending and following the perpetration of the felony as tended to show defendant's complicity of the offense. People v. Hughes, 70 Cal. App. 2d 457, 161 P. 2d 285 (1945).

[14] People v. Smith, 391 Ill. 172, 62 N. E. 2d 669 (1945).

[15] *Id.* at 176, 62 N. E. at 671.

[16] 141 N. C. 722, 53 S. E. 127 (1906); See also State v. Cloninger, 149 N. C. 567, 63 S. E. 154 (1908).

but the court said it is a fair inference that Jarrell was in a situation to be able to go readily to the assistance of Hicks had it been necessary, and this fact realized by Hicks was enough to give to Jarrell's presence that degree of encouragement which constitutes aiding and abetting. The court went on to point out that when the bystander is a friend of the perpetrator and, as such, gives encouragement and protection, presence alone may be regarded as encouraging.

Although there are statutes and decisions[17] creating a duty to act to prevent a crime, lest one's mere presence constitute him an aider and abettor, it is admitted that the vast majority rule is that mere presence will not constitute one an aider and abettor. The majority of courts readily agree that when one is merely present no liability will occur. But when there are other circumstances in addition to one's presence the courts tend to recognize this as a different situation.

In the instant case it would seem that the court was somewhat begging the question by resolving the case with a statement that mere presence at the scene of the crime without any actual participation in its commission is insufficient to constitute a person an aider and abettor. It is not the purpose of this writer to presume to disagree with the court's interpretation of the evidence or to suggest that a jury should have found the defendant guilty. However by the court's dismissal of the case with a summary statement that mere presence "is not enough to convict the defendant of aiding and abetting" several interesting questions are raised. If the court was implying that an overt act is necessary to constitute aiding and abetting on the part of the defendant, it is clearly out of line with prior North Carolina cases and the modern trend of authority, which recognize other incriminating circumstances. Likewise if the court meant to imply by "mere presence" that there was no evidence of other circumstances present in the case upon which criminal responsibility could attach, it would seem it ignored a combination of circumstances: the fact that defendant was aware of the open contention between the parties, having been present at the prison earlier in the day; the close relationship between the defendant and the actual perpetrators, one being his wife; the fact that defendant was a man among these women and the driver of the car, and being aware of this, the defendant must have realized the likelihood that his presence would lend encouragement; lastly and foremost the fact that defendant had some degree of control over the group was manifested when he said "let's go" and they obeyed.

In the instant case, the court stated, "we find no decision of this

[17] A statute in Colorado provides that one is an accessory who stands by without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed. COLO. C. L. Sec. 6645; A New York Case held that a servant who stands by passively knowing that his employer is being robbed, and permits it, will be guilty as a principal. In re Sherman, 6 City Hall Recorder (N. Y.) 2 (1922).

court in which it is held that evidence tending to show that a bystander was a friend of the perpetrator and the perpetrator was aware of his presence and nothing more is sufficient to support a conviction."[18] Yet there is language to that very effect in *State v. Jarrell* in which it is stated that when the bystander is a friend of the perpetrator presence alone may be regarded as encouraging.

In *State v. Holland*,[19] after discussing the law concerning aiding and abetting, the court concluded that "the evidence here taken in its light most favorable to the state, as is the rule of motion of non-suit, is sufficient to justify a finding that the defendant's presence amounted to active encouragement of his friend in the commission of the felonious assault shown to have been committed. Full evidence here is laregly circumstantial but even so such evidence is a recognized and accepted instrumentality in the ascertaining of the truth and here the series of incriminating facts taken in its entirety makes out a prima facie case."[20]

It should be pointed out that the writer finds no argument with the rule of law that mere presence at the scene of the crime is insufficient to constitute one an aider and abettor, but the unfortunate aspect of the instant case is that by the Court's dismissal of the case with only a statement that mere presence at the scene of the crime is insufficient to constitute one an aider and abettor, the impression is given that the Court has failed to recognize other circumstances which, coupled with presence, have been held to constitute aiding and abetting.

THOMAS C. CREASY, JR.

Criminal Law—Arrest without Warrant for Misdemeanor

In *State v. Mobley*[1] it was held that without a warrant an officer could not arrest a peaceful drunk, if he was not committing or about to commit a breach of the peace. The only authority a peace officer had to arrest one committing a misdemeanor was that given to all persons by the common law, and codified in the North Carolina General Statutes,[2] that "Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and if necessary for that purpose shall arrest the offenders." There are, however, exceptions created by statutes which conferred upon peace officers the right to arrest without warrant one violating the motor vehicles laws in his presence[3] or one violating the liquor laws when the officer has absolute personal knowledge that the accused is transporting illegal liquor.[4]

[18] State v. Ham, 238 N. C. 94, 97, 76 S. E. 2d 346, 348 (1953).
[19] 234 N. C. 354, 67 S. E. 2d 272 (1951).
[20] *Id.* at 356, 67 S. E. 2d at 273.

[1] 240 N. C. 476, 83 S. E. 2d 100 (1954).
[2] N. C. GEN. STAT. § 15-39 (1953).
[3] N. C. GEN. STAT. § 20-183 (1953).
[4] N. C. GEN STAT. § 18-6 (1953).

To remedy this situation Mr. Justice Johnson suggested in *State v. Mobley*[5] that the legislature enact a single statewide statute authorizing any peace officer to arrest without warrant (1) when a misdemeanor or other criminal offense is committed in his presence, or (2) when he has reasonable ground to believe that the person to be arrested has committed a criminal offense and will evade arrest if not immediately taken into custody. In response the 1955 Legislature enacted a statute[6] which reads in part: "A peace officer may without warrant arrest a person: (a) when the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has *reasonable grounds to believe* that the person to be arrested has committed a felony or misdemeanor in his presence. . . ." (Emphasis added.) It may be surmised that the legislature, by adding "reasonable grounds to believe" to the statute, intended to protect an officer from liability for false arrest in instances where he clearly sees the offense committed in his presence but the jury fails to convict. Nevertheless, the addition of this clause may have enlarged substantially the authority of peace officers to arrest without warrant for misdemeanors. It is with this possibility that the note will deal.

"Reasonable grounds to believe" has by judicial construction been given a fairly well defined meaning. It is more than mere suspicion.[7] There must be such facts and circumstances as would cause ordinary men to believe. Whether one does in fact believe is somewhat immaterial. The courts, in determining "reasonable grounds to believe," are concerned with the apparent facts within the knowledge of the officer at the time, and with what such facts would make an *ordinary* observer think, not with what are eventually shown to be the actual facts, or with what one observer did, in fact, believe.[8] Reliable information has been held sufficient to give one reasonable grounds to believe.[9] A tip from an anonymous citizen obviously would not be reliable enough to give an officer reasonable grounds to believe, while information from a known upstanding citizen probably would. Thus an officer may learn of facts through his own observation, word of another officer, or from information given him by a private citizen that would give the officer reasonable grounds to believe the accused is committing a crime. Thus, it is apparent that the information sufficient to constitute reasonable grounds to

[5] 240 N. C. at 488, 83 S. E. 2d at 108.
[6] N. C. GEN. STAT. § 15-41 (Supp. 1955).
[7] Dittberner v. State, 155 Tenn. 102, 291 S. W. 839 (1927).
[8] MACHEN, THE LAW OF ARREST, p. 49 (1950).
[9] People v. Filas, 369 Ill. 78, 15 N. E. 2d 718 (1938). Information that a tall slim man driving a Ford coupé, with a tan top, bearing license number 988-216, had been sticking up oil stations gave the officer reasonable grounds to believe that the driver of the described automobile was implicated in crime.

believe may be derived solely from sources other than the arresting officer's personal knowledge.

However the statute does not merely state that an officer can arrest without warrant on reasonable grounds to believe. It says that an officer must have reasonable grounds to believe that the accused is committing a felony or misdemeanor *in his presence.* This presents the question of just how much the words "in his presence" limit the officer's power of arrest without warrant when he has reasonable grounds to believe that the accused has committed a crime.

For a crime to be in the officer's presence, the officer must have more than reliable information or a reasonable belief of its commission.[10] He must actually perceive the offense. The acts constituting the offense must become known to him at the time they are committed through his sense of sight or through his other senses.[11] A Georgia court stated that the words "in his presence" were synonymous with the words "within his immediate knowledge," and that the officer need not see the act which constitutes the crime if by any of his senses, he has personal knowledge of its commission.[12] Thus information, however reliable and even if based on the informant's own personal observation, is not sufficient to cause a crime to be in the officer's presence.[13] The officer must personally observe some part of the offense[14] or at least enough to let him know what is happening.[15] If, however, the officer is suspicious of a person, he may inquire whether the person is committing a crime. Then if that person voluntarily admits that he is committing a crime, the officer may arrest him.[16]

It will be observed that some offences, such as carrying a concealed weapon or transporting illegal liquor, could not be in the officer's presence as concealment is part of the offense. Where a sheriff heard shots in a road, and on investigation found that defendent had been one of the persons standing in the road, the fact that there was a bulge in defendent's pocket was not sufficient to cause it to be a crime committed in the sheriff's presence.[17] But in a case in which an officer could see an imprint in defendent's coat clearly enough to know that it was a gun, it was held a crime in his presence. Yet it was still a concealed weapon because an ordinary man would not detect it.[18]

Thus we have a combination in our arrest statute of two somewhat

[10] State v. DeHerrodora, 192 N. C. 749, 136 S. E. 6 (1926); Catching v. Commonwealth, 203 Ky. 151, 261 S. W. 1107 (1924).
[11] State v. Pluth, 157 Minn. 145, 151, 195 N. W. 789, 791 (1923).
[12] Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S. E. 51 (1911).
[13] People v. Johnson, 86 Mich. 175, 48 N. W. 870 (1891).
[14] State v. Lutz, 85 W. Va. 330, 334, 101 S. E. 434, 439 (1919).
[15] Hughes v. Commonwealth, 19 Ky. 479, 41 S. W. 294 (1897).
[16] Campbell v. Commonwealth, 203 Ky. 151, 261 S. W. 1107 (1924).
[17] Banks v. Commonwealth, 202 Ky. 726, 261 S. W. 262 (1924).
[18] Robinson v. Commonwealth, 207 Ky. 53, 268 S. W. 840 (1925).

mutually exclusive terms. "Reasonable grounds to believe" can consist of information derived from others, and the officer need not have personal knowledge of the crime. "In his presence," on the other hand, must consist of immediate knowledge gained through the senses. Our Court has not yet construed the new statute. Only one other state, New Hampshire, has a statute[19] similar to that of North Carolina, but no cases have been found construing the New Hampshire statute. Therefore, in the absence of any definitive interpretation of the statute, the writer will attempt an analysis of the statute in terms of constructions which might be made.

If an officer is acting on a tip, information, or hearsay, however reliable, the offense is clearly not one committed in his presence. Nor should the addition to the statute of "reasonable grounds to believe" alter the result in these cases in which the officer's knowledge is gained through reports and not the use of his senses, since sensory perception is a *sine qua non* for an offense to be in the officer's presence.

There is more difficulty, however, where the officer has perceived through his senses enough facts and circumstances to give him "reasonable grounds to believe" that a crime is being committed. This may be no more than a well grounded belief, but he has gained his knowledge through his senses. For example, in the case in which the sheriff heard shots in the road, and later found one of the persons who had been in the road, with a bulge in his coat. This was not a crime in the sheriff's presence as he did not have immediate knowledge of the commission of the crime. However, the sheriff did have reasonable grounds to believe that the person was carrying a concealed weapon, and he gained his information through the use of his senses. Though this was not a crime in the sheriff's presence, it could be argued that the facts were sufficient to constitute "reasonable grounds to believe" that the offense was committed in the sheriff's presence since the facts were detected through the use of his senses.

Allowing an officer to arrest under these circumstances would also have far reaching effects on the law of search and seizure. It would create an indirect way to circumvent the requirements for search without a warrant, by allowing an officer to make an arrest under the above circumstances and then make a lawful search incident to such arrest;[20]

[19] N. H. RSA § 594-10.

[20] Mr. Justice Clarkson has suggested that if an officer has a reasonable belief that a person may be arrested and held until a warrant could be obtained, or that illegal goods may be seized without a warrant. However, these suggestions aren't helpful because there is no question but that an officer may search incident to a lawful arrest and does not need to hold the person until a warrant can be obtained. Nor can an officer seize illegal goods without a warrant unless he either has arrested the person accused or has absolute personal knowledge of the possession of the illegal goods by the accused. (State v. Jenkins, 195 N. C. 747, 143 S. E. 538 (1928) and State v. Hickey, 198 N. C. 45, 150 S. E. 615 (1929).)

for it is well settled that an officer making an arrest has authority to search the place of arrest of his prisoner and to take from him any dangerous weapons or anything that he may deem necessary to his own or to the public safety, to prevent escape, or which he believes to be connected with the offense charged or may give a clue as to the commission of the crime.[21]

The section of the North Carolina General Statutes[22] dealing with illegal transportation of liquor states that an officer must have absolute personal knowledge that such vehicle or baggage contains illegal liquor in order to search the same without a warrant. Absolute personal knowledge was defined in *State v. Godette*[23] as knowledge acquired through the sense of seeing, hearing, smelling, tasting, or touching. The court there also said that it is not necessary that the officer should see the contraband, but he must have direct personal knowledge through his hearing or other senses of the commission of the crime.

North Carolina apparently follows this rule of absolute personal knowledge in the search without warrant of a vehicle or baggage for contraband other than liquor.[24] Contrasted with North Carolina's position on this point is the "probable cause" rule which obtains in the Federal Courts. "Probable cause is a belief reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which is subject to seizure and destruction."[25] Thus it seems that under the Federal rule an officer could, without warrant, search an automobile when he has reliable information or a well grounded belief that the automobile is transporting contraband, while in North Carolina an officer must have absolute personal knowledge through his senses that the vehicle contains contraband in order to search it without a warrant. To allow an officer to arrest for a misdemeanor of which he does not have "absolute personal knowledge," but of which he has "reasonable grounds to believe" gained through his senses, would give the officer the right to make a search incident to such arrest. This indirect method of search would be a circumvention of the requirement of absolute personal knowledge requisite for search without a warrant in North Carolina, and would appear to be somewhat of a compromise between an adoption of the Federal rule of "probable cause," and North Carolina's rule of absolute personal knowledge.

It is doubtful that the legislature intended for a construction to be placed on the arrest statute which indirectly would so broaden an officer's

[21] Smith v. State, 52 Okla. Crim. 333, 4 P. 2d 1076 (1931); People v. Chaigles, 237 N. Y. 193, 142 N. E. 583 (1923).
[22] N. C. GEN. STAT. § 18-6 (1953).
[23] 188 N. C. 497, 125 S. E. 24 (1924).
[24] MACHEN, THE LAW OF SEARCH AND SEIZURE, p. 61 (1950).
[25] Carroll v. United States, 267 U. S. 132 (1925).

power to search without a warrant. It seems that the legislature intended to keep the requirement of absolute personal knowledge for an officer to search without a warrant because the same legislature rejected an amendment to G. S. § 18-6 which read "Provided that nothing in this section shall be construed to authorize any officer to search any vehicle or baggage of any person without a search warrant duly issued except where the officer has reasonable grounds to believe that there is intoxicating liquor in such vehicle."[26] This rejected amendment would grant broader power to search without warrant than would the above construction of the arrest statute as the rejected amendment would allow an officer to search without warrant on reliable information gained from others. However, in the line of cases in which the officer has gained his information *through the use of his senses,* the suggested construction might broaden the officer's powers more than the rejected amendment, because the latter has some precautionary measures which aren't present in the arrest statute.

