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Notes and Comments

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Banks and Banking—Survivorship in Joint Accounts

Today the proceeds of numerous joint bank accounts lie dormant in banks due to the fact that the law regarding the right of survivorship in joint bank accounts in North Carolina is marked with uncertainty. Administrators and executors of the estates of deceased parties to these accounts are uncertain whether to retain the funds for the estates or whether to award them to the surviving parties to the accounts.[1] In a recent law review note the author discusses the problem of an attempted transfer of the proceeds of a joint bank account to the survivor of the parties to the account, but at the time of that writing there were no North Carolina holdings regarding joint bank accounts executed with a contract for the right of survivorship.[2] The purpose of this note is to discuss the development of the law since the last writing on the subject and to answer, in so far as possible, the questions raised in that note. For the purposes of this note joint checking accounts and joint savings accounts will be treated alike since by both devices it is possible to create a joint tenancy in the account.

At common law the right of survivorship was an incident of joint tenancy in real property, and under this rule, the surviving party would be automatically entitled to the property on the death of the other party. That rule has been destroyed in North Carolina by statute,[3] but the supreme court has pointed out that the statute does not prohibit joint tenants from making contracts to provide for survivorship both as to personalty and realty.[4]

The law is generally settled as to joint accounts which do not contain a clause designating survivorship. When the sole owner of the fund can be ascertained, he, or his estate, will be awarded the entire fund.[5] But when the evidence does not establish sole ownership, a presump-

[1] Professor Fred B. McCall will deal with the problem from the administrator's point of view in an article to be published in a later issue of this volume of the LAW REVIEW.

[2] Note, 31 N. C. L. REV. 95 (1952).

[3] N. C. GEN. STAT. § 41-2 (1950).

[4] Taylor v. Smith, 116 N. C. 531 at 535, 21 S. E. 202 at 204 (1895). "The Act of 1784 (code, section 1326) abolishes survivorship where the joint tenancy would have otherwise been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship."

[5] Hall v. Hall, 235 N. C. 711, 71 S. E. 2d 471 (1952); Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. 2d 222 (1946); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933).

tion of co-ownership arises and distribution is made accordingly.[6] The normal effect of depositing money in the name of the owner and another is to make that other person merely the owner's agent with power to draw on the account and upon the death of the owner, the agency is revoked. Thus, the agent has no right to any part of the account after the owner's death.[7] The courts of North Carolina hold that such a deposit does not create a gift nor does it establish a trust, for the owner does not make a valid delivery of the fund nor does he relinquish control over the fund.[8]

It is when the joint account contains a provision for survivorship that the confusion in the law begins, and this is especially significant in light of the fact that most, if not all, banks today have such a provision in their standard signature cards for accounts. Since the gift, trust, and agency theories will not support the survivor in his claim for the entire fund, he must resort to a contract with a survivorship clause to maintain his claim for the whole amount.[9] The contract theory originated with *Chippendale v. North Adams Savings Bank*.[10] In that case the depositor made an agreement with the bank that in the event of his death, his wife was to receive the entire fund in the account. Both husband and wife were named in the account and either was authorized to withdraw any or all of the fund. In awarding the fund to the widow the court stressed the fact that the agreement with the bank was a valid contract between the bank and the depositor, and discounted the contention that the issue was whether or not there was a valid gift.

In a leading case[11] the agreement contained the usual statement that the depositors were joint tenants with the right of survivorship, and not tenants in common, with the further provision that upon the death of either party, the fund would become the absolute property of the survivor. The court upheld this agreement and declared the survivor absolute owner of the balance in the account, emphasizing the contract saying that there was an agreement made by the bank with its depositors and that the bank and the depositors were bound by the contract.

North Carolina first recognized the contract theory of survivorship in *Taylor v. Smith*[12] in which two sisters who were joint owners of a

[6] Smith v. Smith, 190 N. C. 764, 130 S. E. 614 (1925); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923). "Under the law of this jurisdiciton, nothing else appearing, the money to the joint credit in the bank belonged equally to plaintiff and defendant." Smith v. Smith, *supra* at 767, 130 S. E. at 615.

[7] Hall v. Hall, 235 N. C. 711, 71 S. E. 2d 471 (1952); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933).

[8] Jones v. Fulbright, 197 N. C. 274, 148 S. E. 229 (1929); Thomas v. Houston, 181 N. C. 91, 106 S. E. 466 (1921).

[9] Note, 31 N. C. L. Rev. 95 (1952).

[10] 222 Mass. 499, 111 N. E. 371 (1915).

[11] Hill v. Havens, 242 Iowa 920, 48 N. W. 2d 870 (1951).

[12] 116 N. C. 531, 21 S. E. 202 (1895).

note made a verbal agreement that the survivor was to be the sole owner of the note on the death of the other. The court said that the right to the fund in case one survives the other was a valuable assignable interest, and there was then a valid contract with the mutual rights of survivorship being the consideration. The same result has been reached as to stocks,[13] and in a later case, *Jones v. Waldroup*,[14] the court seems to have gone a step further in applying the contract theory. In this case the husband, Mr. R. M. Waldroup, had stock certificates which were made out to himself alone. He subsequently executed a paper under seal authorizing the issuing association to transfer the certificates to the names of "R. M. Waldroup or Mrs. Hattie L. Waldroup, either or the survivor." There was evidence introduced to show that Mr. Waldroup changed the names so that "if anything should happen the other would cash in without the usual red tape." Witnesses said that Mr. Waldroup told them he wanted the stock to go to the survivor. In commenting on this the court said: "We construe the conveyance . . . as creating a common ownership in the property which is its subject until one of them should die, with the right of survivorship."[15] The court denied the plaintiff's contention that the wife was merely an agent of her husband saying that the husband's intent was clearly to provide for the right of survivorship in his wife.

Although the North Carolina Supreme Court has recognized the contract theory in joint tenancies in some instances, there is some question as to how far the court will go in allowing persons to contract for the right of survivorship. Will the court allow one party who has deposited money in an account in his own name create by contract the right of survivorship in another person? Will the court allow a contractual right of survivorship where one party deposits his own money in an account in his own name and that of another? Finally, where the contract is allowed, what form must it take?

North Carolina has recognized third party beneficiary contracts in other areas of the law, but the same is not true with regard to joint bank accounts. In *Wescott v. First & Citizens National Bank of Elizabeth City*[16] the court struck down an attempt to create the right of survivorship in one not a party to the account. A soldier in Italy had sent money to the bank with a letter stating: "I wish to establish an account with your bank. . . . In case I become deceased

[13] Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796 (1926). Two brothers owned stock in a bank and made an agreement that upon the death of either, the stock was to go to the survivor at par. The court stated that the agreement "is a contract made by each and both parties . . . to sell to the survivor. . . ." *Id.* at 683, 132 S. E. at 799.

[14] 217 N. C. 178, 7 S. E. 2d 366 (1940).

[15] *Id.* at 188, 7 S. E. 2d at 371.

[16] 227 N. C. 39, 40 S. E. 2d 461 (1946).

I would like to make an agreement with you so as to make my beneficiary my grandfather . . . to receive the money. . . ." It was also stated that this was to be an "in trust for account," and the court denied the grandfather's claim due to the failure of the trust. No mention was made of an attempted contract for survivorship nor of a contract to establish a trust though the bank had accepted the deposit along with the letter containing the agreement. Thus, this might be considered authority for the proposition that our court will not recognize a third party beneficiary contract in regard to joint bank accounts where both parties are not named in the account.

Where both parties are named in the account, but it is determined that one party is the sole owner of the fund, North Carolina authority is to the effect that the sole owner, or his estate, will be awarded the fund though there be a clause providing for survivorship.[17] Thus, there is an apparent requirement that the parties must not only be named in the account, but that they must also be joint owners of the fund.

In the latest case in North Carolina, *Bowling v. Bowling*,[18] there were four funds in question. The first was a joint savings account opened by Mrs. Bowling with funds she had withdrawn from an account in her own name. Later funds from another joint account of Dr. and Mrs. Bowling were added to the savings account. The source of all the other deposits and withdrawals is not determinable from the record. This account initiated by Mrs. Bowling was recorded in the following name: "Mrs. Agnes P. Bowling and/or Dr. W. W. Bowling, 1017 Demerius Street." Through error there was no joint account card executed, but the bank had recognized the account as joint with the survivor having a right to withdraw the entire fund.

The second account was an optional savings account opened by a cash deposit and execution of a written agreement with respect to such account. The agreement was as follows: "It is understood and agreed that the shares hereby subscribed for are issued by the association, and all moneys paid or that may hereafter be paid thereon are held by the association for our account, as joint tenants with right of survivorship and not as tenants in common, and that said shares may be resold subject to the by-laws of the association, by either before or after the death of either, and either is authorized to pledge the same as collateral security to a loan." Both Dr. and Mrs. Bowling signed the agreement. Money deposits were made by Mrs. Bowling, but the source of all deposits is undetermined.

The third account was a savings share certificate account opened by a deposit and the execution of a written agreement with the association

[17] See note 5 *supra*.
[18] 243 N. C. 515, 91 S. E. 2d 176 (1955).

which read as follows: "Membership of joint holders (with right of survivorship) of a share account. The undersigned hereby apply for a membership and for a JOINT share account in the FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DURHAM and for the issuance of evidence of membership in the approved form in the joint names of the undersigned as joint tenants with the right of survivorship and not as tenants in common." There is no record of the source of the deposits in this account.

The fourth fund in question was One Hundred Twenty Five shares of common stock of Life & Casualty Company of Tennessee and was registered as follows: "William W. Bowling and Mrs. Agnes Paulk Bowling, as joint tenants with the right of survivorship and not as tenants in common." There is no record of who purchased or possessed the stock. Thus, whether there was sole ownership or joint ownership of the fund is undeterminable.

As to the first account, the lower court said: ". . . the facts are insufficient to establish that either the estate of William W. Bowling, deceased, or Agnes P. Bowling is the sole owner of the entire fund in this account. A presumption of equal ownership by the co-depositors of said funds applies to the account."[19] The account was awarded one-half to Dr. Bowling's estate and one-half to Mrs. Bowling. For identical reasons, the court reached the same result in regard to the fourth fund, common stock of Life & Casualty Company of Tennessee.

As to the second and third accounts, the lower court awarded the entire funds to Mrs. Bowling saying: "There was a valid written contract covering this account which was executed by W. W. Bowling and Agnes P. Bowling. . . . By the terms of said contract it was agreed that the survivor . . . would be the sole owner of the funds on deposit. . . ."[20]

The supreme court affirmed the judgment of the lower court in essentially the same language. As to the second and third accounts the court made the following comment: ". . . and since the parties having contracted and agreed that the savings accounts described hereinabove as the second and third items, respectively, were held by them as joint tenants with the right of survivorship, and not as tenants in common, the right of survivorship existed. . . ."[21]

The court in refusing to award Mrs. Bowling the entire amount in the first and fourth funds, has in effect, denied the validity of a survivorship clause which does no more than say that the fund is payable to "either or the survivor." Though this clause was not present in the

[19] Bowling v. Bowling, Record on appeal at page 19 (1955).
[20] *Id.* at 20.
[21] Bowling v. Bowling, 243 N. C. 515 at 520, 91 S. E. 2d 176 at 180 (1955).

first account, the account was recognized by the bank as one with the right of survivorship in it. The clause was expressed in the stock certificate as quoted above. The court in failing to recognize the clause standing alone has followed its decisions of the past.[22]

In the *Bowling* case it was shown that the surviving wife had contributed to the first account, but still the court ignored the survivorship clause standing alone. Perhaps this was because she did not contest the lower court's ruling giving her one-half the account, but it seems safe to say that the court probably will continue to ignore such clauses which might well be a result of banking practice rather than an honest attempt by the depositors to contract for the right of survivorship. In the two accounts which the court did award the widow in the *Bowling* case there were express contracts executed with the opening of the accounts. These agreements specifically and unequivocally designated the survivor as having sole rights to the funds. The language is that usually seen in specific and detailed contracts. The court seems to require that the parties spell out the meaning of the clause, "payable to either or the survivor." Though this seems to be merely an academic distinction, the detailed form leaves no room for doubt that the parties intended for the survivor to take the balance of the account.

The two accounts which the court awarded the widow were composed of deposits made by both parties to the account; there was no question as to the parties being co-owners. Where sole ownership has been established, the court has consistently given the remainder to that party, or his estate, who was the sole owner of the fund in the account.[23] Only where there was joint ownership did the court allow a contract for survivorship in a joint account.[24] Thus, we apparently have two prerequisites to the formation of a valid contract as to joint bank accounts. The parties must be co-owners, and they must execute a contract spelling out their intent to create a right of survivorship in the survivor. Anything less has yet to succeed in securing that right in North Carolina. The exact form which the contract must take is not specified in the *Bowling* case or any other case, but in the opinion of the Attorney General the following has been held to be sufficient under *Taylor v. Smith*[25] and *Jones v. Waldroup*[26] to vest title in the survivor of the joint account:

[22] Pope v. Burgess, 230 N. C. 323, 53 S. E. 2d 159 (1949); Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. 2d 222 (1946). In Buffaloe v. Barnes *supra*, the court said there was no agreement nor oral evidence of an agreement. Evidently the court simply refuses to see an agreement in an account labled as a joint account with the right of survivorship. Also in that case the stock was purchased with the husband's money and undoubtedly this had a bearing on the court's decision in that it spoke of the absence of any consideration flowing from the wife.

[23] Cases cited note 5, *supra*.

[24] Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[25] *Ibid.*

[26] 217 N. C. 178, 7 S. E. 2d 366 (1940).

"We ———, and ———, the undersigned, do hereby apply for membership in the Federal Savings and Loan Association of ——— and for the issuance of evidence of membership in the approved form in the joint names of the undersigned who have and do hereby agree as between us that the same shall be held as joint tenants with the right of survivorship and not as tenants in common, regardless of who places the funds in said account. And it is definitely understood between us that in the case of death of either of us the survivor shall be the owner of this entire account, both principal and dividend which may be due at the time of the death of either of us. . . ."[27]

It will be noticed that the Attorney General's opinion was careful to state that the agreement was between the depositors; no mention was made of the bank as a party to the agreement. This is interesting in light of the fact that the court in the *Bowling* case did not mention G. S. 53-146.[28] Heretofore the statute served to protect the bank, but in light of the contract theory, it does not seem unreasonable to question its application where the court has found a valid contract. There would be no problem where the bank paid the survivor, but if the bank should pay the fund to the estate of the deceased, then there is an apparent breach of the contract with the surviving depositor. Thus, the question arises: is the bank protected by statute in an apparent breach of contract? Of course, there is the contention that the contract is between the depositors only and that the bank is not a party to such contract, but this position is logically untenable. When one man makes a deposit with the bank, the bank is bound to pay him, and only him, the fund on deposit. It is elementary that if the bank allowed a withdrawal by a stranger, it would be liable to the depositor for breach of its contract in the amount paid out. The same result would obtain where there are two depositors as well as where there is only one. When an agreement is excecuted at the time of deposit, the deposit should be construed in the light of that agreement. The bank is a party to the deposit, accepting it on the terms of the agreement. Contract law would not allow the bank to accept the deposit and yet assert that it was not a party to the agreement which controls the deposit. It seems to follow that when a valid agreement is found, the depositors and the depositary are all bound by it. One writer[29] in discussing such con-

[27] Opinion of Attorney General to Hon. W. E. Church, Clerk of Forsyth Superior Court, dated 9 October 1945.

[28] N. C. GEN. STAT. 53-146 (1950). The statute provides that when a deposit is made in names of two persons payable to either, or payable to either or the survivor, it is payable to either whether the other is living or not. Courts have consistently held that the statute is for the protection of the bank only and is not controlling as to ownership of the funds. 9 N. C. L. REV. 15 (1930).

[29] Note, 38 HARV. L. REV. 243.

tracts says: ". . . B's interest is not one transferred from A . . . but is a legal interest directly created in B by the depositary's promise to pay A or B, as joint obligees." It seems, the bank makes a direct promise to B when both A and B sign the signature card. If B does not sign, it still is the intention that the bank is obligated to pay B on A's death. The making of the deposit is certainly sufficient consideration flowing from both depositors for the obligation of the bank.