Thus it seems that the legislature intended that for an officer to arrest without a warrant, he must have more than reasonable grounds to believe that a crime is being committed, even if he gained his reasons for this belief through his senses. As has been pointed out, "in his presence" often is treated synomymously with "within his immediate knowledge." Therefore for one to have reasonable grounds to believe that a crime is being committed "in his presence," he must have reasonable grounds to believe that it is within his immediate knowledge. He must have knowledge through his senses, of such facts and circumstances as would lead a reasonable man to believe that he had observed some part of the commission of the crime. Thus if an officer happened to make a mistake, and though he had actual knowledge through his senses of such facts and circumstances as would cause a reasonable man to believe that he had observed the commission of a crime, when in fact no crime was being committed, the clause "reasonable grounds to believe a crime is committed in his presence" would relieve the officer from any liability for his mistakes.

Other states have reached a similar result by judicial interpretation of "in his presence." In *Snyder v. United States,*[27] circuit Judge Woods, dissenting on the particular facts, agreed with the proposition of the majority on the requirements of "in his presence," saying ". . . an officer must have personal knowledge acquired at the time through his hearing, sight, or other senses of the present commission of the crime by the accused. *But this does not preclude the idea that the requisite knowledge may be based on a practically certain inference drawn by a*

[26] Proposed House Bill, number 569, reported unfavorably April 7, 1955.
[27] 285 Fed. 1, 4 (4th Cir. 1922).

reasonable mind from the testimony of the senses." (Emphasis added.) In *LeFaivre v. State*,[28] the Maryland court stated "... an offense is committed in his presence or view if, through his senses he had knowledge of facts or circumstances sufficient to justify a sincere belief that accused is committing the misdemeanor in his presence." The New York court stated in *People v. Esposito*,[29] "If a police officer is in bodily reach of a person then and there engaged in the commission of a misdemeanor, and perceiving indications of the commission of the offense sufficient to induce reasonable belief of the fact, acting in good faith, intending performance of duty, proceeds to arrest such person, the arrest is lawful as for the commission of a crime in the officer's presence." This seems to be what the legislature intended by adding the clause "reasonable grounds to believe that it is committed in his presence." Nor does it seem that the legislature intended our statute to be broader than these interpretations.

Thus the test would seem to be: Has the officer observed enough facts and circumstances through his senses or personal observation as should reasonably cause him to believe that he is presently observing the commission of the crime.

ROBERT L. GRUBB, JR.

Eminent Domain in North Carolina—A Case Study

Eminent domain, a term attributable to the famous seventeenth century jurist, Hugo Grotius, means the right of the state or of a person acting for the state to use, alienate, or destroy property of a citizen for the ends of public utility.[1] This right, also called the power of condemnation, belongs to every independent government as an incident of its sovereignty and needs no constitutional recognition.[2] The right is founded upon the fact that such property is to be used only for the benefit of the general public,[3] and it is allowed only so far as it is necessary for the proper construction and use of the improvement for which it is taken.[4] The policy underlying the authority to condemn is to prevent an owner aware of the necessity of the taker from making the most of such necessity and demanding an outrageously high price.[5] With the upsurge in the development of super highways and hydroelectric dams and the redevelopment of urban areas, eminent domain is an area of the law that is gaining in importance in this state and elsewhere. Thus it seems worth-

[28] 208 Md. 52, 56, 116 A. 2d 368, 369 (1955), case reversed on lack of evidence in 118 A. 2d 639 (1955).
[29] 118 Misc. 867, 194 N. Y. Supp. 326, 332 (Sp. Sess. 1922).

[1] Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 2d 460 (1912).
[2] Jeffress v. Town of Greenville, 154 N. C. 490, 70 S. E. 2d 919 (1911).
[3] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).
[4] Spencer v. Willis, 179 N. C. 175, 178, 102 S. E. 275, 277 (1920) (dictum).
[5] Nantahala Power & Light Co. v. Moss, 220 N. C. 200, 17 S. E. 2d 10 (1941).

while at this time to appraise the North Carolina case law on this subject.

Who can exercise the power of condemnation:

Since the power of condemnation is a sovereign power it can be acquired only by legislative grant.[6] Being in derogation of the ordinary rights of private ownership the statutes conferring condemnation powers are strictly construed.[7] Unless orderly procedure meeting the requirements of due process is specified, the grant of condemnation power is invalid. This procedure may either be expressed in the statute granting the power or in the general law.[8] Yet within the constitutional limitation that the power be exercised for a public purpose,[9] the will of the legislature is supreme; this means that delegating the power rests in the sound discretion of the legislature, even to the extent of discriminating among delegatees.[10] Thus, an electric power company which is a riparian owner does not have condemnation powers for that reason alone,[11] and even a municipal corporation has no such power unless authorized by charter or general law.[12] If the power of condemnation is not expressly or clearly implied in the statute or if there is no provision for compensation included, it is presumed that the legislature intended that the property be obtained by contract.[13]

Extent of the power of condemnation:

Since condemnation is a forced purchase, it is considered that the owner should first have the opportunity to sell voluntarily. Therefore, the condemnor must attempt to purchase the land before it has the right to resort to condemnation.[14] This prerequisite attempt is deemed to have been made where the owner refuses to sell except at an excessive price, or where the owner cannot convey because of some disability.[15] Unless excluded by statute, any kind of private property, real or personal may be condemned.[16]

[6] Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970 (1910).
[7] Sechriest v. Thomasville, 202 N. C. 108, 162 S. E. 212 (1932); Board of Education v. Forrest, 193 N. C. 519, 137 S. E. 431 (1927); Mason v. Durham County, 175 N. C. 638, 96 S. E. 110 (1918); Johnson City So. Ry. v. South & W. R. R., 148 N. C. 59, 61 S E. 683 (1908).
[8] See Eppley v. Bryson City, 157 N. C. 487, 73 S. E. 197 (1911).
[9] Cozard v. Hardwood Co., 139 N. C. 283, 51 S. E. 932 (1905).
[10] Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).
[11] *Ibid.*
[12] Lloyd v. Town of Venable, 168 N. C. 531, 84 S. E. 855 (1915).
[13] Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970 (1910). An instance where condemnation power was implied is found in Mountain Retreat Ass'n v. Mount Mitchell Development Co., 183 N. C. 43, 110 S. E. 524 (1922) where the corporation was given broad powers to maintain turnpikes in the state.
[14] Greensboro v. Garrison, 190 N. C. 577, 130 S. E. 203 (1925); Plott v. Western N. C. R. R., 65 N. C. 74 (1871)
[15] See Western Carolina Power Co. v. Moses, 191 N. C. 744, 133 S. E. 5 (1926).
[16] United States v. Lynah, 188 U. S. 445 (1903); Parks v. Board of County

The power of condemnation is a continuing power, generally to be exercised by the delegatee of the legislature when and to the extent that public good may require, and the power is not exhausted by a single exercise.[17] Yet if an enabling statute does limit a condemnor to take but a certain number of acres of land, the power is not exhausted until the maximum acreage is acquired by virtue of condemnation;[18] land acquired by purchase is disregarded in applying the statutory limitation.[19] The condemnor has no right to condemn only the soil and to disregard the buildings, for the property must be taken as it is or be rejected altogether. It cannot move or compel the owner to move a building from the land to be condemned onto adjacent property of the owner,[20] for the value of the building must be taken into account. However, the legislature has power to authorize payment for the land without the building plus payment for the cost of removing the building to other land and restoring it.[21]

The time, necessity, expediency, manner and method of condemnation is within the absolute discretion of the condemnor in the absence of oppression, and the courts have no jurisdiction as to whether the taking is expedient or necessary.[22] The question of reasonable necessity is in issue only on the owner's allegations showing bad faith or an oppressive abuse of discretion.[23] Even a prior judgment of the superior court that a certain street was not necessary for public purposes will not affect the legislative act authorizing such to be condemned.[24] The power of condemnation extends to the taking of the entire property permanently, even though the most familiar example is a taking of a perpetual easement in realty rather than a fee simple.[25]

The owner's right to just compensation:

The Federal Constitution and all the state constitutions except that of North Carolina now contain express prohibitions against the taking of private property for public use without compensation.[26] Though the North Carolina Constitution has no express provision for compensation,

Commn'rs, 186 N. C. 490, 120 S. E. 46 (1923); North Carolina & R. & D. R. R. v. Carolina Cent. Ry., 83 N. C. 489 (1880).

[17] Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267 (1912).

[18] Board of Education v. Pegram, 197 N. C. 33, 147 S. E. 622 (1929).

[19] Board of Education v. Forrest, 190 N. C. 753, 130 S. E. 621 (1925); Board of School Trustees v. Hinton, 165 N. C. 12, 80 S. E. 890 (1914).

[20] Proctor v. State Highway and Pub. Works Comm'n, 230 N. C. 687, 55 S. E. 2d 479 (1949).

[21] See Goldsboro v. Holmes, 180 N. C. 99, 104 S. E. 140 (1920).

[22] Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394 (1899).

[23] Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267 (1912).

[24] Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468 (1894).

[25] See cases cited in notes 3 and 20 *supra*, and notes 28, 112 and 123 *infra*.

[26] JAHR, EMINENT DOMAIN § 36 (1953).

"it is so well settled that private property cannot be taken directly or indirectly, even for public purposes, without compensation, that it seems a work of supererogation even to restate the principle."[27] The basis seems to be that when North Carolina and its citizens entered into their compact of ordered liberty and self restraints, the principle, although not stated, was assumed by all to exist. This idea was expressed in the leading case on this subject in 1837 by Chief Justice Ruffin in *Raleigh & Gaston R. R. v. Davis*:[28]

> ". . . If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government, that the legislature would never perpetrate so flagrant an act of oppression, or that it would be tolerated by the people, but be redressed by the next representatives chosen. *There is no doubt that while the legislature and the people of this state expressly restrict the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained,* or would never act in a manner to make such restraint necessary. There is, however, no clause in that instrument [the constitution] which seems to bear on that point unless it be [the present Article 1, Section 17, of the North Carolina Constitution.]" [Italics added.]

The italicized portion of the above quoted material takes on special significance in view of the fact that North Carolina at first refused to ratify the Federal Constitution because there was not included a Bill of Rights.[29] Article 1, Section 17, of the North Carolina Constitution, prohibits the taking of a person's property but by the "law of the land" —the words of Magna Carta; this latter instrument was interpreted to require just compensation from the Sovereign long before this country became independent.[30] Although equivocal statements may be found as to the right of just compensation,[31] the principle has never been denied.[32]

[27] Phillips v. Postal Telegraph-Cable Co., 130 N. C. 513, 41 S. E. 1022 (1902).

[28] 19 N. C. 451, 460 (1837). N. C. CONST. art. 1, § 17: "No person ought to be . . . in any manner deprived of his life, liberty or property but by the law of the land." Another provision which seems to relate to this matter is N. C. CONST. art. 1, § 35: ". . . [E]very person for an injury done him in his lands . . . shall have remedy by due course of law. . . ."

[29] LEFLER AND NEWSOME, NORTH CAROLINA 268-70 (1954).

[30] Staton v. Norfolk & C. R. R., 111 N. C. 278, 16 S. E. 181 (1892); JAHR. EMINENT DOMAIN § 1 (1953).

[31] See State v. Glen, 52 N. C. 321, 334 (1859): ". . . [The] legislature may, *perhaps,* resume the incidental rights [to the nonnavigable river bed] for the public use, without making compensation for them; though we believe it has often given such compensation."

[32] See Yancey v. North Carolina State Highway & Pub. Works Comm'n, 222 N. C. 106, 22 S. E. 2d 256 (1942).

The court buttresses this position by relying on justice and equity, which is called the basis of the fundamental law.[33]

However the North Carolina Constitution be construed, statutes which authorize a taking of private property must provide for compensation in order to be valid;[34] it is clear today that the Fourteenth Amendment guarantees the owner just compensation for property taken by the state.[35] Whatever the constitutional basis, the strength of the mandate is shown by the fact that this is apparently one situation where the state may be sued without its consent.[36] This writer concludes that the principle of just compensation is simply a part of the North Carolina provincial law which it retained upon becoming independent,[37] in the same manner as it retained the idea that a petit jury must be composed of twelve members.[38]

The requisite taking to require compensation:

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strictly legal parlance, means the right of the owner to . . . possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."[39] So, when a physical interference with the thing possessed subverts one of these essential rights, such interference is a "taking" of the owner's property. Not all losses of property are compensable, however, for property may be confiscated by virtue of taxation or restrictions imposed by the police power and may be destroyed in great emergencies—such as in wartime[40] or times of public calamity[41] without

[33] Sale v. State Highway and Pub. Works Comm'n, 242 N. C. 612, 89 S. E. 2d 290 (1955).

[34] Parks v. Board of Comm'rs, 186 N. C. 490, 120 S. E. 46 (1923); Bennett v. Winston-Salem Southbound Ry., 170 N. C. 389, 87 S. E. 133 (1915); Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970 (1910).

[35] Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226 (1896); see McKinney v. Deneen, 231 N. C. 540, 58 S. E. 2d 107 (1950) and Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928).

[36] Sale v. State Highway and Pub. Works Comm'n, 242 N. C. 612, 89 S. E. 2d 290 (1955); Dalton v. State Highway and Pub. Works Comm'n, 223 N. C. 406, 27 S. E. 2d 1 (1943); see Angelle v. State, 212 La. 1069, 34 So. 2d 321 (1948).

[37] This conclusion is contrary to that reached by a writer on the subject in Note, 28 N. C. L. Rev. 403, 405 (1950) who contended that the principle is a result of judicial fiat.

[38] State v. Berry, 190 N. C. 363, 130 S. E. 12 (1925). Here the verdict of guilty rendered by less than twelve jurors was held unconstitutional.

[39] Hildebrand v. Southern Bell Tel. and Tel. Co., 219 N. C. 402, 408, 14 S. E. 2d 252, 256 (1941); Matthews v. Board of Corp. Commn'rs, 106 Fed. 7 (4th Cir. 1901).

[40] United States v. Caltex (Philippines), 344 U. S. 149 (1952) *rehearing denied* 344 U. S. 919 (1953). Here the military authorities destroyed oil and installations belonging to a private corporation to keep the Japanese from getting it upon capturing the island.

[41] Bowditch v. Boston, 101 U. S. 16 (1879) (fire); see New Orleans Pub. Serv. Co. v. New Orleans, 281 U. S. 682 (1930).

compensation. Taxation is unlike eminent domain in that no specific property is taken; the police power is unlike eminent domain in that the police power fetters the rights of property while eminent domain takes them away. But any direct encroachment on the property creates a right in the owner to compensation.[42]

Parties entitled to compensation:

Only persons with some sort of ownership interest in the property may receive compensation. The cases indicate that this interest need not be an exclusive one, and that the damages will be given to the extent that each person's interest in the property has in fact been taken.[43] Among

[42] McKinney v Deneen, 231 N. C. 540, 58 S. E. 2d 107 (1950); Hildebrand v. Southern Bell Tel. and Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1941); Clinard v. Town of Kernersville, 215 N. C. 745, 3 S. E. 2d 267 (1939).