That the statute expressly protects the bank is not denied, but neither is it denied that G. S. § 41-2 expressly abolishes the right of survivorship in joint tenancies, and yet the Supreme Court has said many times that the statute (41-2) does not prohibit the making of contracts to provide for such a right.[30] Thus, there would seem to be nothing in G. S. § 53-146 to prohibit the banks from contracting away the protection which the statute confers upon them in the same manner. Further it does not seem a wrong to take away such protection where a bank has voluntarily chosen to accept a deposit which carries with it the obligation of the bank to pay the survivor and only the survivor. To do otherwise would be a clear breach of contract. Yet, such a construction of the statute and court decisions affecting it would place banks in the dubious position from which they were lifted with the initial passage of the statute. Banks would act at their peril when determining the validity of an agreement before paying the fund to anyone but the survivor.

The foregoing emphasizes the need for a standard form of contract which will be universally recognized in North Carolina as valid for creating the right of survivorship. A bill providing such a form was presented to the North Carolina General Assembly in 1953 and 1955,[31] and each time the bill was defeated for the reason that it might result in defeating creditor's rights. The Legislature should recognize that court decisions in time will effect the same result but amid much argument and confusion. Creditors' rights in this instance will eventually yield to those who form valid contracts with banks. There is no reason to make it an uneasy process for the depositor and the bank when all that can be gained is delay.

CALVIN W. BELL

[30] Jones v. Waldroup, 217 N. C. 178, 7 S. E. 2d 366 (1940); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923); Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[31] Address by William F. Womble, Thirty-seventh annual conference of the association of superior court clerks of North Carolina, July 7, 1955.

Conflict of Laws—Domicile Rule in Custody Proceedings

While the whole field of custody of the children seems to be confused, that area of the problem which crosses into the domain of Conflict of Laws is an entangled mass of inconsistent awards, decrees, and orders.[1] This lack of uniformity has given rise to abuses of custody orders which not only go unreproved, but far too often result in advantage to the recalcitrant. The most prevalent of such violations are withholding of a child against the wishes of his custodian and abducting of a child from the custodian by a parent or relative. How and why such conduct is resorted to and often rendered advantageous in subsequent custody actions can best be understood by considering the jurisdictional aspects of such actions.

This subject presented no problem to the early common law for in that system a father had absolute authority over his family. In America, however, the state stands in the relation of *parens patriae* to its children. In this capacity the sovereign's right is superior to that of the child's parents, and this authority has as its natural corollary a duty to attend the welfare and best interests of its minors. An incident of this obligation is the determination of custody of those children whose parents are separated, divorced, deceased, or who by some unsocial conduct have lost the right to their child. While legislatures enact some child welfare regulations, the individual nature of the responsibility renders the ultimate resolution a matter for judicial discretion. Though broad range is essential in the matter of deciding the specific issues, as in all judicious actions some jurisdictional bounds must be defined.

A court determination of custody, being an adjucation of the domestic status of the child is considered to be an in rem proceeding.[2] Following the general rule of in rem proceedings as it is applied to property and divorce actions, the res must be within the territorial dominion of the court for jurisdiction to attach. Thus, in divorce actions, the res is said to be the marital status, and in most states one or both of the parties to the suit must be domiciled in the forum in order to bring the res into the state.[3] In a custody action, the child is considered the res,[4] but the action differs from other in rem proceedings in that the foremost purpose must be the determination of what course is

[1] See Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 59 (1940).

[2] Coble v. Coble, 229 N. C. 81, 84, 47 S. E. 2d 798, 800 (1948) (dictum); Goodrich, *Custody of Children in Divorce Suits,* 7 CORNELL L. Q. 1 (1921). *But see* Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 56 (1940).

[3] GOODRICH, CONFLICT OF LAWS § 132 (3d ed. 1949).

[4] Coble v. Coble, 229 N. C. 81, 84, 47 S. E. 2d 798, 800 (1948) (dictum).

in the best interests of the child, and not the settlement of the rights of two conflicting parties.[5]

Because custody actions adjudicate status, domicile of the child as well as his presence within the geographic bounds of the court's authority is essential to give jurisdiction in the majority of the states,[6] and this has generally been considered the rule in North Carolina.[7]

The minor cannot have domicile apart from that of his parent, guardian, or legal custodian. While living with his parents, the child's domicile is that of his father. Following the common law rule of the absolute authority of a father over his children, some states hold that upon separation of the parents the child's domicile continues to be that of his father until a custody award is made, even if the child lives with his mother. Other states allowing a married woman living apart from her husband separate domicile, and giving the parents equal rights to the child, hold that upon separation of the parents, the child takes the domicile of the parent with whom he lives.[8]

The domiciliary state is presumed to have the greatest interest in the welfare of its citizens and therefore to give the utmost deliberation to providing for its own incompetents. This forms a policy basis for the rule requiring domicile as well as physical presence to give a court jurisdiction in a custody case. Two well known authorities[9] set out domicile as a prerequisite to jurisdiction. The *Restatement*[10] supports the view that the child's domiciliary state has greater power than other states and thus may change a foreign custody award. But domicile of the child in the jurisdiction of the forum is not requisite for every purpose: "In any state into which the child comes, upon proof that the custodian is unfit to have control of the child, the child may be taken from him and given while in the state to another person. . . . This action will be effective within the state. If the state is also the domicile of the child, the action will change the status and will therefore be effective in every state."[11]

Another leading authority[12] has suggested that the welfare of the

[5] Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 56 (1940).

[6] 2 BEALE, CONFLICT OF LAWS § 144.3 (1935); 67 C. J. S., *Parent and Child* § 13 (1950).

[7] Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744 (1955); Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 288 (1955); Gafford v. Phelps, 235 N. C. 218, 29 S. E. 2d 313 (1952); Allman v. Register, 233 N. C. 531, 64 S. E. 2d 861 (1951).

[8] GOODRICH, CONFLICT OF LAWS §§ 36-40 (3d ed. 1949).

[9] *Ibid.*; Beale, *The Status of Children in the Conflict of Laws,* 1 U. CHI. L. REV. 13, 22 (1948), where this authority says: "Since custody of a child by one parent carries with it domicile and domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicile of the child."

[10] RESTATEMENT, CONFLICT OF LAWS § 145 (1934).

[11] *Id.* § 148.

[12] Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 62 (1940).

child being of foremost consideration, a legal technicality like domicile should not be made the basis for jurisdiction. Because a minor cannot establish domicile himself, it is felt that the rule fails if it is based on a greater interest of the domiciliary court. Fear is expressed that a child may suffer detriment at the hands of an undesirable custodian if the court of the residence state cannot take jurisdiction.

While both domicile and physical presence of the child within the state are required for jurisdiction in many states, a strong minority group holds that physical presence alone is a valid basis for determination of custody.[13] Justice Cardozo considered the latter the proper rule and gave voice to this view in *Finlay v. Finlay*.[14] Mere domicile of a child not in the state at the time of the action has been held a sufficient basis for custody action jurisdiction in one or two scattered cases,[15] but does not appear to be the consistent standard in any state. There are a few opinions which have intimated that the presence of both parents within the state would be reason enough for a court to entertain a custody action, and that neither the child's presence nor domicile would be necessary.[16]

The full faith and credit clause of the United States Constitution[17] is generally considered to prevent judgments and orders of the courts of the various states from overlapping,[18] yet the United States Supreme Court has given almost no indication as to how this clause should apply to custody cases. *Halvey v. Halvey*[19] was the last Supreme Court opinion on custody, and there the court based its decision on the narrow conflict of laws rule[20] that a Florida judgment was only entitled to such faith and credit by the New York court as Florida herself would give her custody order.[21] Many of the questionable areas were suggested

[13] Helton v. Crawley, 241 Iowa 296, 41 N. W. 2d 60 (1950); *In re* Bort, 25 Kan. 308 (1881); Rogers v. Daven, 298 Pa. 416, 148 Atl. 524 (1930).

[14] 240 N. Y. 429, 431, 148 N.E. 624, 625 (1925): "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection of the incompetent or helpless."

[15] Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P. 2d 739 (1948).