Instances where there was held a compensable taking are as follows: Matthews v. Board of Corp. Commn'rs, 106 Fed. 7 (4th Cir. 1901) (utility rates fixed too low); McLean v. Town of Mooresville, 237 N. C. 498, 75 S. E. 2d 327 (1953) (sewer line); Moore v. Clark, 235 N. C. 364, 70 S. E. 2d 182 (1952) (land taken for public highway); Myers v. Wilmington-Wrightsville Beach Causeway Co., 204 N. C. 260, 117 S. E. 858 (1933) (cost of new bridge built to Government specifications when old bridge ordered destroyed); Hiatt v. Greensboro, 201 N. C. 515, 160 S. E. 748 (1931) (street in front of owner's lot changed from through street to dead-end); Query v. Postal Telegraph-Cable Co., 178 N. C. 639, 101 S. E. 390 (1919) (telegraph poles as additional servitude on fee even though land already subject to easement for railroad right of way); Kirkpatrick v. Piedmont Traction Co., 170 N. C. 477, 87 S. E. 232 (1915) (additional servitude on abutting owners caused by commercial railroad in street); Donnell v. Greensboro, 164 N. C. 330, 80 S. E. 377 (1913) (continuing pollution of stream by municipality); Moore v. Carolina Power and Light Co., 163 N. C. 300, 79 S. E. 595 (1913) (trees cut down that are not interfering with the use of the street or sidewalk); Spencer v. Seaboard Air Line Ry., 137 N. C. 107, 49 S. E. 96 (1904) (forced sale of railroad stock at assessed value); State v. New, 130 N. C. 731, 41 S. E. 1033 (1902) (drainage ditch dug through private land); Beach v. Wilmington & W. R. R., 120 N. C. 498, 26 S. E. 703 (1897) (lands of owner overflowed by backwater from dam); Cornelius v. Glen, 52 N. C. 512 (1860) (removal of dam from private stream); Pipkin v. Wynns, 13 N. C. 412 (1830) (using owner's river bank for ferry landing although at point of public highway).

Instances where there was not a compensable taking are as follows: Spaugh v. Winston-Salem, 234 N. C. 708, 68 S. E. 2d 838 (1952) (city's appropriation of sewage system built by owner who had constructive knowledge of ordinance giving city power to take without payment when incorporating new area); Hildebrand v. Southern Bell Tel. and Tel. Co., 221 N. C. 10, 18 S. E. 2d 827 (1942) (highway commission's assignment of right to maintain telephone line on its easement pursuant to broad powers in condemnation judgment); Calhoun v. State Highway and Pub. Works Comm'n, 208 N. C. 424, 181 S. E. 271 (1935) (decreased value of the lot caused by grade change in established street); Pemberton v. Greensboro, 208 N. C. 466, 181 S. E. 258 (1935) (owner restrained from discharging sewage in his own stream when it is source of city's water supply); Hudson v. Town of Morganton, 205 N. C. 353, 171 S. E. 329 (1933) (owner forced to abandon own land through fear of prosecution for trespassing on "watershed" set up without any physical entry on part of city); Turner v. North Carolina Pub. Serv. Corp., 174 N. C. 522, 93 S. E. 998 (1917) (servitude on adjoining lot owner when street used for street railway); Crowell v. City of Monroe, 152 N. C. 399, 67 S. E. 989 (1910) (inconvenience to lot owner by town's closing of part of street under police power); Rosenthal v. Goldsboro, 149 N. C. 128, 62 S. E. 905 (1908) (city's removal of owner's shade trees to preserve street sewers); Pool v. Trexler, 76 N. C. 297 (1877) (draining "wet lands" across land of another by virtue of police power statute).

[43] Joyner v. Conyers, 59 N. C. 78 (1860).

those who have been allowed a recovery are: one tenant in common, although the other tenant had already given a grant to the taker;[44] the developer of a subdivision when its water system was appropriated by the city, even though many of the lots had been sold;[45] and the purchaser at a foreclosure sale of land from which the mortgagor, without the consent of the mortgagee, had granted a right of way instead of forcing the taker to condemn.[46] Even a lessee may recover damages when his right of ingress and egress was obstructed by the condemnor building a railroad.[47] Both the life tenant and the vested remainderman of the land taken may recover,[48] but the clerk holds the award for contingent remaindermen in trust.[49] And it would seem that a mere possessor of land might be entitled to compensation.[50]

Condemnation must be for a public use:

Condemnation is not proper unless it is exercised for a public purpose, to be determined by the right of the general public to use or benefit from the use of the property rather than by the extent of the actual use.[51] The question of whether condemnation is for a public use is a judicial one to be decided by the courts.[52] Condemnation for such things as electric light poles,[53] schools,[54] public highways and railroads[55] are obviously for public purposes; the court has gone so far as to say that condemnation for a public street is a taking for a public use as a matter of law.[56] The modern trend seems to allow condemnation for purely aesthetic purposes.[57] The use may be public although managed by a private corporation, as where a toll road is open to all the public upon payment of a reasonable fee.[58]

[44] Hill v. Glendon and Gulf Mining and Mfg. Co., 113 N. C. 259, 18 S. E. 171 (1893).
[45] Stephens Co. v. Charlotte, 201 N. C. 258, 159 S. E. 414 (1931).
[46] Liverman v. Roanoke & T. R. R., 109 N. C. 52, 13 S. E. 734 (1891).
[47] South Atlantic Waste Co. v. Raleigh, C. & So. Ry., 167 N. C. 340, 83 S. E. 618 (1914).
[48] Joyner v. Conyers, 59 N. C. 78 (1860).
[49] Stubbs v. United States, 21 F. Supp. 1007 (M. D. N. C. 1938); Miller v. Asheville, 112 N. C. 769, 16 S. E. 765 (1893).
[50] See Pace v. Freeman, 32 N. C. 103 (1849).
[51] Cozard v. Hardwood Co., 139 N. C. 283, 288, 51 S. E. 932, 934 (1905) (dictum).
[52] Cobb v. Atlantic C. L. R. R., 172 N. C. 58, 89 S. E. 807 (1916); Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468 (1894). The Federal Rule seems to be that Congress may decide what type of taking is for a public use. United States *ex rel.* TVA v. Welch, 327 U. S. 546 (1945).
[53] Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460 (1912).
[54] Board of School Trustees v. Hinton, 165 N. C. 12, 80 S. E. 890 (1914).
[55] Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837).
[56] Jeffress v. Town of Greenville, 154 N. C. 490, 70 S. E. 919 (1911).
[57] Berman v. Parker, 348 U. S. 26 (1954), noted in Note, 33 N. C. L. Rev. 482 (1955) (redevelopment of blighted areas); Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928) (park).
[58] Mountain Retreat Ass'n v. Mount Mitchell Development Co., 183 N. C. 43, 110 S. E. 524 (1922). Although the legislature cannot authorize the owner of

Change in the public use:

For one taker to be able to condemn the property of one also having the power of condemnation, there ordinarily must be a legislative grant of this particular power in express terms or by necessary implication.[59] Such a taker must show necessity and must exercise the right with as little interference as it can without a great increase in cost and inconvenience.[60] The power of the North Carolina State Highway and Public Works Commission to condemn land within a city for highway purposes is an example of this.[61] Without special legislative authority, one taker cannot spoil the plan of another by condemning lands needed by the other who is free from unreasonable delay, bad faith, or abandonment of the condemnation purpose.[62] There is general language in the cases to the effect that entry for a new and different use is a taking, without regard to the extent of the injury, and such new entry can be made only when the new use is public.[63] Thus, it is generally held that the owner should be compensated for takings where additional servitudes which cause additional damages are placed on the land. A telegraph company placing its poles on lands over which a railroad has an easement must pay for this privilege.[64] Yet a street car company does not have to pay the owner of the fee for tracks laid down the street because this does not materially increase the burden on the land.[65] In another situation, *Bass v. Roanoke Navigation & Waterpower Co.*[66] held that the legislature may substitute a new public use not more burdensome to the owners of the fee than the old public use without making additional compensation for a retaking; the court's theory was that the owners were not entitled to claim a forfeiture of the original easement because their possibility of reverter is a contingent claim, defeasible at the will of the state.

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standing timber to build a railroad or tramway over the lands of another to remove such timber because this would be a taking for a private use, the statute providing that the timber owner may condemn a right of way for a cartway is valid. Cozard v. Hardwood Co., 139 N. C. 283, 51 S. E. 932 (1905). Condemnation for a cartway, on the other hand, is justified upon the ground that cartways are regarded as quasi-public roads intended to be publicly used to some extent, although they are laid out on the application of particular individuals, paid for by them, and designed for their special accommodation. Waldroup v. Ferguson, 213 N. C. 198, 195 S. E. 515 (1938).

[59] Yadkin County v. High Point, 217 N. C. 462, 8 S. E. 2d 470 (1940).

[60] Virginia & C. So. R. R. v. Seaboard Air Line R. R., 161 N. C. 531, 78 S. E. 68 (1913).

[61] Sechriest v Thomasville, 202 N. C. 108, 162 S. E. 212 (1932).

[62] Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 188 N. C. 128, 123 S. E. 312, *writ of error dismissed, 267* U. S. 586 (1924).

[63] Hildebrand v. Southern Bell Tel. and Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1941).

[64] Query v. Postal Telegraph-Cable Co., 178 N. C. 639, 101 S. E. 390 (1919).

[65] Turner v. North Carolina Pub. Serv. Corp., 174 N. C. 522, 93 S. E. 998 (1917).

[66] 111 N. C. 439, 16 S. E. 402 (1892). *Cf.* Charlotte Park and Recreation Comm'n v. Barringer, 242 N. C. 311, 88 S. E. 2d 114 (1954), *cert. denied* 350 U. S. 983 (1956), noted in Note, 33 N. C. L. Rev. 482 (1955).

Right of party to object to condemnation:

It has been held that any taxpayer subject to general tax assessment for the cost of the taking may object to the condemnor's appropriating property for an improper or private use.[67] But the right to object is much clearer when asserted by one whose property will be directly affected by the condemnation. The taking may be said to be for a private use when the substantial benefit is for a private individual and the benefit to the condemnor is only incidental and prospective,[68] and it hardly needs to be said that only with the consent of the owner can property be taken for a private use.[69] But the fact that the condemnor is authorized or allegedly intends to engage in private as well as public business is no objection to condemnation.[70] The objector must wait until the property is actually used for private purposes before he can maintain the action of quo warranto to compel cessation of the private or improper use.[71] The owner cannot usually enjoin the taking of his property by a municipality even if the purpose is to create what would be a nuisance, which could be enjoined if committed by a private individual.[72] An injunction pendente lite could probably be secured by the owner, however, where the taker flatly denies the owner's application for compensation.[73] In addition to one's right to resist condemnation where such is for an improper use is his right to resist condemnation where the condemnor has acted arbitrarily and capriciously. However, unless the action of the condemnor is so unreasonable, arbitrary or unjust, as to amount to an oppressive and manifest abuse of discretion, the courts

[67] Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394 (1899). *But cf.* Shaw v. Liggett & Myers Tobacco Co., 226 N. C. 477, 38 S. E. 2d 313 (1946); Peters v. Pasquotank Highway Comm'n, 184 N. C. 30, 113 S. E. 567 (1922).

[68] Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394 (1899).

[69] Winchester v. Byers, 196 N. C. 385, 135 S. E. 774 (1928).

[70] Wadsworth Land Co. v. Piedmont Traction Co., 162 N. C. 314, 78 S. E. 297 (1913).

[71] *Ibid.*

[72] Rhyne v. Flint Mfg. Co., 182 N. C. 489, 109 S. E. 376 (1921); Rhodes v. City of Durham, 165 N. C. 679, 81 S. E. 938 (1914). See Town of Selma v. Nobles, 183 N. C. 322, 111 S. E. 543 (1922), where it was held that since the cemetery for which the town proposed to take the property would create a nuisance this amounted to a condemnation of adjacent property rights; injunction against the town was granted because the town had no power to condemn residential property. Later, the court in Raleigh v. Edwards, 235 N. C. 671, 71 S. E. 2d 396 (1952), distinguished this case and held that the landowner intervening in the condemnation proceedings could not prevent or collect damages for the nearby erection of an elevated water tank on the ground that it would constitute a nuisance. This was said to be a permature action since the tank had not yet been erected, a water tank not being a nuisance per se. Damages were held proper, though, because of the city's condemnation of negative easements or restrictive covenants. In McKinney v. High Point, 237 N. C. 66, 74 S. E. 2d 440 (1953), the elevated water tank had already been erected and was painted a bright silver which reflected the sun's rays, causing blinding glare. The landowner recovered on the ground that this cheapening of his property was a taking of his land without just compensation, though the court refused to hold the tank might constitute a nuisance.

[73] Luther v. Commissioners of Buncombe County, 164 N. C. 241, 246, 80 S. E. 386, 388 (1913) (dictum).

will not interfere.[74] Even an allegation that the condemnor's charter was a fraud will not be considered.[75]

The measure of compensation:

The measure of compensation has been stated in a number of ways. It is said to be the just equivalent for the property taken;[76] it is also defined as the sum which probably would be arrived at as a result of fair negotiations by an owner willing to sell and a purchaser willing to buy after due consideration of all elements reasonably affecting value;[77] again, the measure is called the balance struck between the damages and benefits conferred.[78] Perhaps one of the most familiar rules grows out of the situation where the condemnor takes only an easement over a small part of a total tract; here the measure of damages is defined often as the difference, caused by the taking, in the value of the land before and after the taking.[79] The underlying idea seems to be that the owner is entitled to be put in as good a position pecuniarily as if the property had not been taken. Applying this rule, the owner is entitled to be paid only for the value of the property to him, and not for its value to the condemnor.[80] Generally, however, all the capabilities of the property and all of the uses to which it may be applied or for which it is adapted may be considered insofar as they affect its value in the market.[81]

The value of the property is awarded only as of the time when the condemnation proceeding was begun; no prior or subsequent fluctuation in value can be considered.[82] The price that the owner was offered or that he actually paid for the property at some remote time prior to condemnation is permissible only as impeachment testimony.[83] The grantee of the owner is not allowed to sue for damages done to the land

[74] *In re*: Housing Authority Project N. C.-16-2, 235 N. C. 463, 70 S. E. 2d 500 (1952). Lee v. Town of Waynesville, 184 N. C. 565, 115 S. E. 51 (1922).

[75] Holly Shelter R. R. v. Newton, 133 N. C. 132, 45 S. E. 549 (1903); see Peters v. Pasquotank Highway Comm'n, 184 N. C. 30, 113 S. E. 567 (1922).

[76] North Carolina State Highway and Pub. Works Comm'n, v. Black, 239 N. C. 198, 79 S. E. 2d 778 (1954); State v. Suncrest Lumber Co., 199 N. C. 199, 154 S. E. 72 (1930).

[77] United States *ex rel.* and For Use of TVA v. Powelson, 118 F. 2d 79 (4th Cir. 1941).

[78] Elks v. Commissioners, 179 N. C. 241, 102 S. E. 414 (1920); Southport, W. & D. R. R. v. Owners of The Platt Land, 133 N. C. 266, 45 S E. 589 (1903).

[79] *Ibid.*; Lanier v. Greenville, 174 N. C. 311, 93 S. E. 850 (1911); Lambeth v. Southern Power Co., 152 N. C. 371, 67 S. E. 921 (1910).

[80] Nantahala Power & Light Co. v. Moss., 220 N. C. 200, 17 S. E. 2d 10 (1941).

[81] *Ibid.*

[82] Town of Ayden v. Lancaster, 197 N. C. 556, 150 S. E. 40 (1929); Western Carolina Power Co. v. Hayes, 193 N. C. 104, 136 S. E. 353 (1927). *But see* State Highway & Pub. Works Comm'n v. Hartley, 218 N. C. 438, 11 S. E. 314 (1940).

[83] Palmer v. North Carolina State Highway Comm'n, 195 N. C. 1, 141 S. E. 338 (1927) (18 years); Lloyd v. Town of Venable, 168 N. C. 531, 84 S. E. 855 (1915).

before he acquired title,[84] nor for damages to crops and use and occupation of the land—all this being considered "fruit fallen."[85] However, the grantee can recover for fresh injuries.[86]

The only damages contemplated in the original condemnation proceedings are those that necessarily arise in the proper construction of the work. Nuisance or negligence is not contemplated and the owner does not have the right to collect damages for such torts in the original grant of compensation. Instead, the owner must bring a separate action to recover for work negligently done or which resulted in a nuisance.[87]

When the condemnation causes mere inconvenience to the owner in the use of his property, this alone is no basis for compensation unless there is also an actual impairment of the owner's ability to use the property in a reasonable manner.[88] Also, loss of profits or injury to an established business is not an element of damages unless provided by statute, because business as such is not "property" in the eminent domain constitutional context.[89]

The owner is not restricted to compensation for the value of the property physically brought under the taker's control, but may recover damages for intangible injuries as well. Examples of this have been recovery for increased dangers to person and property plus inconvenience and annoyance not suffered in common with others;[90] jarring, smoke, noise, dangers of fire and cinders;[91] additional fencing made necessary;[92] actual damages to growing crops outside the right of way;[93] loss of church congregation;[94] depreciation in value of property due to poles and trolley wires;[95] land made unfit for dairying by sewage disposal plant;[96] and depreciation in value of lands not taken.[97] On the other hand, the condemnor may reduce the amount of recovery by showing such things

[84] Phillips v. Postal Telegraph-Cable Co., 130 N. C. 513, 41 S. E. 1022 (1902); see Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674 (1904).

[85] Liverman v. Roanoke & T. R. R. R., 114 N. C. 692, 19 S. E. 64 (1894).

[86] Phillips v. Postal Telegraph-Cable Co., 130 N. C. 513, 526, 41 S. E. 1022, 1026 (1902) (dictum).

[87] Spencer v. Willis, 179 N. C. 175, 102 S. E. 275 (1920); see Moses v. Town of Morganton, 195 N. C. 92, 141 S. E. 484 (1928); Ingram v. City of Hickory, 191 N. C. 48, 131 S. E. 270 (1926).

[88] Elks v. Commissioners, 179 N. C. 241, 102 S. E. 414 (1920) (new road not as convenient as old road which is still open).

[89] Pemberton v. Greensboro, 208 N. C. 466, 181 S. E. 258 (1935); State v. Suncrest Lumber Co., 199 N. C. 199, 154 S. E. 72 (1930).

[90] Raleigh, C. & So. Ry. v. Mecklenburg Mfg. Co., 169 N. C. 156, 85 S. E. 390 (1915).

[91] Carolina & Y. R. R. R. v. Armfield, 167 N. C. 464, 83 S. E. 809 (1914).

[92] Raleigh & A. A. L. R R. v. Wicker, 74 N. C. 220 (1876).

[93] Haislip v. Wilmington & W. R. R., 102 N. C. 376, 8 S. E. 926 (1899); *cf.* Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 (1903).

[94] Durham & No. R. R. v. Trustees of Bullock Church, 104 N. C. 525, 10 S. E. 761 (1889).

[95] Wadsworth Land Co. v. Charlotte Elec. Co., 170 N. C. 674, 88 S. E. 439 (1915).

[96] Pemberton v. Greensboro, 208 N. C. 466, 181 S. E. 258 (1935).

[97] Western Carolina Power Co. v. Hayes, 193 N. C. 104, 136 S. E. 353 (1927).

as that the land is already subject to an easement[98] or that the claimant has only a life estate.[99] Also considered is the uses and purposes to which the property is reasonably adapted and might with reasonable probability be applied,[100] such as the eligibility of land for factory sites.[101] The rental value of a building taken, the location and surroundings of land, and any other factor which would normally affect the value of the property may be considered.[102]

Right of condemnor to offset benefits to realty:

One thing of great potential value to a condemnor is the right to offset benefits, both special and general. This entails offsetting any increase in the value of the owner's adjacent realty or of any estate remaining in the owner, caused by the condemnation, against the price due for the land taken. Benefits have to result directly to the property from the taking, but special benefits, unlike general ones, are not shared in common with the whole vicinity.[103] The law as to offset, though, has been subject to vacillation in North Carolina. These changes are explainable by virtue of the fact that granting or withholding this right of offset rests in the sound discretion of the legislature.[104] Prior to 1872 railroads could offset only special benefits.[105] This was changed in 1871 when the legislature provided that no benefits could be offset by railroads; but in 1891 the former principle was restored and special benefits could be offset once more.[106] In 1923 the General Asembly provided that municipalities could offset both general and special benefits.[107] This same rule has applied to the North Carolina State Highway and Public Works Commission since 1935.[108] Thus, the charter or the statutes applicable to the condemnor should always be consulted to determine if special or perhaps even general benefits can be offset. G. S. § 40-18 seems to indicate, though, that today offset of special benefits is allowed in the case of the usual condemnor. The right of municipalities and of the Highway Commission to offset all benefits appears to be the result of

[98] Brown v. W. T. Weaver Power Co., 140 N. C. 333, 52 S. E. 954 (1903).
[99] Miller v. Asheville, 112 N. C. 769, 16 S. E. 765 (1893).
[100] Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 186 N. C. 179, 119 S. E. 213 (1923).
[101] Teeter v. Postal Tel. Co., 172 N. C. 783, 90 S. E. 941 (1916). *See* Note, 34 N. C. L. Rev. 545 (1956) for a discussion on the right to include the special adaptability of the property for a dam site as an element of damages.
[102] Railroad v. Land Co., 137 N. C. 330, 49 S. E. 350 (1904).
[103] Lanier v. Greenville, 174 N. C. 311, 93 S. E. 850 (1911).
[104] Goode v. Asheville, 193 N. C. 134, 136 S. E. 340 (1927); Elks v. Commissioners, 179 N. C. 241, 102 S. E. 414 (1920); Commissioners v. Johnston, 71 N. C. 398 (1874); Freedle v. North Carolina R. R., 49 N. C. 89 (1856).
[105] Southport, W. & D. R. R. v. Owners of The Platt Land, 133 N. C. 266, 45 S. E. 589 (1903); Freedle v. North Carolina R. R., 49 N. C. 89 (1856)
[106] Southport, W. & D. R. R. v. Owners of The Platt Land, *supra* note 105.
[107] N. C. Gen. Stat. § 160-210 (1952).
[108] N. C. Gen. Stat. § 136-19 (1952 & Supp. 1955); *see* Bailey v. State Highway and Pub. Works Comm'n, 214 N. C. 278, 199 S. E. 25 (1938).

a legislative policy favoring purely public agencies[109] It should be noted, however, that in no event may the special or general benefits exceed the damages to the owner, for if this could happen the owner might be held liable to pay the condemnor for taking his land.[110]

Landowner's right to be paid for the "full fee":

It is not what the condemnor actually does, but what it acquires the right to do that determines the quantum of damages.[111] Therefore, since the condemnor acquiring a perpetual easement acquires the right to occupy and use the entire surface of the land for all time to the exclusion of the landowner, for all practical purposes the bare fee is of no value and the damages should be the same as if the fee were acquired. The possibility of abandonment by the taker is so remote and improbable that it is not allowed to be taken into consideration in determining the value of the easement.[112] However, if the parties stipulate that the owner may recover for any additional burdens placed on the land, an instruction that the perpetual easement amounts to a fee for all practical purposes is prejudicial error.[113] Generally, a person is entitled to the damages in proportion to the period for which he suffers the encumbrance, though special circumstances may alter the case.[114] Contingent remaindermen have to wait until the termination of the prior estate before payment is made, and the property, although converted into personalty, is treated as realty upon distribution.[115] After payment of damages to the life tenant, the court may direct the clerk to invest the balance and distribute it to the contingent remaindermen only at the end of the life estate.[116]

Owner's right to interest:

The owner will get interest from the time of the condemnation judgment except against the state or one of its agencies.[117] On trial de novo in the superior court from the award it is error to give interest from the

[109] Elks v. Commissioners, 179 N. C. 241, 245, 102 S. E. 414, 416 (1920). Here Chief Justice Clark said: "The distinction seems to be that where the improvement is for a private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general."

[110] Goode v. Asheville, 193 N. C. 134, 136 S. E. 340 (1927).

[111] Carolina Cent. Gas Co. v. Hyder, 241 N. C. 639, 86 S. E. 2d 458 (1955).

[112] *Ibid.*; North Carolina State Highway and Pub. Works Comm'n v. Black, 239 N. C. 198, 79 S. E. 2d 778 (1953).

[113] Carolina Power and Light Co. v. Clark, 243 N. C. 577, 91 S. E. 2d 569 (1956).

[114] See Joyner v. Conyers, 59 N. C. 78, 82-83 (1860).

[115] Miller v. Asheville, 112 N. C. 769, 16 S. E. 765 (1893).

[116] *Ibid.*

[117] N. C. GEN. STAT. § 24-5 (1953), Yancey v. North Carolina State Highway and Pub. Works Comm'n, 222 N. C. 106, 22 S. E. 2d 256 (1942).

date of the taking or from the date of the award below in addition to the jury's verdict of the value of the property; it is presumed that a jury, properly instructed, has taken the interest factor into account in fixing value.[118] The Federal rule, however, is that the Fifth Amendment, applicable only to the United States, requires interest from the date of the taking.[119]

Informal condemnation of realty by award of permanent damages:

Prior to *Ridley v. Seaboard & Roanoke R. R.*[120] the ordinary trespass action for the wrongful taking of or entry onto one's real property was not available to the owner where the taker had condemnation powers. The owner had to have his damages assessed according to the taker's charter or general statutes.[121] But the *Ridley* case espoused the idea of "permanent damages," giving in effect an informal condemnation. The idea is that where one having the right of eminent domain, or its licensee[122] or appointee,[123] enters on or takes land without resorting to condemnation, either party[124] may demand that permanent damages be awarded. Upon suit being commenced by the owner for permanent damages, this ends the continuing trespass, and upon payment of the damages assessed an easement passes to the taker.[125] This informal manner of condemnation is equivalent to formal condemnation,[126] and such a taker cannot be ousted by ejectment.[127] The fact that a suit for trespass may be barred after three years does not prevent a suit for permanent damages[128] because to recover such damages the owner must show a continuing trespass rather than single acts of trespass.[129] The conditions obviously must be existing when the action is brought.[130] The owner is not required to sue for permanent damages in the superior court when the entry is wrongful, for the owner has the option to sue for permanent damages or petition the clerk for assessment of damages.[131] His right to sue for permanent damages exists only against entities having the power of condemnation, which means that the owner may not of right have permanent damages assessed against a private corporation for the maintenance of a nuisance which the owner could have en-

[118] City of Durham v. Davis, 171 N. C. 305, 88 S. E. 433 (1916).
[119] Stubbs v. United States, 21 F. Supp. 1007 (M. D. N. C. 1938).
[120] 118 N. C. 996, 24 S. E. 730 (1896).
[121] Holloway v. University R. R., 85 N. C. 452 (1881).
[122] White v. Northwestern N. C. R. R., 113 N. C. 610, 18 S. E. 330 (1893).
[123] Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62 (1905).
[124] Rhodes v. City of Durham, 165 N. C. 679, 81 S. E. 938 (1914).
[125] Mason v. Durham County, 175 N. C. 638, 96 S. E. 41 (1918).
[126] Geer v. Durham Water Co., 127 N. C. 349, 37 S. E. 474 (1900).
[127] Porter v. Aberdeen & R. F. R. R., 148 N. C. 563, 62 S. E. 741 (1908).
[128] Love v. Postal Telegraph-Cable Co., 221 N. C. 469, 20 S. E. 2d 337 (1942).
[129] Clinard v. Town of Kernersville, 215 N. C. 745, 3 S. E. 2d 267 (1939).
[130] Ingram v. City of Hickory, 191 N. C. 48, 131 S. E. 270 (1926).
[131] McMahan v. Black Mountain Ry., 170 N. C. 456, 87 S. E. 237 (1915).

joined.[132] The early cases on the subject held that the measure of damages in the permanent damages action included past, present and prospective damages,[133] but a more recent case appears to allow only the value of the land at the time the action is brought.[134] The *Ridley* case applied the doctrine to railroads, but it has since been applied to water companies.[135] telegraph companies,[136] canals,[137] municipalities, [138] and nuisance created by a municipality's discharge of sewage.[139] The principle now seems broad enough to cover any taker with the power of eminent domain.

Once the owner begins the permanent damages suit he may recover although he conveys to a third party during the pendency of the action. The theory which allows this is that when suit is begun the owner terminates the continuing trespass by indicating his consent to grant an easement upon payment of damages.[140] However, if the owner does not bring suit during the period of his ownership the right to sue for permanent damages passes to the grantee, because the continuing trespass has not in such a case been terminated.[141] Where the grantor is granted permanent damages, the grantee is estopped from denying that an easement passed to the taker.[142]

Nature of the proceedings:

After the prerequisite offer to buy has been made the taker begins the condemnation with the institution of a special proceeding before the clerk of the superior court.[143] The general procedure is outlined in Chapter 40 of the General Statutes.[144] However, some condemnors may have even the proper procedure outlined in their charters or in statutes specially relating to them.[145]

Although in the usual condemnation proceeding the clerk acts as a judicial officer, an instance where he acts in an administrative capacity is where condemnation is for school purposes.[146] If the owner cannot show cause why the taker's petition for appointment of commissioners of appraisal should not be granted, the clerk orders the appointment of three

[132] Langley v. Staley Hosiery Mills Co., 194 N. C. 644, 140 S. E. 440 (1927).
[133] Porter v. Aberdeen & R. F. R. R., 148 N. C. 563, 62 S. E. 741 (1908).
[134] Clinard v. Town of Kernersville, 215 N. C. 745, 3 S. E. 2d 267 (1939).
[135] Geer v. Durham Water Co., 127 N. C. 349, 37 S. E. 474 (1900).
[136] Phillips v. Wilmington & W. R. R., 130 N. C. 582, 41 S. E. 805 (1902).
[137] Mullen v. Lake Drummond Canal & Water Co., 130 N. C. 496, 41 S. E. 1027 (1902).
[138] Harper v. Town of Lenoir, 152 N. C. 723, 68 S. E. 228 (1910).
[139] Rhodes v. City of Durham, 165 N. C. 679, 81 S. E. 938 (1914).
[140] Caveness v. Charlotte, R. &. So. R. R., 172 N. C. 305, 90 S. E. 244 (1916).
[141] *Ibid*
[142] Bruton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1939).
[143] Johnson City Ry. v. South & W. R. R., 148 N. C. 59, 61 S. E. 683 (1908).
[144] N. C. GEN. STAT. §§ 40-11 through -29 (1950 and Supp. 1955).
[145] See Norfolk & So. R. R. v. Warren, 92 N. C. 620 (1885).
[146] N. C. GEN. STAT. § 115-125 (Supp. 1955), Board of Education v. Allen, 243 N. C. 520, 91 S. E. 2d 180 (1956).

disinterested freeholders to make the appraisal.[147] Since the assessment of the commissioners is not a jury verdict, a majority vote is sufficient.[148] And the fact that the commissioners are citizens of the town in which the land to be condemned is located, and therefore subject to additional taxes to pay for the land condemned, is no ground for disqualifying them; their interest is considered too remote.[149]

Not until the commissioners file their report of appraisal can an appeal to the superior court be had, for prior to this time there is no final judgment from which to appeal.[150] Although proceedings before the clerk may be administrative in some cases, the proceedings in the superior court are always judicial in nature.[151] Appeal can be made only to the court in term, and not to the judge at chambers.[152] Here a trial de novo is held as though no appraisal had been made, unless the superior court judge in his discretion remands the proceedings to the clerk for a new appraisal.[153] The tactic of appeal cannot be used as a device for delay. The condemnor may take possession despite the appeal.[154] Since the condemnor must make adequate provision for compensation such as the posting of a bond as a condition of the taking, the owner is protected.[155] Because the statutory remedy is considered exclusive, the matter of compensation is settled if there is no appeal, and the owner cannot later maintain an action for damages.[156] On an appeal to the superior court the usual function of the jury is to pass on the issue of compensation,[157] but it may properly decide such questions as whether condemnation would amount to a nuisance[158] or whether lands already condemned are being used so as to exempt them from further condemnation.[159]

Condemnation seems to be an in rem proceeding, and payment of the award into court discharges the taker's obligation whether or not the