[16] Re Lee's Guardianship, 123 Cal. App. 2d 882, 267 P. 2d 847, 851 (1954) (dictum).

[17] U. S. CONST., art. IV, § 1.

[18] Harris v. Balk, 198 U. S. 215 (1905).

[19] 330 U. S. 610 (1947).

[20] In Halvey v. Halvey, 330 U. S. 610, 612 (1947) the court said that under FLA. STAT. ANN. § 65.14 (1941): ". . . decrees of Florida courts in divorce cases fixing custody of children are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of the decree."

[21] In Halvey v. Halvey, *supra* note 20 at 614 the court cited REV. STAT. § 905 (1875), 28 U. S. C. § 1738 (1950) which "declared that judgments shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

by this case, but the court merely noted these issues and declined to consider them as essential to the determination of the case.[22]

The essential modifiability of the custody award is often given by the courts as the reason for not being bound to full faith.[23] A judgment, it is said, is not entitled to full faith and credit unless it is a final judgment.[24] An order is usually held to be binding and not subject to subsequent adjudication when a "full-dress-hearing" has been entertained in a court of competent jurisdiction and an award has been made on the issues before the court.[25] The best interests of a child, however, require that the custody award be redetermined upon show of subsequent change in circumstances rendering the former custodian incompetent.[26]

"Change of conditions" is so broad a standard as to place almost no restrictions upon the courts in treating foreign awards. Moreover, the United States Supreme Court in the *Halvey* case apparently did not feel that even evidence of such change was required for a redetermination of another state's award. In that case the father took the child from Florida to New York the day before the divorce decree and attendant award of custody to the mother was handed down. The mother promptly brought action in New York to recover the child. No finding of change of circumstances by the New York court was held necessary for it to make a different award of custody. Neither was the child's domicile made an issue in this case. Perhaps, then, Mr. Justice Brewer[27] was right when he said the temporary nature of a custody decree prevented it from being entitled to full faith and credit.[28]

[22] In a concurring opinion, Mr. Justice Rutledge suggests that once the child returned to Florida, the disappointed mother would be able to secure another decree nullifying that of the New York Court; that the father might then again abduct the child and secure restoration of those rights in New York, setting up "an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters." Halvey v. Halvey, 330 U. S. 610, 620 (1947).

[23] See Boone v. Boone, 150 F. 2d 153, 156 (D. C. Cir. 1945).

[24] Sistare v. Sistare, 218 U. S. 1 (1909); Lynde v. Lynde, 181 U. S. 183 (1900).

[25] See Beale, *The Status of Children in the Conflict of Laws*, 1 U. CHI. L. REV. 13, 24 (1930): "When custody is awarded one parent by a court having jurisdiction, the right of this parent will be recognized by other states. The facts upon which the award was based have become res judicata and cannot be reexamined in the second state. But this estoppel extends only to conidtions which existed at the time of the original decree; the second court may examine any facts which have occurred since the original decree which throw light upon the fitness of the parents to have custody of the child."

[26] Rogers v. Daven, 298 Pa. 416, 441, 148 Alt. 524, 552 (1930).

[27] Mr. Justice David Josiah Brewer of the Kansas Supreme Court, later of United States Supreme Court.

[28] *In re* Bort, 25 Kan. 308 (1881). The subsequent post held by the Justice has been considered by some authorities to have given this case more recognition than it is due. See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 58 (1940).

The fact that no uniform requirements exist to govern jurisdiction of custody matters practically amounts to "open season" for "child snatching." After an award of custody is made by a court of competent jurisdiction in State *A*, the disappointed parent or relative may without authority take the child from his custodian, carry him into State *B*, and have the child's custody redetermined in the courts of State *B*.[29] Similarly, this lack of harmony also puts a parent's custodianship in jeopardy if the child is allowed to visit the other parent or grandparents in a state other than that which awarded the custody.[30]

Two recent North Carolina cases, *Richter v. Harmon*[31] and *Weddington v. Weddington*,[32] bring these abuses sharply into focus. In the *Richter* Case, upon a divorce decree of the Florida court, the custody of a four year old girl was awarded to the child's mother. Sometime later, the mother notified the child's father, who was then living in North Carolina, that he could take the child for a visit to his home. In offering to allow the child to make the visit, the mother stipulated that the child was to be returned to her as soon as she could find employment and become settled in the Washington-Baltimore area. Later, upon the mother's demand, the father refused to relinquished the child. The mother then came to North Carolina and brought a special action[33] in the superior court to enforce the Florida custody award. That court held the foreign decree was entitled to full faith and credit, and ordered the father to surrender the little girl to her mother.

Upon appeal, the North Carolina Supreme Court held that the sister state's award was not entitled to such credit, and that the superior court should examine the circumstances of the case and determine into whose custody she should be placed. Apparently, the basis for the court's decision was the fact that the child's state of domicile which follows that of her legal custodian, the mother, had ceased to be Florida[34] and had become Maryland.[35] A point was made of the fact that a child usually must be domiciled in North Carolina for the court to assume jurisdiction in a custody proceeding.[36] Yet this child had never been

[29] Helton v. Crawley, 241 Iowa 296, 41 N. W. 2d 60 (1950); *Ex Parte* Heilman, 176 Kan. 5, 269 P. 2d 459 (1954); Commonwealth v. Schofield, 173 Pa. Super. 631, 98 A. 2d 437 (1953).

[30] Richer v. Harmon, 243 N. C. 373, 90 S. E. 2d 744 (1955); Goldsmith v. Salkey, 131 Tex. 139, 112 S. W. 2d 165 (1943).

[31] 243 N. C. 373, 90 S. E. 2d 744 (1955).

[32] 243 N. C. 702, 92 S. E. 2d 71 (1956).

[33] N. C. GEN. STAT. § 50-13 (1950).

[34] *In re* Alderman, 157 N. C. 507, 73 S. E. 126 (1911). This case has been cited often as authority for the proposition that a prior court's custody award has no binding force in a new state of domicile.

[35] *Cf.* Lorenz v. Royer, 194 Ore. 355, 360, 241 P. 2d 142, 148 (1952); *Re* Burns, 194 Wash. 293, 297, 77 P. 2d 1025, 1028 (1938).

[36] See Allman v. Register 233 N. C. 531, 533, 64 S. E. 2d 861, 862 (1951): "The validity of the [prior foreign] judgment . . . depends on whether the children

in her domiciliary state of Maryland and subject to the jurisdiction of its courts, and in addition both parents were before the North Carolina court; therefore, it was held proper that jurisdiction should be assumed and a redetermination of custody made. Thus by refusing to comply with the Florida court's order the father gained a redetermination of the child's custody.[37]

The *Weddington* Case is the most recent North Carolina decision involving "parental kidnapping." Here the superior court, in a habeas corpus action[38] brought upon separation, had awarded one of the two children to each parent with stipulations for visitations at given intervals. Later a divorce action was brought by the wife with no request for determination of custody. Then she sent the child over whom she had custody to visit the father. He did not return the child nor give any notice of her whereabouts from June until September. The mother located her child on a school yard in South Carolina and brought her back to North Carolina. She then moved the superior court for a de-determination of custody as part of the divorce action and the father was served with notice of this motion. Three days later he bodily picked the child up from her schoolroom and carried her back to South Carolina.[39]

The superior court again awarded the child to the mother and ordered that she be returned immediately under penalty of contempt proceedings. Upon appeal, the supreme court held that the lower court was without jurisdiction to determine custody as the child was not within the jurisdiction of the court.[40]

If such noncompliance and attendant abuses are not rebuffed in the subsequent custody actions,[41] is there not some legal recourse for this unsocial conduct? Contempt proceedings are available,[42] but if the

involved herein were domiciled in North Carolina at the time this proceeding was instituted. . . . [U]nless the children were domiciled in this state at such time, the court below was without jurisdiction to award their custody. . . ."

[37] Would it not have been a more orderly procedure for the court to uphold the lower court's order on domiciliary grounds, remanding the child to her mother? The father then could have petitioned the Maryland Court for a redetermination with the burden of proof of change of circumstances falling on him.

[38] N. C. GEN. STAT. § 17-39 (1953).

[39] *Quaere* what the South Carolina courts would have done if the action had been brought by the mother in that forum?

[40] The habeas corpus award was said to become ineffective upon the instigation of divorce proceedings thus rendering the action brought not one of enforcement of a previous custody order but an action for a new determination as part of the divorce action.

[41] See Commonwealth v. Schofield, 173 Pa. Super. 631, 645, 98 A. 2d 437, 443 (1953): "The fact that the mother took the children from Florida without the father's consent, and in violation of the decree of the Florida court is important here only so far as it may have a bearing upon her fitness to be awarded their custody."

[42] State v. Keller, 36 N. M. 81, 8 P. 2d 786 (1932).

abductor flees the state, as is most often the case, this action is of course ineffective. Kidnaping statutes of some states have been construed to allow a criminal action against the abducting parent or his agent.[43] Apparently, however, North Carolina's kidnaping laws have closed the door on this remedy.[44] Even where this action is available, when "border hopping" is practiced, difficulties of extradition proceedings render the law virtually unenforceable, especially where escape is made to a state not allowing such action. The federal statute on kidnaping[45] expressly excludes abduction by a parent.

At least one court[46] has awarded damages for mental disturbance to the parent or guardian from whom a child was illegally taken in a custody fight. Apparently, this action has not been often used, probably because many jurisdictions still adhere to the common law notion that a loss of services of a child must be proved before a parent is entitled to damages for the abduction of his child.[47]

With such meager remedies available, in the interest of the welfare of our children, the courts should refuse to entertain custody actions when a child's presence within the state is a result of wrongful conduct of one of the parties to the action.[48] The jurisdictional requirement of domicile of the child, in comparison with residence or presence alone, substantially reduces the benefits which are available to the abductor and withholder. The domicile rule is not suggested as a "cure-all" for custody abuses,[49] but until the United States Supreme Court speaks, or

[43] Lee v. People, 53 Colo. 507, 127 Pac. 1023 (1912); State v. Taylor, 125 Kan. 594, 264 Pac. 1090 (1928); Commonwealth v. Bresnahan, 255 Mass. 144, 150 N.E. 882 (1926); 31 AM. JUR., *Kidnapping* § 6 (1940); 51 C. J. S., *Kidnapping* § 4 (1947).

[44] N. C. GEN. STAT. §§ 14-40 and 42 (1952) provide that no near blood relative shall be indicted for abducting or conspiring to abduct a child.

[45] 62 STAT. 760 (1948), 18 U. S. C. § 1201 (1952), as amended, Pub. L. No. 983, 84th Cong., 2d Sess. S. (Aug. 6, 1956).

[46] Pickle v. Page, 252 N. Y. 474, 169 N. E. 650 (1930).

[47] *But see* Howell v. Howell, 162 N. C. 283, 78 S. E. 22 (1913), where the court held that in actions for abduction of infants no loss of service need be alleged or proved.

[48] See Shippin v. Bailey, 303 Ky. 10, 14, 196 S. W. 2d 425, 427 (1946) where the court said to adjudge custody would put the "stamp of judicial approval upon the wrongful taking." *Re* Burns, 194 Wash. 293, 77 P. 2d 1025 (1938) is an example of a case where the court refused to take jurisdiction when the child was wrongfully detained in the state. See Taylor v. Jeter, 33 Ga. 195, 203 (1862): "Shall the courts of Georgia avail themselves of a tort to wrest from those of a sister state a jurisdiction properly appertaining to them? We say not: rather let the subject be remanded to them."

[49] See *Ex Parte* Heilman, 176 Kan. 5, 269 P. 2d 459 (1954), where custody was awared the grandmother who abducted the child from California after the California court had awarded custody to the mother. The court considered substantial changes (*i.e.*, remarriage of the parents and subsequent reparting) before disposing of the prior Kansas award. Here both states seemed to claim the child as domiciliary. *Cf.* Evens v. Keller, 35 N. M. 659, 6 P. 2d 200 (1931). Neither would the domicile rule effect the abuses of the *Weddington* Case.

a conflict of laws rule evolves which shapes some jurisdictional contours out of the custody tangle, retention of this rule appears to be the most advisable course.

JOHN L. DAVIDSON

Constitutional Law—The Right to Government Employment for Those Invoking the Fifth Amendment—Loyalty Oaths—Due Process

Slochower v. Board of Higher Education of New York City[1] again brought before the United States Supreme Court one of the most controversial issues that has confronted our courts in recent years—the right to continued government employment for those persons who have not been charged with or convicted of any crime,[2] but whose government service has been terminated[3] because of security or loyalty reasons. Specific examples have involved situations where: (a) the employee's loyalty was questionable,[4] (b) his status as a security risk made his retention incompatible with the best interests of national security,[5] (c)

[1] 350 U. S. 551 (1956).

[2] "The charge of disloyalty or even of being a security risk has become in the setting of today so serious that it is almost like a charge of a crime." Garrison, *Some Observations on the Loyalty-Security Program,* 23 U. CHI. L. REV. 1, 2 (1955).

[3] The cases before the Supreme Court on this point have challenged both state and federal laws. Although the principles involved are similar, the federal and state policies that have given rise to the cases have not been the same. The federal government has established an elaborate and expensive system for investigating its employees, for conducting loyalty and security hearings and for reviewing the results of these hearings. The states, if they have acted at all, have tended to confine their loyalty measures to less expensive and more easily administered programs. Generally, with reference to those categories listed in the text, those cases under a, b, and d have concerned federal employees and those under c and e have concerned state employees. Both the federal and state cases should be considered in a discussion pointed primarily at either line of decisions.

[4] Peters v. Hobby, 349 U. S. 331 (1955); Bailey v. Richardson, 341 U. S. 918, (1951).

[5] By virtue of Executive Order 10450 of April 27, 1953, the loyalty cases, which were formerly categorized separately from the security risk cases, are merged with and are known as security risks.

The criterion for dismissal as established under the first loyalty program was "on all the evidence, reasonable grounds exist for the belief that the person involved is disloyal." Executive Order 9835 of March 21, 1947. This criterion was changed to "reasonable doubt as to the loyalty of the person involved." Executive Order 10241 of April 28, 1951. Executive Order 10450 of April 27, 1953, made the criterion "whether the . . . retention . . . is clearly consistent with the interests of national security." This order provides standards and procedures for the exercise by agency heads of their power under the Summary Suspension Act, 64 STAT. 476, 1950, to summarily dismiss employees in the interests of national security and establishes the criterion for dismissal as stated above. "There has thus been a change from loyalty to security. At the present time, a person discharged as a security risk may well be able to establish his unswerving loyalty. . . . Loyalty cases as such no longer exist; a disloyal person is now dismissed as a security risk." Sweeney, *People, Government and Security: An Analysis of Three Books and a Program.* 51 NW. U. L. REV. 79, 81 (1956).

Executive Order 10450 was held invalid to the extent that it authorizes an em-

his failure to take a loyalty oath disqualified him for government service,[6] (d) his past or present membership in or association with organizations or persons whose activities or ideals are suspect endangered the national security,[7] or (e) his exercise of the constitutional privilege against self-incrimination[8] was made sufficient cause for dismissal.[9] The *Slochower* case involved this last point. Even before the *Slochower* case the Supreme Court jealously guarded the privilege so as to prevent its limitation or complete abolition (which has been suggested at times[10]) by anything less than a Constitutional Amendment; and the Court will

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ployee's dismissal "irrespective of the character of his job and its relationship to the 'national security.'" The Court held that the Federal Summary Suspension Act did not authorize the summary dismissal of a federal employee who occupied a non-sensitive job even though he is charged with disloyalty. Cole v. Young, 351 U. S. 536 (1956). This case recognized and eliminated one of the most serious objections to the program.

The practical effect of Executive Order 10450 seems to be diametrically opposed to the one desired. By placing the loyalty case in the same category as the security risk the latter is tainted with the more serious stigma of disloyalty and merely serves as a smoke screen for those who are suspected of actual disloyalty. At the same time there is little actual benefit to the loyalty case since he is still subject to the same public ostracism. See Garrison, *supra* note 2, at 2.

[6] Garner v. Board of Public Works, 341 U. S. 716 (1951); Notes, 50 MICH. L. REV. 467 (1952), 20 U. CIN. L. REV. 514 (1951).