[147] N. C. GEN. STAT. § 40-16 (1950).
[148] Austin v. Helms, 65 N. C. 560 (1871).
[149] Johnson v. Rankin, 70 N. C. 550 (1874).
[150] *In re* Baker, 187 N. C. 257, 121 S. E. 455 (1924).
[151] N. C. GEN. STAT. § 115-125 (Supp. 1955), Board of Education v. Allen, 243 N. C. 520, 91 S. E. 2d 180 (1956).
[152] Cape Fear & No. R. R. v. Stewart, 132 N. C. 248, 43 S. E. 638 (1903).
[153] Carolina Power and Light Co. v. Reeves, 198 N. C. 404, 151 S. E. 87 (1930); Hanes v. North Carolina R. R., 109 N. C. 490, 13 S. E. 896 (1891).
[154] State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905).
[155] State v. Wells, 142 N. C. 590, 55 S. E. 210 (1906); Postal Telegraph-Cable Co. v. Southern Ry., 89 Fed. 190 (C. C. W. D. N. C. 1898) (telegraph company was prohibited from entering until payment of amount assessed into court); Carolina Cent. R. R. v. McCaskill, 94 N. C. 746 (1886); Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837).
[156] Harwood v. Concord, 201 N. C. 781, 161 S. E. 534 (1931); Carolina Cent. R. R. v. McCaskill, 94 N. C. 746 (1886).
[157] Board of Education v. Allen, 243 N. C. 520, 91 S. E. 2d 180 (1956); Madison County Ry. v. Gahagan, 161 N. C. 190, 76 S. E. 696 (1912).
[158] Town of Selma v. Noble, 183 N. C. 322, 111 S. E. 543 (1922).
[159] Blue Ridge Interurban R. R. v. Oates, 164 N. C. 167, 80 S. E. 398 (1913).

true owner of the land is known or ever receives the money.[160] By the same token if the condemnor pays the award into court voluntarily and without objection, labeling it as payment rather than as a deposit, the owner may accept the "offer" and settle the question of compensation.[161]

Generally, as to the assessment of damages, the owner is not entitled to prior notice, but proper notice and an opportunity to be heard must be given to enable the owner to attack the fairness of the assessment.[162] The procedure for giving this notice is usually found in the statutory or charter provisions applicable to the condemnor, but the taker may be able to proceed by giving actual notice to the owner where there is no express provision.[163] Initial service of notice upon parties may be by publication if they cannot be found after the exercise of due diligence.[164] Once a proceeding has been commenced, because a motion made before the clerk is in the same category as one made out of term in the superior court, the clerk cannot make a determination on exceptions of a party until all other parties are given notice and opportunity to be heard.[165]

The title and possessory rights in connection with condemnation:

Generally, the condemnor may take possession of the land before compensation has been ascertained or paid.[166] But since title does not vest in the condemnor until final confirmation and payment of the amount appraised, the owner may effectively convey or the condemnor may vacate or take a nonsuit any time prior to confirmation and payment;[167] and, the legislature can authorize the condemnor to decline taking the land even after final judgment.[168] Although the condemnor does not acquire the title until payment of the award of compensation, it is deemed owner from and its title, once perfected, relates back to the time of the commencement of the proceedings.[169] If the title of the purported owner is denied by the condemnor, the one claiming to own the land has the

[160] See N. C. GEN. STAT. §§ 40-14, -19, -22 to -24 (1950 and Supp. 1955); United States v. Burnette, 103 F. Supp. 645 (W. D. N. C. 1952).

[161] North Carolina State Highway and Pub. Works Comm'n v. Brann, 243 N. C. 758, 92 S. E. 2d 146 (1956); North Carolina State Highway and Pub. Works Comm'n v. Pardington, 242 N. C. 482, 88 S. E. 2d 102 (1955).

[162] Kinston v. Loftin, 149 N. C. 255, 62 S. E. 1067 (1908); Dickson v. Perkins, 172 N. C. 359, 90 S. E. 289 (1916); Luther v. Commissioners, 164 N. C. 241, 80 S. E. 386 (1913); State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905). As to cartways being condemned, notice and opportunity to be heard must be given to the owner as a prerequisite to the taking, for this is primarily a contest between individuals. Waldroup v. Ferguson, 213 N. C. 198, 195 S. E. 615 (1935).

[163] Luther v. Commissioners, 164 N. C. 241, 80 S. E. 386 (1913).

[164] Brown v. Doby, 242 N. C. 462, 8 S. E. 2d 921 (1955).

[165] Collins v. North Carolina State Highway and Pub. Works Comm'n, 237 N. C. 277, 74 S. E. 2d 709 (1953).

[166] State v. Lyle, 100 N. C. 497, 6 S. E. 379 (1888); see note 155 *supra*.

[167] Nantahala Power and Light Co. v. Whiting Mfg. Co., 209 N. C. 560, 184 S. E. 48 (1936); Caveness v. Charlotte, R. & So. RR., 172 N. C. 305, 90 S. E. 244 (1916); Abernathy v. South & W. Ry., 150 N. C. 97, 63 S. E. 180 (1908).

[168] State v. Floyd, 204 N. C. 291, 168 S. E. 222 (1933).

[169] *Ibid.*

burden of proving his ownership,[170] and the condemnor may show that the title is in some third person.[171]

Statute of limitations:

Property may be acquired by the state or condemnor by user or adverse possession for the requisite period, in addition to grant, dedication, or condemnation.[172] If the charter of the condemnor provides that all claims for compensation must be made within a certain time, this is a positive statute of limitations and bars all claims of parties sui juris not made within that time.[173] But if the statute or charter is silent as to when the claim for compensation must be brought, the owner may sue any time before the period for adverse possession or prescription has expired.[174]

GERALD CORBETT PARKER

Insurance—Automobile Liability Policies—Proportionate Distribution for Multiple Claimants

Multiple claims arising under an automobile liability insurance policy, when the insured motorist is insolvent and the proceeds of the insurance fund are insufficient to cover all claims, have created a situation in which some of the claimants find that instead of receiving compensation for their injuries, they will receive only a valueless judgment against the tortfeasor.

This situation is growing; one has only to look at the records to see that deaths and injuries on our highways are increasing; that judgments are larger, resulting in a corresponding increase in settlements. The coverage of insurance policies is relatively small in comparison to these increases.

To illustrate, suppose that A, the insolvent motorist, negligently col-

[170] Fuller v. Elizabeth City, 118 N. C. 25, 23 S. E. 922 (1896).

[171] Abernathy v. South & W. Ry., 150 N. C. 97, 63 S. E. 180 (1908). A trap was laid for the title searcher in Norman Lumber Co. v. United States, 223 F. 2d 868 (4th Cir. 1955), which held that the North Carolina statutes relating to recording and cross-indexing of judgments have no application to federal judgments of condemnation. This means that the title lawyer must inquire at the office of the Clerk of the United States District Court before his title is cleared. As to parties other than the United States, condemnation judgments must be recorded and cross-indexed in the office of the superior court clerk of the county in which the land is located, but judgments are recorded as special proceedings judgments and are exempt from the requirements as to registration of deeds. Carolina Power & Light co. v. Bowman, 228 N. C. 319, 45 S. E. 2d 531 (1947). Nevertheless, such judgments must include a description of the land and the estate or interest secured by the condemnor. Beal v. Durham & C. R. R., 136 N. C. 298, 48 S. E. 674 (1904).

[172] Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344 (1915).

[173] Carolina Cent. R. R. v. McCaskill, 94 N. C. 746 (1886).

[174] Carolina & N. Ry. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Love v. Postal Telegraph-Cable Co., 221 N. C. 469, 20 S. E. 2d 337 (1942).

lides with another automobile driven by B. B was not at fault. Guests X, Y and Z in A's car were seriously injured. Guests M and N in B's car were killed. B was seriously injured. A has a liability policy with a coverage of $5000 for injuries to any one person and $10,000 for any one accident. X settled for $3500. M's estate settled for $6000. N's estate secured a judgment for $10,000, receiving $500 from the insurer, as the balance due on its liability under the policy. B and Z have already started their respective suits but have not received a judgment. Y, who suffered a back injury, has not commenced his suit because he is partially paralyzed and the full extent of this paralysis cannot be determined until sometime in the future. Therefore, under the principle, "first come, first served" which apparently prevails in this State,[1] X and M's estate are paid in full, and N's estate got only $500 of the $10,000 judgment. B, Z and Y will receive nothing of the proceeds of the insurance fund.[2]

An unfortunate, collateral aspect of the situation of multiple claims, arising out of an accident when the insurance is insufficient and there is an insolvent motorist, is that the insurer possesses the power to force inequitable settlements upon claimants with a threat of preference to the others if anyone of them does not submit. For example, suppose that X, Y and Z are injured by the negligence of A, the insolvent, insured motorist. A's policy covers up to $10,000 for any one accident. X, Y and Z are willing to settle for $6000 each, even though they stand a good chance of getting more in a court action. The insurer approaches each claimant in turn and threatens to pay the insurance proceeds to the other claimants, if he does not settle for $3000. X, Y and Z submit to this pressure. Therefore, the insurer has saved itself $1000 plus the cost of defending an action brought by any of the claimants.

North Carolina has realized the need to protect innocent, injured parties from the financially irresponsible motorist.[3] It is not the purpose

[1] While no case has arisen in this State involving a liability insurance policy, priority in judgments is recognized in N. C. GEN. STAT. §§ 1-215, 1-233 (1953) and 44-40 (1950). Since settlements are allowed by statute, N. C. GEN. STAT. § 1-540 (1953), a reasonable deduction would be that payment of settlements could be made in preference to subsequent judgments.

[2] This is only one of many possible combinations of claims involving serious injuries and death. This illustration is indicative of such combinations.

A similar situation is possible in a separate and distinct suit by a parent for the loss of services of a child. Automobile Underwriters v. Camp, 109 Ind. App. 389, 32 N. E. 2d 112 (1941). North Carolina allows such a suit. Ellington v. Bradford, 242 N. C. 159, 86 S. E. 2d 925 (1955).

That a husband or wife may not maintain a separate suit for loss of consortium, mental anguish, nursing and care, or any other damage that the injured spouse might recover in an action against the tort-feasor. Helmsteller v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945) (suit by husband); McDaniel v. Trent Mills, 197 N. C. 342, 148 S. E. 440 (1929) (suit by wife). See Note, 29 N. C. L. REV. 178 (1950) (loss of consortium).

[3] N. C. GEN. STAT. §§ 20-279.1-.39 (1955), known as the Motor Vehicle Safety-Responsibility Act of 1953 (hereinafter referred to as the Responsibility Law). See Survey of Statutory Changes, 31 N. C. L. REV. 420 (1953).

A survey of other plans now in effect throughout the United States and Canada

of this note to discuss the sufficiency of the coverage required under the Responsibility Law, but rather to suggest a solution to the situations under the existing forms of liability policies. The solution, the writer feels, must provide for some method of proportionate distribution of the insurance fund among the various claimants.

Pro Rata Distribution—Argument Against:

The courts' argument against ratable distribution is that such a procedure would eliminate settlements and require the reduction of all claims to judgments, in order to determine judicially what the pro rata share shall be, thereby increasing litigation; that such a change would make it necessary for the insurance company to ascertain, before it could safely pay anyone, how many persons might have claims on the policy and what the total amount of judgments which might be presented would be.[4]

In answer to contentions that failure to allow ratable distribution results in inequitable preferences and is contrary to public policy, the courts have said that since the insurance policy does not disallow settlements, equitable results may be reached in this manner.[5]

Statutes are in force in these jurisdictions which have refused pro rata distribution, requiring that the form of automobile insurance policy must be one of a *liability* form, instead of the *indemnity* form. Under the liability form, the insurer is liable regardless of the solvency or insolvency of the insured, and it is not a condition precedent to the insurer's liability that the insured make satisfaction of a judgment obtained against the insured. In other words, the injured person may maintain an action on the policy of insurance against the insurer upon its failure to pay a judgment received against the insured; that is, coverage attaches when liability attaches, regardless of actual loss by the insured at the time, and the coverage inures to the benefit of the party injured.[6]

The courts have answered the contention that these statutes require, by their nature, pro rata distribution, by saying that the absence of a provision in these statutes for proportionate distribution does not lend itself to a construction that these statutes include the same and that it is

may be found in Plummer, *Uncompensated Automobile Accident Victim*, 1956 INS. L. J. 459; Note, 66 HARV. L. REV. 1300 (1953).

[4] Pisciotta v. Preston, 170 Misc. 376, 10 N. Y. S. 2d 44 (1938); Stolove v. Fidelity & Casualty Co., 157 Misc. 106, 282 N. Y. S. 263 (1935); Bruyette v. Sandini, 291 Mass. 373, 197 N. E. 29 (1935); Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933).

[5] Bruyette v. Sandini *supra* note 4; Bartlett v. Travelers' Ins. Co. *supra* note 4.

[6] The liability form is required in North Carolina. See, N. C. GEN. STAT. § 20-279.21 (1955) (Responsibility Law); All other automobile insurance policies which are not held to meet the Responsibility Law are of the liability form through the power of the Insurance Commission to regulate. N. C. GEN. STAT. § 58-9 (1950). See also, Hall v. Harleysville Mutual Casualty Co., 233 N. C. 339, 64 S. E. 2d 160 (1951).

not the power of the courts to legislate.[7] Further, the courts have emphasized that under the terms of the contract, in which the insured is forbidden to settle any claim, except at his own cost, and which accords the insurer the exclusive right to adjust such claims,[8] to disallow settlements would be a breach of the contract and would materially prejudice the insured and leave him at the mercy of the jury. The courts further pointed out the advantages[9] to be gained from settlements by all parties concerned, as outweighing the disadvantages.[10]

It is apparent from the courts' argument that the main objection to proportionate distribution would be the termination of settlements. They feel that reduction in litigation is to be valued above equality.

Pro Rata Distribution—Argument For:

In the case of *Century Indemnity Co. v. Kofsky*,[11] an action in equity, the court allowed the insurer, under a liability policy, to interplead the claims of four judgment creditors arising under the policy, and the court further provided for a proportionate distribution of the proceeds among the judgment creditors, regardless of the time when actions were commenced or judgments rendered. The Chief Justice, who wrote the opinion of the court, in dictum, said, "The exigencies of this case do not require that we deal at large with the various situations which might be presented where several parties suffer injuries by reason of a single accident and the total amount recovered against the insured exceeds the limits of the obligation of the insurer. Such a contingency seems not to have been contemplated when the statute in question was enacted,[12] and it is a matter which might well have the attention of the Legislature, as it has in New York, for instance, in a particular class of cases.[13] We would, in the absence of strong considerations to support such a ruling, be reluctant to apply legal principles which would recognize any priority between the judgment creditors."[14]

[7] It was further stated that to give these statutes the construction sought would also restrain the motorist or the Secretary of State, depending on whether the motorist furnished cash or bond, instead of a liability insurance policy, from utilizing the funds so created as a means of compromising any claim arising out of the negligent operation of a motor vehicle even to the extent of exhausting the entire fund.

[8] This same provision appears in policies issued in this State.

[9] (1) As compensation to the injured party without the delay, expense, inconvenience, anxiety and uncertainty of result attendant upon pursuit of litigation; (2) Relief of the insured from similar annoyances; and (3) The benefit to the insured and the insurer of settlement below maximum coverage.

[10] Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933).

[11] 115 Conn. 193, 161 Atl. 101 (1932); *Accord*: Underwriters for Lloyds of London v. Jones, 261 S. W. 2d 686 (Ct. App. Ky. 1953).

[12] The court is here referring to the statute which makes all automobile insurance policies of the liability form and makes the insurer liable regardless of the solvency or insolvency of the insured.

[13] This particular class of cases is discussed later in this note.

[14] Century Indemnity Co. v. Kofsky, 115 Conn. 193, 197, 161 Atl. 101, 103 (1932).

Pro Rata Distribution—Allowed:

Several states, New York the leader, by statute,[15] have provided for ratable distribution of insurance proceeds in the case of motor vehicles for hire, applicable only in cases where the insured is either bankrupt or insolvent.[16] In the case of *Bleimeyer v. Public Service Mut. Casualty Ins. Corp.*,[17] Cardozo, C. J., set out the appropriate procedure by which ratable distribution is to be made under the statute. It is first required that a claimant secure a judgment in an action at law; then this same claimant is to bring an action in equity, on behalf of himself and all the other claimants, for an interlocutory judgment requiring other judgment creditors to prove their claims within a stated time if they wish to share in the fund. If claims are in litigation, but have not yet been reduced to judgment, there is a reasonable allowance of time, six months, or a year, or whatever other period is fair in the light of all the circumstances, within which claims are to be perfected. When the allotted time elapses, final judgment is rendered for the proportionate distribution of the fund, according to the amount of their respective judgments, among the judgment creditors entitled. It was further set out that the action in equity for the interlocutory judgment does not have to be postponed until the other claimants' rights are barred by the Statute of Limitation.

In a similar case,[18] involving a similar statute, the court held that the policy of insurance is for the benefit of all, but that a claimant has no right to rely upon other claimants or the insurer to protect his interest in seeing that the fund is apportioned, and that under circumstances which to his knowledge show him that they are not acting for him, in the absence of any collusion between the insurer and the other claimants, he has the duty to exercise reasonable diligence to prosecute his own claim, so as not to lead the insurer to believe that he has abandoned his claim. In which case, if he fails to act, he is precluded from recovery by laches.

From Whom the Remedy Must Come:

In those jurisdictions which have refused to pro rate the insurance fund, the courts have uniformly held that, in the absence of an express provision, the policy cannot be construed to include proportionate distribution. This has even been true of jurisdictions which have passed the "motor vehicle for hire" acts when the statute does not provide for ratable distribution.[19] It is interesting to note that in all these cases

[15] N. Y. HIGHWAY LAW § 282-b, *transferred to* VEHICLE AND TRAFFIC LAW § 17.

[16] Frank v. Hartford Acc. & Indemnity Co., 136 Misc. Rep. 186, 239 N. Y. S. 397 (1930).

[17] 221 N. Y. S. 794, 165 N. E. 286 (1929).

[18] Darrah v. Lion Bonding & Surety Co., 200 S. W. 1101 (Tex. Civ. App. 1918).

[19] O'Donnell v. New Amsterdam Casualty Co., 50 R. I. 275, 146 Atl. 770 (1929); Turk v. Goldberg, 91 N. J. Eq. 283, 109 Atl. 732 (1920).

the *Bleimeyer* case was distinguished because of its statutory provision for ratable distribution, but the courts never denounced its equitable advantage.

The Supreme Court of North Carolina has never ruled upon this question of ratable distribution. The views of the courts of other jurisdictions, that they will not rewrite the insurance contract to include pro rata distribution, probably explain counsels' reluctance to seek such relief.[20]

Therefore, the writer feels that if relief is to come, it will have to be by act of the Legislature.[21]

There are, the writer feels, certain justifications in our statutes and the purposes for which they were passed for finding that all injured parties have a beneficial interest in the proceeds of the insurance fund to such an extent that the Legislature would be warranted in requiring all such insurance policies to include a provision for pro rata distribution of the proceeds in the case where multiple claims arise out of a single accident, or the Legislature may say in the statute that all policies carry this implication.

The change over from indemnity to the liability form of policy, under which the latter provides that the insurer is liable upon the adjudication of a claim against the insured and gives the injured party a right of action against the insurer if he does not meet this obligation;[22] the purpose[23] of the Responsibility Law to protect injured parties from financially irresponsible motorist; the provisions under the Responsibility Law prohibiting the insurer from cancelling the policy after the accident has occurred by any agreement with the insured, or from defeating the policy because of a statement made by the insured or on his behalf, or from voiding the policy for a violation by the insured,[24] give support to a construction that *all* injured parties have a beneficial interest in the proceeds of the insurance.

Compromise:

The position of the courts that ratable distribution would disallow settlements is not without merit.[25] But this position is based upon the

[20] No recent cases in other jurisdictions have been found.

[21] Possibly the relief could come through action by the Insurance Commissioner under his statutory power to regulate the form of insurance policy which shall be used in this State. See, N. C. GEN. STAT. § 58-9 (1950).

[22] See note 6 *supra.*

[23] N. C. GEN. STAT. §§ 20-225 (1950) and 20-279.38 (1955).

[24] N. C. GEN. STAT. § 20-279.21 (1955).

[25] N. C. GEN. STAT. § 20-279.21 (1955) specifically provides for settlements. However, the writer feels that equality should not be subordinate to a maxim advocating reduction in litigation, no matter what the cost.

The justice of proportionate distribution of limited funds is well recognized. Terry v. Little, 101 U. S. 216, 25 L. Ed. 864 (1879); Monmouth Lumber Co. v.

assumption, it seems, that proportionate distribution requires that all claims be perfected through an action of law. This is the procedure required under the "motor vehicle for hire" acts.

However, the writer feels that an equitable solution can be reached which provides for ratable distribution and settlement and which maintains a balance between and retains the advantages and equities of both.

Suggested Solution:[26]

A statute could be passed providing that:

1. When the multiple claim, insufficient insurance situation arises, there will be a pro rata distribution of the insurance fund, according to the amount of the claimants' respective settlements or judgments, without regard to when either were obtained.

The statute should set out certain criteria for determining when a multiple claim situation arises from which it will be necessary to pro rate the insurance fund. For example, the provisions of the statute may be made to apply only when three or more persons, other than the insured (or one of the insured, if there are two or more automobiles involved and the motorists are insured), of which two or more of such persons are either killed or injured to such an extent that each is required to be hospitalized for more than a certain number of hours.[27]

2. When the multiple claim situation arises, the insurer shall have the right to settle any and all claims, but the insurer shall not be permitted to discharge such settlement.[28] Instead, the claimant should be allowed

Indemnity Insurance Co., 21 N. J. 439, 122 A. 2d 604 (1956) (citing the *Kofsky* case, note 11 *supra*, and quoting the dictum of the Chief Justice in that case).

The provision of N. C. GEN. STAT. § 20-279.34 (1955) calling for assigned risk plans indicates the willingness of this State to pro rate to bring about an equitable solution. See also, N. C. GEN. STAT. § 44-11 (1950) (pro rata distribution on subcontractors' liens).

[26] Illustrations will be based on the hypothetical case set out at the beginning of this note. The insurance coverage will be $5000/$10,000 because this is the minimum allowed under the Responsibility Law. B, Y and Z received judgments of $4000, $15,000 and $6500, respectively.

[27] The suggestion, applying the statute only to the situation when two or more persons are either killed or hospitalized for more than a certain number of hours, is to eliminate those accidents in which the injuries are not serious, or if only one is serious, and the insurance fund will be sufficient to cover all claims.

This suggestion, however, will have the effect of restricting settlements in a non-serious accident to the extent that such cannot be made until it can be determined that a multiple claim accident under the statute is not involved; in other words, until the time of hospitalization has passed it will be impossible to determine whether or not a multiple claim situation arising under the statute is present. However, there is no serious objection to such a short delay because fast settlements should be scrutinized. In fact, many states have statutes prohibiting settlements until a certain length of time has expired after an accident.

[28] This provision should eliminate most of the power in the hands of the insurer to force inequitable settlements upon claimants with threats of preference.

For example, under the hypothetical case in which the total of all claims was $45,000, each claimant's proportionate share of the $10,000 insurance fund would be as follows: B, $888.90 ($4000); M, $1333.34 ($6000); N, $2222.22 ($10,000); X, $777.80 ($3500); Y, $3333.34 ($15,000); Z, $1444.40 ($6500).

an advancement upon his settlement.[29] Such advancement should be determined by the court, based upon the facts and circumstances of each case.[30] When this amount is determined, the insurer is notified that it is to pay the amount of the advancement.

3. A procedure for effecting the pro rata distribution should be established. The writer feels that the use of the interlocutory judgment under the New York statute[31] in the *Bleimeyer* case is basically a good one. The statute should provide a definite time in which such a suit in equity[32] must be brought, and such time should be as soon as possible after the accident.[33] An additional provision is needed to meet the contingency whereby the suit for the interlocutory judgment is not brought within the prescribed time.[34]

4. There shall be a right to appeal by any party, plaintiff or defendant, from any judgment rendered in an action at law.[35]

5. There shall be an alternative right of claimants to enter into a voluntary agreement among themselves for proportionate distribution.

6. The proportionate distribution of the insurance fund shall not relieve

[29] There are, the writer feels, two major reasons why an injured party is willing to settle. One is that he is uncertain and in doubt that he can recover in an action at law. The other is that the injured party or his family, in case of death, needs immediate cash to meet the expense of the necessities of life.

When the latter reason is the motivating factor, there would be no inducement to the injured party to settle if he could not get this immediate relief. Therefore, a provision for an advancement on his settlement should be able to meet this situation.

[30] For example, under the hypothetical case, X settled for $3500, and M settled for $6000. An advancement might be computed by taking the amount of the settlement, divided by twice the number of persons injured. Therefore, X would receive around $290, and M would receive $500. Of course, the advancement would be credited against the claimant's final proportionate share. The court, the writer feels, should be given the power, in their discretion, to determine the formula for such advancements, depending on the facts and circumstances of each case.

[31] See note 15, *supra*.

[32] The statute could provide that the suit in equity for the interlocutory judgment may be brought by any claimant, on behalf of himself and all the other claimants, or by the insurer.

Cost of this suit should be divided among the claimants. Cost for services in bringing the suit, the writer feels, should be set by the court upon a *quantum meruit* basis.

[33] The interlocutory judgment should direct that all claims be perfected by a certain, fixed date, in order for a claimant to be entitled to share in the pro rata distribution of the fund.

However, the date of distribution should be soon enough after the accident—that the insurer will not get a new power to force settlements in order that a claimant may get an advancement.

Some provision may prove to be needed for allowing review of a settlement where it appears the settlement is excessive in proportion to the claimant's injury. However, except in cases of a fraudulent scheme between an insurer and one of the claimants, such a provision is needless, since the original amount of the settlement should still be good against the insured as representing an excess due over the proceeds of the insurance fund.

[34] The statute may provide that it is the duty of the insurer to bring this action in equity if a claimant has not done so within the prescribed time.

[35] Some provision will be needed to define how a claimant's share will be set aside until final judgment is rendered.

the insured from liability for that amount due claimants in excess of the obligation of the insurer.

7. The proportionate distribution of the insurance fund shall not relieve the insurer from his duty to defend all suits against the insured, when the policy of insurance so provides.

The writer feels that this addition to our insurance law will bring North Carolina one step closer to better protection of innocent parties from the irresponsible motorist and to realization of equality for all.

BENJAMIN S. MARKS, JR.

Insurance—Soliciting Agent—Waiver of Initial Policy Provisions

In the case of *Life and Casualty Ins. Co. of Tennessee v. Gurley*,[1] recently before the Fourth Circuit of the United States Court of Appeals, the court was faced with the question of whether a valid insurance contract had come into existence. The applicant had made application[2] for a plan of life insurance calling for a $99.00 quarterly premium. The premium was paid at the time of application and a receipt[3] given. A policy of the plan applied for was issued, but at a quarterly premium of $122.00, the applicant having been given a "Class B" rate. The applicant refused to pay the premium increase or accept the policy, and requested the local agent to get the policy issued at the standard rate.[4]

[1] 229 F. 2d 326 (4th Cir. 1956). The district court decision appears in 132 F. Supp. 289 (1955).

[2] The application was signed by the applicant and stated in part, "3) With the exception of officers of the Company, notice to or knowledge of the agent, medical examiner or any other person is not notice to or knowledge of the Company unless stated in either Part A or B of this application, and none of such persons are authorized to accept risks or pass upon insurability, nor shall any of such persons have the power on behalf of the Company to make or modify any contract on behalf of the Company or to waive any of the Companies rights or requirements." The policy contained the following provision. "ENTIRE CONTRACT . . . only the President, a Vice-President, Secretary, and Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract." And on the back of the policy, "NOTICE TO POLICYHOLDERS . . . The Company's agents have no authority to alter or amend the Policy, to accept premiums in arrears, or to extend the due date of any premium."

[3] The receipt stated in part, "If this sum is equal to the first full premium on the policy applied for then if the Company shall be satisfied that at the time of completion of the medical examination or Part B of the application, if no medical examination is required, that the risk was acceptable to the Company under its rules, for the plan and amount of insurance herein applied for at the rate of premium, declared paid, then the insurance shall be in force as of the date of completion of the medical examination, or of Part B of the application if no medical examination is required, but otherwise no insurance shall be in force under said application unless and until a policy has been issued and delivered and the first full premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant. The above sum shall be refunded upon request if the application is declined or if the policy is issued other than as applied for and is not accepted by the applicant."

[4] The district court record reveals that the applicant was at one time a life insurance salesman. Transcript of Record, Page 20, 132 F. Supp. 289 (1955). Question addressed to Mrs. Gurley, wife of applicant. "Q. Mr. Gurley as a matter of fact used to be a life insurance salesman? A. Yes, Sir."

The policy was returned to the company, but was sent back to the agent with the premium rate unchanged. The applicant, knowing the agent was going to Greensboro, requested the agent to speak to company officials. The company again refused to lower the premium rate. Upon returning home the agent telephoned the applicant and informed him of the companys' refusal. The applicant then stated that he would take the policy as it was issued. Early the next morning the applicant died.[5] The policy had not been delivered nor had the premium increase been paid.

The case, by virtue of the Erie Doctrine,[6] was based on North Carolina law. The circuit court ruled that a valid insurance contract had come into existence once the applicant had verbally accepted the policy, and held the company liable. In the course of its decision the court stated, "Apparently, a soliciting agent, in North Carolina, has the power to waive certain written conditions and requirements connected with the inception of the insurance contract and the payment of the first premium, though not as to subsequent premiums nor as to the coverage of the policy."[7] As authority for this statement the circuit court cites the North Carolina cases of *Foscue v. Greensboro Mutual Life Ins. co.*[8] and *Burch v. Provident Life and Accident Ins. Co.*[9]

It is settled law in North Carolina that the local agent of a life insurance company is a *soliciting* agent[10] rather than a *general* agent.[11] The importance of the local life insurance agent today would warrant a close inspection of the North Carolina cases, and especially the circuit court's interpretation of the *Foscue* and *Burch* cases, involving the question of the power of such an agent to waive premium payments contrary to his authority as stated in the policy and application.

[5] The applicant died on September 18, 1952. The Transcript of Record Page 16 132 F. Supp. 289 (1955) reveals that on September 16, 1952, one day prior to the applicant's verbal acceptance, applicant consulted a doctor, was given a cardiogram, and advised, "To stay at home for a few days and see how he would feel."

[6] Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938).

[7] Life and Casualty Ins. Co. of Tennessee v. Gurley, 229 F. 2d 326, 330 (4th Cir. 1956). This case also involves interesting questions on constructive delivery, what acts constitute waiver by agent or company, and delivery in good health. This note will be limited to the question of the agent's power to waive premium payments.

[8] 196 N. C. 139, 144 S. E. 689 (1928).

[9] 201 N. C. 720, 161 S. E. 313 (1931).

[10] 16 APPLEMAN, INSURANCE LAW AND PRACTICE Sec. 8696 (1945), "A general agent ordinarily passes on risks, issues policies, and may vary the terms of the written contract. A soliciting agent, on the other hand, merely procures application, forwards them to the home office, collects premiums, delivers policies, and is without authority to issue policies." See also 29 AM. JUR. *Insurance* Sec. 96 (1940); 44 C. J. S. *Insurance* Sec. 152 (1945).