[7] "In many instances, it is his associations or character faults which compel the conclusion that his retention is not clearly consistent with national security." Sweeney, *supra* note 5, at 81. Also, see Garrison, *supra* note 2, at 3.

[8] U. S. CONST. amend. V. See 8 WIGMORE, EVIDENCE, 3rd ed., §§ 2250, 2251 (1940) for a discussion of the history and policy of the privilege.

All states have included similar provisions in their constitution, except the states of New Jersey and Iowa, and in those states it is held to be a part of the existing law. Twining v. New Jersey, 211 U. S. 78, 91 (1908). Also, see Note, *Self-Incrimination—Historical Background of the Doctrine,* 44 KY. L. J. 124 (1955).

"As to the type of proceedings in which the privilege against self-incrimination may be used, the court has said; 'the object was to insure that a person should not be compelled, when acting as a witness *in any investigation,* to give testimony which might tend to show that he himself had committed a crime.' . . . In a later case, it said, 'the privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is used. It applies alike to civil and criminal proceedings wherever the answer might tend to subject to criminal responsibility him who gives it.'" Trimble, *Self-Incrimination and Congressional Investigations,* 44 KY. L. J. 333, 335 (1956).

This note does not attempt to deal with the Fifth Amendment in all of its many ramifications since it is not disputed that the privilege was properly invoked; but, merely with those aspects surrounding Professor Slochower's summary dismissal as a result of his use of the privilege.

[9] For discussions of this problem see: STUDIES ON PRIVILEGE AGAINST SELF-INCRIMINATION—A SYMPOSIUM. *Historical Background and Implications of the Privilege Against Self-Incrimination,* R. Moreland; *Scientific Evidence in the Law,* J. R. Richardson; *The Privilege Against Self-Incrimination—Policy Pro and Con,* C. L. Calk; *The Investigating Power of Congress—Its Scope and Limitations,* J. R. Richardson; *Self-Incrimination and Congressional Investigations,* E. G. Trimble. 44 KY. L. J. 267 (1956). Also, see PROBLEMS OF THE FIFTH AMENDMENT IN MODERN TIMES—A SYMPOSIUM. *The Right to Silence,* J. R. Connery; *The Fifth Amendment Today,* E. N. Griswold; *The Fifth Amendment in Non-Criminal Proceedings,* C. C. Williams. 39 MARQ. L. REV. 179 (W 1955-56).

[10] This is discussed in two recent articles. Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination,* 2 U. CIN. L. REV. 28 (1955); Calk, *supra* note 9, at 303.

not permit any unfavorable inference to be drawn from the fact that the privilege has been invoked in a federal proceeding.[11] However outside the court, suspicions, questions, and imputations continue to rise and surround those claiming the privilege.[12] Frequently, it has resulted in the loss of that person's job,[13] which in turn has caused numerous appeals to the courts as the employees attempt to retain their positions[14] or, more important in many cases, remove that "badge of infamy"[15] with which they have been branded.

The *Slochower* case is typical of the situations encountered in these cases. It raised the question of the constitutionality of a statute that provided for the automatic dismissal of any city employee invoking the privilege against self-incrimination in order to avoid answering a question relating to his official conduct.[16] The appellant was serving as an associate professor at Brooklyn College, an institution operated by the City of New York, when he was called to testify before a Congressional investigating committee.[17] He invoked the Fifth Amend-

[11] Twining v. New Jersey, 211 U. S. 78 (1908); Ullman v. United States, 350 U. S. 422 (1956); See, Note, *Constitutional Law—Privilege Against Self-Incrimination—Immunity*, 9 Sw. L. J. 474 (1955).

[12] Elson, *People, Government and Security; An Analysis of Three Books and A Program*, 51 Nw. U. L. Rev. 83, 85 (1956); Garrison, *supra* note 2, at 1.

[13] Note, *Constitutional Law—Due Process—Automatic and Permanent Dismissal of Public School Teachers for Invoking the Privilege Against Self-Incrimination*, 54 Mich. L. Rev. 126 (1955). For a presentation of the reasons favoring dismissal see, Note, 34 Neb. L. Rev. 88 (1954).

[14] "Thirteen other individuals brought suit for reinstatement after their dismissal for pleading the privilege against self-incrimination in the same federal investigation." 350 U. S. 551, 555 and n. 2.

[15] "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'" Wieman v. Updegraff, 344 U. S. 183, 190-91 (1953).

[16] Section 903 New York City Charter states, "If any . . . employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any . . . body authorized to conduct any hearing . . . , or having appeared shall refuse to testify, or to answer any question regarding . . . affairs of the city . . . on the ground that his answer would tend to incriminate him, . . . his term or tenure of . . . employment shall be vacant and he shall not be eligible to . . . employment under the city. . . ."

This section was not aimed at communists but was designed to help in the elimination of graft and corruption. In the past, numerous public employees had refused to testify as to criminal acts on the ground of self-incrimination and New York wished to remove these persons from public employment. See, In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury, December 27, 1932, pp. 9-10.

[17] The investigation was being conducted on a national scale by the Internal Security Subcommittee of the Committee on the Judiciary of the Senate and related to subversive influences in the American Educational system. Recognizing education to be primarily a state function, the chairman stated that the inquiry would be limited to "considerations effecting national security, which are directly within the purview and authority of the subcommittee." 350 U. S. 551, 553.

ment while testifying before that committee. Although he had twenty-seven years' experience; was entitled to tenure under state law; and could only be dismissed for cause, after notice, hearing and appeal;[18] he was summarily discharged from his position.[19] The New York Court of Appeals upheld the dismissal as constitutional but the United States Supreme Court reversed the finding of that Court and held that the summary dismissal of the appellant, Slochower, violated due process of law.[20]

The appellant, in addition, had attacked the constitutionality of the act on the ground that it abridged the privileges and immunities of a citizen of the United States since it in effect imposed a penalty on the exercise of the privilege against self-incrimination. The Court did not decide the privilege and immunity question[21] but held it unconstitutional as a violation of due process.[22]

The principal case does not involve a loyalty oath; nevertheless, an examination of the loyalty oath cases and their background should be undertaken since the Court relied largely upon those cases for authority to support its decision. The examination will provide a better understanding of the use of this authority in the present case and will help explain the basis on which the majority placed its opinion, an opinion which the minority felt struck deep into the authority of a state "to protect its local governmental institutions from influences of officials whose conduct does not meet the declared state standards for employment."[23]

The problems concerning the right to employment in the federal government are more complex than those concerning state government, as already indicated[24] and the discussion of the former[25] will be limited to those aspects of the federal problem as are necessary to the dis-

[18] McKinney's New York Laws; Education Law § 6206(2).

[19] The Court of Appeals of New York has held § 903 to mean that "the assertion of the privilege against self-incrimination is equivalent to a resignation." Daniman v. Board of Education, 306 N. Y. 532, 538; 119 N. E. 2d 373 (1954).

[20] 350 U. S. 551, 559.

[21] U. S. CONST. amend. XIV, § 1. Considering the Court's past approach to the privilege and immunities question, it is doubtful that there would be any relief forthcoming under this provision. Twining v. New Jersey, 211 U. S. 78 (1908); Barron v. Mayor, ETC., of Baltimore, 7 Pet. 243, 8 L. Ed. 672 (U. S. 1830); Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394 (U. S. 1873).

[22] Although two different types of statutes are involved, the Court finds that their effect is similar. It states, "the heavy hand of the statute fall alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action fall squarely within the prohibition of *Wieman v. Updegraff* . . . there has not been the protection of the individual from arbitrary action. . . ." 350 U. S. 551, 558.

[23] 350 U. S. 551, 559-60.

[24] See note 3 *supra*.

[25] Shapiro, *Government Employment and the Loyalty-Security Program*, 15 LAW GUILD REV. 131 (1955); Garrison, *supra* note 2, at 1.

cussion of the loyalty oath cases; which primarily, in recent years, have concerned state statutes.[26]

The principle of the loyalty oath is not new and has been used in this and other countries in earlier times in attempts to determine or test loyalty.[27] In the past known as the test oath, the loyalty oath is its modern counterpart.[28] The United States Supreme Court struck down attempts by the states[29] and by Congress[30] to establish test oaths and thereby prevent former Confederates from practicing certain professions. These oaths were held to be unconstitutional both as ex post facto laws and as bills of attainder. The loyalty oaths have been attacked on the same grounds, but in most instances the Court has held the modern oaths to be valid.

In the current series of loyalty oath cases, four leading decisions had laid the foundation for the opinion in the *Slochower* case. They are *Gerende v. Board of Supervisors,*[31] *Garner v. Board of Public Works,*[32] *Adler v. Board of Education,*[33] and *Wieman v. Updegraff.*[34] The first of these, the *Gerende* case, questioned the constitutionality of a Maryland statute[35] which apparently required every candidate for public office to swear that he was not engaged in nor advocated any activity the purpose of which was to overthrow the government by force or violence and that he was not a member of any organization which did so. However, the Maryland Supreme Court had interpreted the statute and stated that the oath was intended to apply to those engaged "in one way or another in the attempt to overthrow the government by force or violence" or who are "knowingly" members of organizations that do so.[36] The United States Supreme Court interpreted this Maryland decision to mean that the candidate need not only take an oath that he is not "knowingly" a member of an organization engaged in an attempt to overthrow the government by force or violence and this interpretation was made only on the assurance of the Maryland Attorney General that affidavits stating that the candidate was not ". . . knowingly a member of an organization engaged in such an attempt"[37] would meet

[26] See note 8 *supra.*
[27] Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association,* 11 LAW. GUILD REV. 111 (1951).
[28] Fraenkel, *Law and Loyalty,* 37 IA. L. REV. 153 (1951).
[29] Cummings v. Missouri, 4 Wall. 277 (U. S. 1866).
[30] *Ex Parte* Garland, 4 Wall. 333 (U. S. 1866).
[31] 341 U. S. 56 (1951).
[32] 341 U. S. 716 (1951); See note 6 *supra.*
[33] 342 U. S. 485 (1952); See Notes, 66 MARQ. L. REV. 111 (1952), 100 U. PA. L. REV. 1244 (1952), 36 MINN. L. REV. 961 (1952).
[34] 344 U.S. 183 (1952); See note 49 *infra,* for a citation of LAW REVIEW notes commenting on this case.
[35] MD. LAWS c. 86, § 15 (1949).
[36] Shub v. Simpson, 76 Atl. 2d 332 (Md. 1950).
[37] 344 U. S. 183, 189.

the requirements of the oath. Thus, in a brief per curiam decision without a discussion of any of the other basic issues involved, the Court pointed out a fundamental requirement for any valid loyalty oath—scienter.[38]

The *Garner* case questioned the constitutionality of a City of Los Angeles ordinance of 1948 requiring an oath that the employee had not advocated or belonged to an organization advocating the overthrow of the government by force or violence during the five preceding years.[39] The Court assumed that scienter was implicit in each clause of the oath and that there was no denial of due process.[40]

The oath was attacked as a bill of attainder and as an ex post facto law in that it denied government employment to persons because of an affiliation that might have been terminated at the time the oath was enacted into law. The majority of the Court held that it was not ex post facto since it did not punish past lawful conduct[41] and that in the absence of punishment, neither was it a bill of attainder.[42] The Court cited *U. S. v. Lovett*[43] for a definition of a bill of attainder[44] and apparently limited its holding in that case by its decision in the *Garner* case.

In *Adler v. Board of Education,* the issue was the constitutionality

[38] Note, *The Scienter Requirement and Retrospective Clauses in Loyalty Oaths,* 3 D. B. J. 93 (1953).

[39] The ordinance was passed pursuant to a 1941 Amendment to the City of Los Angeles Charter which provided that no person should hold public office who had within 5 years of the adoption of the amendment advocated, or belonged to a organization which advocated the overthrow of the United States Government or the Government of the State of California by force or violence. The amendment gave the city council authority to pass an ordinance effecting it.

[40] The Court stated, "We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or the California Courts as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any organization when its character became apparent. . ." 341 U. S. 716, 723.

[41] The 1941 Amendment had been in force for the 5 years preceding the enactment of the oath. For that reason, the conduct involved was not lawful at the time it was engaged in and the subsequent act did not punish prior lawful conduct. Therefore, it was not ex post facto. See notes 29 and 30 *supra.* The dissenting judges would hold it to be a bill of attainder and hold Cummings v. Missouri, note 29 *supra,* and *Ex Parte* Garland, note 30 *supra,* to be applicable.

[42] The Court pointed out that punishment is a prerequisite to a bill of attainder and stated, "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." 341 U. S. 716, 722.

[43] 328 U. S. 303 (1946). Congress had provided in the Urgent Deficiency Appropriation Act of 1943, § 304 that the appropriation for the Interior Department would lapse if it was used to pay the salaries of certain named employees. The Court stated, "this permanent proscription from any opportunity to serve the government is punishment and of a most severe type. . . . Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial." *Id.* at 316.

[44] "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the constitution." 328 U. S. 303, 315.

of the New York Feinberg Law[45] which barred from employment in the public schools persons who advocate or belong to organizations which advocate the overthrow of the government by force or violence. Membership in certain listed organizations was made prima facie evidence of the person's ineligibility to teach. This act was upheld on the basis of a New York decision which had interpreted the law to require knowledge of the purpose of such organizations before the law was applicable.[46] The Court reiterated its past approach to the question of right to government employment, stating, "it is equally clear that they have no right to work for the state in the school system on their own terms. *United Public Workers v. Mitchell,* 330 U. S. 75 (1947). They may work for the school system upon the reasonable terms laid down by the proper authorities of New York."[47] In the past, government employment had been treated as a privilege rather than a constitutional right.[48]

However, in the last case of the series, the *Wieman* case,[49] the Court with reference to the above quotation from the *Alder* case stated "that to draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue."[50] But the Court further stated, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[51]

The *Wieman* case questioned the constitutionality of an Oklahoma statute[52] requiring public employees to take an oath similar to those in *Gerende* and *Garner.* However, in *Wieman,* there was no requirement of scienter in the language of the statute itself nor was there a state court decision that made "knowledge" of the purpose of the organization a part of the oath.[53] The statute was attacked on the usual grounds that the

[45] N. Y. EDUC. LAW §§ 3021-22.
[46] Thompson v. Wallin, 301 N. Y. 476, 95 N. E. 2d 806 (1950).
[47] 342 U. S. 485, 492.
[48] Bailey v. Richardson, 182 F. 2d 46 (D. C. Cir. 1950); aff'd by an equally divided Court, 314 U. S. 918 (1951).
[49] For discussions of this case, see: Note, *Constitutional Law: Oklahoma Loyalty Oath Unconstitutional as a Denial of Due Process,* 39 CORNELL L. Q. 188 (1953); Note, *Constitutional Law—Fourteenth Amendment—Validity of Statutes Requiring Loyalty Oaths,* 22 U. CIN. L. REV. 243 (1953); Note, *Oklahoma Loyalty Oath Void,* 25 ROCKY MT. L. REV. 395 (1953); Note, *Constitutional Law —Due Process—Validity of State Statutes Requiring Public Employees to Take Loyalty Oath—,* 51 MICH. L. REV. 1076 (Mar.-Ju.-1953).
[50] 344 U. S. 183, 191.
[51] *Id.* at 192.
[52] 51 OKLA. STAT. §§ 37.1-37.8 (1951).
[53] The Supreme Court of Oklahoma had limited the organizations forbidden by the statute to those listed as subversive by the attorney general prior to the effective date of the statute and had upheld the constitutionality of the oath.

oath is denial of due process, an ex post facto law, and a bill of attainder.[54] The Court distinguished the *Wieman* case from *Gerende, Garner,* and *Adler* with the following statement, "Yet under the Oklahoma Act the fact of association alone determines disloyalty and disqualification, it matters not whether association existed innocently or knowingly. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."[55] In each of these cases, it had been emphasized that the state must conform to the requirement of due process.[56]

The Court does not go so far as to hold that one has a constitutional right to public employment, but it makes it clear that one will be protected from exclusion by a statute which operates in a patently arbitrary or discriminatory manner[57] and that any such oath, to be constitutional, must require scienter.[58]

Although the decision in the principal case will probably be of little practical value to Professor Slochower in his attempt to retain his tenure rights and job, the more liberal interpretation of the due process clause, as contrasted to that advocated by the dissent,[59] was desirable.