[11] Hicks v. Home Security Life Ins. Co. 226 N. C. 614, 39 S. E. 2d 914 (1946); Jones v. Gates City Life Ins. Co. 216 N. C. 300, 4 S E. 2d 848 (1939); North Carolina Bank and Trust Co. v. Pilot Life Ins. Co. 206 N. C. 460, 174 S. E. 289 (1934); Thompson v. Equitable Life Assurance Soc. 199 N. C. 59, 154 S. E. 21 (1930).

In the *Foscue* case, the insured had taken out an accident insurance policy with the defendant in 1925. The policy called for a monthly premium of $3.40, paid in advance, and stated that the agent did not have authority to extend the time of premium payments. The insured was unable to pay the premium due in August, 1926. Defendant's agent told the insured that if he would take out another policy he, the agent, would extend the time of payment of the premium on the accident policy until the insured's next pay day. The insured was accidently killed, the premium on the accident policy not having been paid up to his death.

The court, in holding that the insurance company was not liable on the accident policy, stated that waiver could be established by: (1) express agreement, (2) conduct or a course of dealings, or (3) ratification. The decision makes it clear that the acts which constitute the waiver must be acts of the company, not of the agent.[12] The agent cannot, by his own acts, enlarge his power beyond that stated in the policy. The binding effect of the non-waiver provision in the policy was again indicated when the court took notice of the fact that the agent was not an officer of the company, but only a local agent for selling insurance and collecting premiums. Under the non-waiver provision, only executive officers of the company were permitted to change the policy. The only mention of the local agent's power to waive conditions at the inception of the contract, which would include the first premium, was by way of dictum. The court stated, "The restrictions inserted in the contract upon the powers of the agent to waive any conditions unless done in a particular manner cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered the policy and accepted the premium with full knowledge of the situation."[13] The authority for this dictum is a case involving the *general* agent of a fire insurance company.[14] The court thus applies a principle of law developed in a case concerning a general agent to a case dealing with a soliciting agent.

In the *Burch* case, the insured had taken out a policy with the defendant in 1923 covering accidental death by automobile. The insured failed to pay the premium due July 17, 1929, and was killed in an automobile accident on July 31, 1929. There was evidence to the effect that defendant's agent had, in the past, extended the time of premium payments and accepted payment beyond the due date. The plaintiff, by this evidence, was attempting to establish a course of dealings and thereby show waiver by the agent of the condition in the policy calling for pre-

[12] Foscue v. Greensboro Mutual Life Ins. Co., 196 N. C. 139, 141, 144 S. E. 689, 690 (1928), "The powers of the agent as expressed in the policy may be enlarged by usage of the Company, its course of business, or by its consent, express or implied."

[13] *Ibid.*

[14] Johnson v. Rhode Island Ins. Co. 172 N. C. 142, 90 S. E. 124 (1916).

payment of premiums. The agent was engaged in the general insurance business, selling automobile liability, accident, health and fire insurance. It is not clear whether the agent was acting as a general or soliciting agent. The court denied the plaintiff's claim, holding that even though a course of dealings between the agent and insured can be shown, it is necessary to prove that the defendant company had knowledge of such dealings.[15] The court pointed out that to establish waiver by ratification, the ratification must be by the defendant company, not by the agent.

Again, the only comment of the court concerning agreements made by the agent at the inception of the contract was by way of dictum. The court states: "At the outset it must be borne in mind that there is a vital and fundamental distinction between liability arising from agreements made by the agent of an insurance company at the inception of the contract and that arising from agreements made by the agent with the insured after the contract has taken effect, resulting in the modification of the terms and conditions of the written engagement of the parties."[16] The authority cited for this dictum is the *Foscue* case.

Summarizing the *Foscue* and *Burch* cases, both deal with the question of an insurance agent's power to waive conditions *subsequent* to the existence of a binding insurance contract; in both cases the only mention of an insurance agent's power to waive conditions at the inception of the contract is by way of dicta and the authority for the dicta is a case involving a general agent of a fire insurance company; and lastly, in only one of the cases is it clear that the agent is a soliciting agent of a life insurance company.

From the foregoing dicta it might appear that should the question of a life insurance soliciting agent's power to waive conditions at the inception of the contract and particularly pre-payment of the first premium, ever come before the North Carolina court, the court would follow the dicta in the *Foscue* and *Burch* cases. That such a result would not be reached is indicated by the case of *North Carolina Bank and Trust v. Pilot Life Ins. Co.*,[17] in which the soliciting agent of the defendant had delivered the policy to the insured for inspection. The premium had not been paid and the agent made it clear that the policy would not be in effect until payment of the premium. When applicant died, he still possessed the policy but had never paid the premium. The court denied the plaintiff's claim, posing itself the following question: Can a soliciting

[15] Burch v. Provident Life and Accident Ins. Co., 201 N. C. 720, 724, 161 S. E. 313, 315 (1931), "It is contended that the evidence discloses a course of dealings between the insured and the agent of the insurer with respect to the payment of the premium, but there is no evidence that the defendant Company had knowledge of such course of dealings other than such knowledge as would be imputed to it through its local agent, nor is there evidence of ratification, as defined by law, on the part of the defendant."

[16] *Id.* at 722, 161 S. E. at 314.

[17] 206 N. C. 460, 174 S. E. 289 (1934).

agent for a life insurance company deliver a policy and waive payment of the *first* premium or extend credit for the payment thereof when both the application and policy provide that the contract of insurance shall not become effective until the first premium has been paid; and further that only executive officers as specified shall have power to alter or modify the contract?[18] (Emphasis added.)

In answering this question, the court cites the *Foscue* and *Burch* cases and states: "Both of these cases hold that the local or soliciting agents, as such, have no authority to extend credit to the insured or to waive the premium provided in the policy or extend the time of payment thereof."[19]

Thus, the North Carolina court either ignores or differently interprets its previous dicta, and comes to a conclusion diametrically opposed to the circuit court in its interpretation of the same two cases.

Considering the *Foscue* and *Burch* cases involving waiver of premiums subsequent to a binding contract, in conjunction with the *Bank and Trust Co.* case involving waiver of the first premium, it would seem that the North Carolina court intends to treat the power of a soliciting agent to waive first or a subsequent premium the same; i.e., a soliciting agent does not have the power to waive payments or extend the time of payment of premiums contrary to the terms of the policy.

A further indication that the North Carolina court will, in the future, hold that a soliciting agent cannot waive payments as prohibited in the policy is found in the North Carolina court's citation in the *Bank and Trust Co.* case of *Curtis v. Prudential Co. of America.*[20]

This case was decided by the fourth circuit and arose in North Carolina, but since it was decided prior to the *Erie Railroad Co.* case, was not based on North Carolina law and was not binding on the circuit court in the *Gurley* case. The facts of the *Curtis* and *Gurley* cases are very much the same. In the *Curtis* case, the insured had paid almost half of the first quarterly premium. On the day prior to the insured's death, the beneficiary offered to pay the remaining premium but defendant's soliciting agent told her it was not necessary, that the policy was in force for another month. The policy had never been delivered. The circuit court refused to hold the insurance company liable, giving binding effect to the provisions in the policy that the policy would not be effective until delivery and payment of the premium. The court said, "The provisions that a policy of life insurance shall not take effect unless the first premium is actually paid during the lifetime of the person insured, is valid and will be enforced according to its terms."[21] To support its position, the court cites a North Carolina case.[22]

[18] *Id.* at 463, 174 S. E. at 300.
[19] *Ibid.*
[20] 55 F. 2d 97 (4th Cir. 1932).
[21] *Id.* at 99.
[22] Sturgill v. New York Life Ins. Co., 195 N. C. 34, 141 S. E. 280 (1928).

> At the time, the fourth circuit court defended the result thusly: "We believe this to be a wholesome rule, because it is clearly apparent that the business of life insurance, which is too important a part of our civilization in this latter-day world, could not be carried on were the insurance companies bound by every act or statement of a local agent; especially one whose duty is mainly that of soliciting or collecting. If it were otherwise, great injustice would follow, and a great loss be imposed upon holders of life insurance policies, because of the increased burden upon the companies that would result. While the courts are careful, in every way, to protect the interests of beneficiaries under insurance policies, yet there is a limit which should not be exceeded. The reasonableness of the respective contentions should be the yardstick with which to measure the justice of the matter."[23]

Whether the North Carolina court will now interpret its decisions and dicta as the fourth circuit court of appeals did in the instant case, or will continue to enforce the insurance contract as written, remains to be seen. To the writer it seems that the policy announced by the court in the *Curtis* case is patently sound.

ROBERT M. HUTTAR

Labor Law—Right to Distribute Union Literature on Company Property

In *NLRB v. Babcock & Wilcox Co.*,[1] the Supreme Court of the United States reversed the National Labor Relations Board in three cases[2] and held that union organizers who are nonemployees do not have the right to distribute union literature on company property where there are other means of communicating with the workers available to the union and there has been no discrimination by the company.

The opinion handed down by Mr. Justice Reed for a unanimous Court said: "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."[3]

The plants, in all three cases, were located within one mile of the

[23] 55 F. 2d 97, 99 (1932).

[1] 351 U. S. 105 (1956).

[2] Babcock & Wilcox Co., 109 N. L. R. B. 485 (1954), *enforcement denied*, 222 F. 2d 316 (5th Cir. 1955), *aff'd*, 351 U. S. 105 (1956); Ranco, Inc., 109 N. L. R. B. 998 (1954), *enforcement granted*, 222 F. 2d 543 (6th Cir. 1955), *rev'd sub nom.* NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956); Seamprufe, Inc., 109 N. L. R. B. 24 (1954), *enforcement denied*, 222 F. 2d 858 (10th Cir. 1955), *aff'd sub nom.* NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956).

[3] NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 113-14 (1956).

nearest town, where a substantial number of the employees lived, and all the workers of each plant lived within a radius of thirty miles from work. In each case the company had enforced a nondiscriminatory rule prohibiting nonemployees from distributing literature on the company property. The usual methods and channels of communication were open to the union, including mail, newspapers, radio and personal interviews.[4]

The Board found violations of section 8 (a) (1)[5] of the National Labor Relations Act[6] in that the employers had interfered with the employees in their exercise of rights under section 7[7] of the act by not allowing the union organizers to distribute literature on the company owned parking lots. The Board concluded that the organizers could not readily distribute their literature away from the plant area, and ordered the employers to allow union organizers limited access to the parking lots.[8]

The Board based its decisions on its reasoning in *Le Tourneau Co.*[9] In that case, two employees were suspended two days for distributing union literature on their own time on company owned property. This was in violation of a company rule of long standing against the distribution of literature by anyone, adopted prior to union organization activity. The Board decision, approved by the Supreme Court, clearly states the holding in that case: ". . . we are convinced and find, that the respondent in applying its 'no distribution' rule to the distribution of union literature by its employees on its parking lots has placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization. . . ."[10] Neither the Board nor the Supreme Court attempted to answer the question raised in *NLRB v. Babcock & Wilcox Co.* In fact, counsel for the Board itself said in the brief submitted to the Court on the review of *Le Tourneau:* "The facts in the instant case do not present and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots."[11] Yet, the Board in these three cases

[4] *Id.* at 113.

[5] 49 STAT. 452 (1935), as amended, 29 U. S. C. § 158 (a) (1) (1952): "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

[6] 49 STAT. 449 (1935), as amended, 29 U. S. C. §§ 151-68 (1952).

[7] 49 STAT. 452 (1935), as amended, 29 U. S. C. § 157 (1952): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . . ."

[8] Babcock & Wilcox Co., 109 N. L. R. B. 485, 486 (1954); Ranco, Inc., 109 N. L. R. B. 998, 999 (1954); Seamprufe, Inc., 109 N. L. R B. 24, 25 (1954); see note 2 *supra* for full citations.

[9] 54 N. L. R. B. 1253, *enforcement denied,* 143 F. 2d 67 (5th Cir. 1944), *rev'd sub nom.* Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945).

[10] *Id.* at 1262.

[11] Brief for Appellant Le Tourneau Co., p. 29, n. 17, Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945).

extended the principle of freedom of communication for self-organization to this situation, and refused to distinguish between employee and nonemployee union organizers.

The Supreme Court, however, did recognize a distinction between organizational efforts of employees and nonemployees, saying: ". . . an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."[12]

Looking at the decision from the standpoint of actual union organizational techniques, some question may be raised as to the true value of the distinction between the two types of organizers. The courts have recognized that the place of work is "uniquely appropriate for the employees full freedom of association."[13] In order for them to exercise their right of self-organization effectively, employees need outside aid.[14] "Thus, practical considerations dictate that the right of self-organization include the right to have outside organizers carry out solicitation activities."[15] The Supreme Court, however, did not consider this aspect of the situation controlling and apparently would look for circumstances more closely related to that of the isolated lumber camp,[16] where the employees live as well as work on the company property, before it would regard the plant site as "uniquely appropriate" for nonemployee organizational activities.

In contrast with the practical aspects of the situation, the counter-argument most likely to arise would be that of the owner's "right to exclude from property."[17] It is recognized of course that this right, inherent in ownership, must yield when it stands in the way of an equally important and valuable right of another.[18] The problem is a weighing of opposing rights. However, this disregard of an employer's property rights seems only to be allowed[19] where the union has encountered an

[12] NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 112 (1956).

[13] Republic Aviation Corp. v. NLRB, 324 U. S. 793, 801 n. 6 (1945); see Bonwit Teller, Inc. v. NLRB, 197 F. 2d 640, 645 (2d Cir. 1952), *cert, denied,* 345 U. S. 905 (1953): ". . . the place of work has been recognized to be the most effective place for the communication of information and opinion concerning unionization."

[14] See Thomas v. Collins, 323 U. S. 516, 534 (1945).

[15] Note, *"Not as a Stranger": Non-Employee Union Organizers Soliciting on Company Property,* 65 YALE L. J. 423, 427 (1956).

[16] NLRB v. Lake Superior Lumber Corp., 167 F. 2d 147 (6th Cir. 1948).

[17] NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 112 (1956).

[18] *Ibid.; accord,* Cities Serv. Oil Co., 122 F. 2d 149, 152 (2d Cir. 1941): "It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."

[19] See NLRB v. Stowe Spinning Co., 336 U. S. 226 (1949) (discrimination by the company against the union); NLRB v. Lake Superior Lumber Corp.,

"insuperable and unsurpassable hardship or difficulty in exercising some constitutional right."[20] The Court, unlike the Board, found no such countervailing hardship or difficulty here.

With this decision, the Supreme Court has more clearly defined the basic rule to be applied here. The employees' right to discuss self-organization among themselves, as set out in *Le Tourneau Co.*, has been reaffirmed.[21] In a situation where the employees spend the greater part of their living as well as working time on the company property, the employer may not prohibit the entrance of the union on the property for organizational activity.[22] Nor may the entry be prohibited where the company rule discriminates against the union.[23] But, as the Court ruled in the principal case, if the living quarters of the employees in town or country are within reasonable reach of the union, no nonemployee access to the company property has to be granted. Thus, the remaining question is the factual one of what combination of distances and proportions of employees will have to prevail before the employer is made to open his doors to nonemployee organizers.

HENRY H. ISAACSON

Labor Law—State Jurisdiction Over Picketing

While the extent of the jurisdiction of a state to enjoin peaceful picketing still remains uncertain,[1] the United States Supreme Court in a recent decision, *United Automobile Workers v. Wisconsin Employment Relations Board*,[2] made definite the power of a state to enjoin picketing or other employee activity which assumes the form of violence or coercion. The Court thus reaffirmed the reasoning in *Allen Bradley v. W.E.R.B.*[3] that otherwise an ". . . intention of Congress to exclude the states from exerting their police power must be clearly manifested."[4]

If the *U. A. W.* case had involved an employer seeking to prevent violence and destruction of property, by securing an injunction from a state court acting under its traditional police power to preserve the general order by preventing violence and breaches of the peace, the decision

167 F. 2d 147 (6th Cir. 1948); *cf.* NLRB v. Cities Serv. Oil Co., 122 F. 2d 149 (2d Cir. 1941)

[20] Brief for Appellee Babcock & Wilcox Co., p. 17, NLRB v. Babcock & Wilcock Co., 351 U. S. 105 (1956).

[21] NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 113 (1956) (dictum).

[22] NLRB v. Lake Superior Lumber Corp., 167 F. 2d 147 (6th Cir. 1948); Weyerhauser Timber Co., 31 N. L. R. B. 258 (1941).

[23] NLRB v. Stowe Spinning Co., 336 U. S. 226 (1949).

[1] See Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A. B. A. J. 415 (1956) for discussion of pre-emption problems arising from the Taft-Hartley amendments to the National Labor Relations Act.

[2] 351 U. S. 266 (1956).

[3] 315 U. S. 740 (1942).

[4] *Id.* at 749

of the Supreme Court would have conformed to the jurisdictional pattern which the Court apparently has been developing in recent cases concerned with federal-state relationship in labor disputes. In the *U. A. W.* case, however, more was involved than a state court exercising the police power which the National Labor Relations Act[5] does not preclude from state action. It invloved an administrative board acting under statutory authority from the state legislative body regulating labor-management relations.

The Kohler Company of Wisconsin and the appellant union reached an impasse in collective bargaining for a new contract. The production workers struck and picketed the premises of the company. The Kohler Co. filed a complaint with the Wisconsin Employment Relations Board charging the union and its members with the commission of unfair labor practices within the meaning of the Wisconsin Employment Peace Act.[6] On the authority of the Wisconsin Act, one provision of which made it an unfair labor practice for employees to engage in mass picketing and other coercive activities,[7] the state board ordered the union and certain members to cease and desist from a fairly inclusive list of activities which the board found to be coercive and intimidating. Simultaneously, the board issued positive regulations limiting the number and conduct of pickets. The board's order was enforced by a Wisconsin Circuit Court and the judgment was affirmed by the state supreme court[8] and the United States Supreme Court.[9]

While *Garner v. Teamsters Union*[10] denied the state's jurisdiction to enjoin peaceful picketing where the conduct of the union would constitute an unfair labor practice under the NLRA, state courts have continued to enjoin union activity where violence or intimidation is present as a valid exercise of the police power.[11] In the *Garner* case

[5] 49 STAT. 449 (1935), as amended 29 U. S. C. §§ 151-68 (1952), hereinafter referred to as NLRA.

[6] WIS. STAT. 111.01 *et seq* (1953). The Wisconsin Act is a comprehensive labor relations statute differing in parts and scope but generally patterned after the federal act and administered by an agency similar to the National Labor Relations Board.

[7] WIS. STAT. 111.06 (2) (1953).

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights including those guaranteed in sect. 111.04 or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"....

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

[8] U. A. W. v. W. E. R. B., 269 Wis. 578, 70 N. W. 2d 191 (1955).

[9] U. A. W. v. W. E. R. B., 351 U. S. 266 (1956).

[10] 346 U. S. 485 (1953).

[11] In Perez v. Trifilette, 74 So. 2d 100, 102 (Fla. 1954); *cert. denied*, 348 U. S.

itself, the Supreme Court carefully limited the decision to the facts presented by quoting from *Allen-Bradley v. W. E. R. B.*[12] that the state could still exercise " '. . . its historic powers over such traditionally local matters as public safety and order . . .' [and also stating that] nothing suggests the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority."[13] In *Erwin Mills v. Textile Workers Union*,[14] decided before *Garner*, but after amendments to the NLRA had determined that certain union conduct could be an unfair labor practice, the North Carolina Supreme Court found nothing in the NLRA or decisions of the United States Supreme Court[15] to prevent a state court from enjoining mass picketing or other violent conduct.[16]

In deciding the *U. A. W.* case, the United States Supreme Court conceded that the enjoined conduct was a violation of section 8 (b) (1) of the NLRA,[17] that the Kohler Company was subject to that act, and that the National Labor Relations Board[18] could have issued an order similar to the one issued by the state board. The appellant union argued that while a state may, within its police power and under its applicable criminal statutes, restrain and punish violence, it should not be permitted to exercise this reserved power through an agency concerned primarily with labor relations and operating under a state statute which seeks to effectuate a declared labor policy of the state. The Court, in rejecting this argument, said that the inclusion of unfair labor practices by unions in the NLRA did not make *Allen-Bradley* obsolete and that "The fact that Wisconsin has chosen to entrust its power to a labor

926 (1955), the Florida court said ". . . it seems settled that while states are precluded from applying their preventive labor law in controversies affecting interstate commerce, their power to preserve the peace remains intact even though it may be invoked in connection with a labor dispute."

[12] 315 U. S. at 749.

[13] Garner v. Teamsters Union 346 U. S. 485, 488 (1953).

[14] 234 N. C. 321, 67 S. E. 2d 372 (1951).

[15] The North Carolina court quoted at length from the so-called "Briggs-Stratton" case, International Union v. W. E. R. B., 336 U. S. 245, 253-54 (1949), where the United States Supreme Court upheld an order of the Wisconsin Employment Relations Board ordering a union and its members to cease from collectively engaging in intermittent work stoppages. The Court said: "While the federal board is empowered to forbid a strike when and because its purpose is one that the federal act made illegal, it has no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left to the states. . . . This conduct is governed by the states or it is entirely ungoverned." *Id.* at 328, 67 S. E. 2d at 379.

[16] ". . . nothing . . . interferes . . . with the right of a state to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by violence or the threat of violence, or to protect property and to safeguard its lawful use during a strike or labor dispute." *Id.* at 329, 67 S. E. 2d at 379.

[17] 61 STAT. 141 (1947) as amended 29 U. S. C. § 158 (b) (1) (1952).

[18] Hereinafter referred to as NLRB.

board is of no concern to this court."[19] Three justices dissenting argued that the majority was allowing a duplication of administrative remedies which the Court had disallowed in *Garner*. The dissent reasoned that the police power which the Court exempted from exclusive jurisdiction of the NLRB was that traditional power which a state could have exercised independently of any general state labor policy or specific legislation. Apparently the dissenters had no objection to the state protecting against the type of conduct in which the union had here engaged, so long as the state did not award administrative relief similar to that available from the NLRB.

The majority view, in so far as it allows the state to exercise its police power to prevent violence in labor disputes, confirms what it had already said in *Garner*.[20] However, by allowing Wisconsin to implement this power through a local administrative labor board, the Court takes a position which seems inconsistent with the federal-state jurisdictional relationship it had been developing in cases since the NLRA was amended in 1947. Although the *U. A. W.* case can be distinguished from *Amalgamated Association v. W. E. R. B.*,[21] since there was no issue of violent conduct in the latter, it would seem anomalous that a state is completely powerless to prevent a crippling strike in a vital public service affecting the community at large, and yet, may invoke the full weight of its labor regulation machinery in an isolated case of mass picketing or intimidation involving a small segment of the populace.

The *U. A. W.* case seems more consistent with the dissenting opinions in earlier cases, which would have allowed the states a freer hand in labor relations.[22] The Court, however, indicates no desire to overrule those earlier cases where the majority of the Court severely restricted state interference. Thus, the Court seems to depart from the reasoning of the earlier cases in situations where coercion and intimidation were present, without modifying its rulings in those cases.

This may become clearer through a review of the Court's rulings on the validity of state injunctions against union activity where no overt or threatened acts of violence were involved.[23] Even prior to *Garner*, the

[19] U. A. W. v. W. E. R. B., 351 U. S. 266, 275 (1956).

[20] "We have held that the state may still exercise its historic power over such traditionally local matters as public safety and order and the use of the streets and highways." Garner v. Teamsters Union, 346 U. S. 485, 488 (1954).

[21] 340 U. S. 383 (1951), where the Court held that the NLRA precluded Wisconsin from enjoining a peaceful strike in essential public services since § 7 of the NLRA guarantees this right to employees.

[22] See Hill v. Florida, 325 U. S. 538, 547-61 (1945) (dissenting opinion); Amalgamated Association v. W. E. R. B., 340 U. S. 383, 399-410 (1951) (dissenting opinion); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767, 777-84 (1947) (separate opinion).

[23] See Smoot, *Stranger Picketing: Permanent Injunction or Permanent Litigation*, 42 A. B. A. J. 817 (1956) for a discussion of the development of court rulings on the validity of state injunctions against peaceful organizational picketing.

Court held that peaceful picketing *per se* was not enjoinable unless some other factor was present.[24] Picketing was stripped of this protection, however, when it lost its peaceful nature and took the form of force and violence.[25] The Court further limited the privilege of peaceful picketing by allowing it to be enjoined if its purpose was to achieve an objective contrary to declared state policy whether this was legislative or judicial.[26] Under this limitation state courts were enjoining many union activities which not only sought a result in violation of a state policy, but also amounted to an unfair labor practice under the NLRA.[27] *Garner* reversed the trend of the Court by denying the state the power to enjoin the union activity if it would have been an unfair labor practice subject to the jurisdiction of the NLRB. *Weber v. Anheuser-Busch*[28] amplified the *Garner* ruling by holding that if the union conduct would be an unfair labor practice under the NLRA, the state was not free to act even if the union activity violated a state policy other than labor policy such as restraint of trade. The state was still free to act where the union activity violated state policy but did not amount to a federal unfair labor practice as in the *Briggs-Stratton*[29] case. There the union's conduct was in violation of the Wisconsin Act. Although there was some coercion in the case, the Court based its finding on the fact that the union's conduct while harassing the employer did not seek any specific end. The NLRA only gives the NLRB jurisdiction where the objectives are unlawful and makes no provision for the methods by which the employees seek these ends other than protecting the right of the employees to act in concert.[30]

In *United Construction Workers v. Laburnum*,[31] the Court upheld an award of damages by a state court in a common law tort action for violent and intimidating acts by a labor union. The conduct on which the action was based would have constituted an unfair labor practice. The Court distinguished this case from *Garner* stating that the decision there was aimed at preventing a duplication of remedies.[32] Since there

[24] A. F. of L. v. Swing, 312 U. S. 321 (1941).
[25] Drivers Union v. Meadowmoor, 312 U. S. 287 (1941).
[26] Giboney v. Empire Storage Co., 336 U. S. 490 (1949).
[27] Plumbers Union v. Graham, 345 U. S. 192 (1953).
[28] 348 U. S. 468 (1955).
[29] International Union v. W. E. R. B., 336 U. S. 245 (1949).
[30] The Court in *Briggs-Stratton* gave § 7 of the NLRA a restricted interpretation when it said "No longer can any state . . . treat otherwise lawful activities to aid unionization as an illegal conspiracy. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal conduct is made legal by concert." International Union v. W. E. R. B., 336 U. S. 245, 258 (1949).
[31] 347 U. S. 656 (1954)
[32] *Id.* at 663 where the Court said "In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."

is no provision in the NLRA for compensation for injuries caused by unfair labor practices, the state tort remedy was not in conflict with any federal remedy.[33]

The Court, in *Weber v. Anheuser-Busch,* reviewed and summarized all the important decisions it had made in cases involving federal-state jurisdiction over labor relations. It would seem that the Court had defined the relationship as closely as the vagueness of the NLRA on this point allows, except for the ". . . penumbral area" which Justice Frankfurter in his opinion said ". . . can be rendered progressively clear only by the course of litigation."[34]

The power of a state to regulate labor disputes and activities prior to the *U. A. W.* case may be summarized as follows:

(1) Peaceful employee or union activity *per se* is not enjoinable.

(2) Peaceful employee or union activity may be enjoined if the conduct or the objectives sought are violative of declared state policy, unless the activity is either

(a) protected by section 7 of the NLRA as one of the rights of employees to act in concert for their mutual benefit,[35] or

(b) amounts to an unfair labor practice under the NLRA and the NLRB has jurisdiction over the conduct.

If the activity is not precluded from the states as falling within the exceptions noted, the state may exercise its power through an administrative procedure for labor regulation since it falls in that area which is neither prohibited nor protected by the NLRA.[36]

(3) If there is a state remedy available in a labor dispute which would be operative independently of any state or federal labor policy and the remedy is one which the NLRB has no power to grant, the state may exercise its jurisdiction to grant the remedy.[37]

(4) A state is precluded from enforcing through preventive remedies its labor law or labor policy over conduct for which the NLRA provides a federal administrative remedy. It may, however, exercise its traditional power to prevent violence and preserve the peace.

By considering it inconsequential in the *U. A. W.* case that the state exercised its police power through an agency dealing with labor relations, the Court has further blurred the relationship of the state to the NLRB, since state judicial power to prevent violence was already recognized by the Court. The majority argued that a labor board of

[33] See *The Supreme Court, 1953 Term,* 68 HARV. L. REV. 96, 143 (1955) for comparison of the *Laburnum* and *Garner* cases.

[34] 348 U. S. at 480.

[35] "If the conduct does not fall within the provisions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7 as concerted activity for the purpose of mutual aid or protection." Weber v. Anheuser-Busch, 348 U. S. 468, 478-79 (1955).

[36] International Union v. W. E. R. B., 336 U. S. 245 (1949).

[37] United Construction Workers v. Laburnum, 347 U. S. 656 (1954).

the state would probably be more favorable to the interests of labor than a purely judicial court. While this may be true of the Wisconsin Board involved here, it is a dubious assumption to make of states in general.

Violence on a picket line is undesirable in any state but the majority ruling enables a state administrative agency to assume jurisdiction at its own discretion in a labor dispute subject to the provisions of the NLRA, if it finds any coercion present. This could be done even though the coercion factor may be very slight in a labor dispute and possibly unsanctioned by the union leadership. Since the NLRB cannot act until an unfair labor practice charge has been made,[38] the employer can secure the protection he desires from the state agency and deprive the NLRB of an apportunity to adjudicate the merits of his case, by not filing a charge with the NLRB.[39] The state agency, in effect, is allowed to regulate conduct subject to the jurisdiction of the NLRB on the authority of state legislation patterned after the NLRA, using an administrative remedy that duplicates that available through the NLRB.

Since the NLRA is vague as to the proper relationship of the state and the NLRB, the ultimate answer to the myriad problems raised by the jurisdictional question will lie with the Congress rather than the courts. A partial solution to the problem raised by the *U. A. W.* case would be for Congress to make it mandatory that a charge be filed with the NLRB within a specified period after any state relief had been sought. Then, the NLRB could, at its discretion, request a federal court to enjoin the state proceeding if such were necessary to protect its jurisdiction.[40] It is to be hoped that the Congress will include a clarification of the jurisdictional question in any future changes which may be made in the NLRA.

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[38] The NLRB has consistently interpreted § 10 (b) of the NLRA as only giving it jurisdiction over an unfair labor practice when the aggrieved party has filed a charge and thus the party who may be alleged to be guilty of an unfair labor practice has no standing to bring its own possibly wrongful conduct to the board's attention.

[39] In Capitol Service v. NLRB, 347 U. S. 501 (1954), the Court held that the NLRB could, at its discretion, request a federal court to enjoin a state injunction against the same conduct and acts over which the NLRB seeks to exercise its exclusive jurisdiction (as laid down by the Court in Garner v. Teamsters, 346 U. S. 485 (1954). Thus the Court allowed the NLRB to come within the exception to the general rule of the Judicial Code that a court of the United States may not grant an injunction to stay proceedings in a state court except ". . . where necessary in aid of its jurisdiction." 28 U. S. C. § 2283 (1952). See Amalgamated Clothing Workers v. Richman Bros. Co., 348 U. S. 511 (1955), *The Supreme Court, 1954 Term,* 69 HARV. L. REV. 119, 180 (1956), for a discussion of the applicability of § 2283 of the Judicial Code to enjoin state proceedings in a labor dispute.

[40] *Ibid.*