The Court in considering the question of a person's right to government employment in the *Slochower* case points out that "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities."[60] It appears from these decisions that the Court does not consider government employment to be a constitutional right but it will give constitutional protection to those already employed. It will not permit the summary dismissal of an employee by operation of statute without opportunity for a hearing. The extent of the protection in the future may be broadened but at the present time the statute providing for dismissal must require evidence of the employee's unfitness. In the case of loyalty

Board of Regents v. Updegraff, 205 Okla. 301, 237 P. 2d 131 (1951). The Oklahoma Court refused to permit the teachers to take the oath as thus construed and it denied petition for rehearing which was partly based on the ground that this refusal was a denial of due process. The United States Supreme Court felt that this refusal meant that the Oklahoma statute did not require scienter and was faced with the question of whether innocent membership was sufficient basis for removal from public employment.

[54] See notes 31, 32, and 33 *supra.*

[55] 344 U. S. 185, 191.

[56] 350 U. S. 551, 556.

[57] 344 U. S. 185, 192.

[58] See note 38 *supra.*

[59] "For this Court to hold that state action in the field of its unchallenged powers violates the Due Process . . . demands that this Court say . . . that the action of the Board . . . was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. A denial of due process is 'a practice repugnant to the conscience to mankind.' Surely no such restriction exists here." 350 U. S. 551, 562-3.

[60] 350 U. S. 551, 555.

oaths, that evidence must show scienter on the part of the employee and in the case of dismissal for use of the privilege against self-incrimination in a federal investigation or proceeding, a proper inquiry that would show the employee's retention to be inconsistent with the best interest of the state. This is a minimum of protection for the employee but it is a recognition that some constitutional protection is necessary and shows some tendency on the part of the Court to liberalize its past interpretations of the Fourteenth Amendment in the area of loyalty oaths and statutes such as the one in the *Slochower* case.

CHARLES J. NOOE

Criminal Law—Burglary in North Carolina

At common law, burglary was a felony punishable by death;[1] it was regarded as an infamous offense against the habitation and not against the property,[2] or, as expressed at an early date, ". . . man's house is his castle, and its security must not be lightly invaded."[3] To preserve this security the law created safeguards imposing severe penalties on their infringement. From the common law concept of burglary, however, a number of statutory crimes associated with burglary have evolved, each one extending the original scope further into the area of property protection. Illustrative of this expansion is a recent amendment[4] to G. S. § 14-54,[5] which states where non-burglarious breaking or entering ". . . shall be wrongfully done *without intent to commit a felony or other infamous crime,*" (Emphasis added) a misdemeanor has been committed. This amendment virtually completes the statutory modification of crimes associated with the elements of common law burglary. A brief examination of the development of these related crimes within the framework of the North Carolina statutes and decisions is the purpose of this note.

Burglary was defined originally as the breaking and entering, in the night time, of a dwelling house of another,[6] with intent to commit a felony therein.[7] Since 1889, the offense has been divided into two degrees. The gravamen of first degree burglary is that the crime is

[1] 4 BLACKSTONE, COMMENTARIES *228.
[2] 12 C. J. S., *Burglary* § 1b (1944).
[3] 9 AM. JUR., *Burglary*, 240 (1937); State v. Williams, 90 N. C. 728 (1884). See also State v. Surles, 230 N. C. 272, 52 S. E. 2d 880 (1949).
[4] N. C. Sess. Laws 1955, c. 1015; see also 33 N. C. L. REV. 538 (1955).
[5] N. C. GEN. STAT. § 14-54 (Supp. 1955).
[6] Under common law, it was immaterial that the occupant of the dwelling house was not present. State v. Foster, 129 N. C. 704, 40 S. E. 209 (1901); 4 BLACKSTONE, COMMENTARIES *225.
[7] State v. Langford, 12 N. C. 253 (1827). Under common law, it was immaterial that the felony intended was not committed, State v. Morris, 215 N. C. 552, 2 S. E. 2d 554 (1939); State v. Allen, 186 N. C. 302, 119 S. E. 504 (1923).

committed when the dwelling house or sleeping apartment is actually occupied at the time of the commission of the crime.[8] Second degree burglary is the crime committed when (1) the dwelling house or sleeping apartment is not occupied at the time of the commission of the crime, or (2) when the crime is committed on any house within the curtilage of a dwelling house, or (3) in any building not a dwelling house, in which is a room used as a sleeping apartment but is not actually occupied as such at the time of the commission of the crime.[9] From these statutory distinctions it is apparent that common law burglary persists today under G. S. § 14-51 (defining first and second degree burglary); other related statutory crimes embrace one or more elements of the common law concept of burglary and might properly be said to be derivative.

For example, according to the early concept of burglary, there had to be a breaking, removing or putting aside of something material which constituted a part of the dwelling house relied on as security against intrusion.[10] Any force employed to effect an entrance through any usual or unusual place of ingress was a breaking sufficient in law, but force or violence was essential. Obviously, this required such acts of force as knocking a hole in a wall, burning a hole in a house, and breaking out a window or door to effect an entry, or, under certain circumstances, breaking an *inner* door or window, even though entrance to the building itself was effected without a breaking.[11] This requirement of a violent or forceful breaking was soon abandoned and breaking was held to be "any violation of the mode of security," which the occupant had adopted,[12] using some measure of force, *however slight.* Consequently, unlocking or unlatching a door, lifting a hook with which a door was fastened, pushing open a door which was shut but neither locked nor latched, the mere picking of a lock, the turning of a key, and the raising of a window kept in its place only by its own weight, were adjudged to be "actual" breaking.[13] The element of breaking was extended judicially by the concept of "constructive" breaking; so that conviction was made possible when, by some trick, the offender entered through an open door or window,[14] or a hole in the wall or roof,[15] or

[8] N. C. GEN. STAT. § 14-51 (1953). See also State v. Mumford, 227 N. C. 132, 41 S. E. 2d 201 (1946).

[9] N. C. GEN. STAT. § 14-51 (1953). For a development of this statute, see Laws of 1889, c. 434, s. 1; Rev., s. 3331 (1905); C. S., s. 4232 (1919).

[10] State v. Boon, 35 N. C. 244 (1852).

[11] State v. Foster, 129 N. C. 704, 40 S. E. 209 (1901). See also 9 AM. JUR., *Burglary* § 9 (1937); 12 C. J. S., *Burglary* § 4 (1944); 5 WORDS AND PHRASES 777 (1938).

[12] State v. Henry, 31 N. C. 463 (1849).

[13] State v. Fleming, 107 N. C. 905, 12 S. E. 131 (1890); State v. Henry, 31 N. C. 463 (1849). See also State v. Madden, 212 N. C. 56, 192 S. E. 859 (1937).

[14] State v. Henry, 31 N. C. 463 (1849).

[15] *Ibid.*

where entrance was gained by procuring an occupant by strategem to remove the inner lock.[16] "Constructive" breaking was defined loosely as an entrance through an *open* door or window obtained by conspiracy, fraud or threat of violence. This included the entrance obtained by procuring the servant or some inmate to remove the fastening,[17] once even by imitation of a voice of a friend.[18] It was extended to the point where it was held that when the defendant encountered the owner of a dwelling house immediately outside the house at night time, marched him into the house at the point of a gun and stole money hidden in the house, the method of entry was held to be a constructive breaking.[19]

Perhaps the first statute modifying the common law concept of burglary was the English statute of Anne.[20] By this statute, breaking *out* of a dwelling house in the night time was made a crime of the same degree of gravity as breaking *in,* making the crime of *burglary* complete when a person entered a dwelling house by day or night with intent to commit a felony therein and broke out in the night time.[21] This statute of Anne was incorporated into the statutory law of North Carolina in 1854 and has remained since that time.[22] It is important to note that although the modification of "actual" breaking, "constructive" breaking, and the statute involving a "breaking out" extended the original concepts of what constituted "breaking," they did not change the requisite elements of burglary. Breaking, whether "actual," "constructive," "in" or "out" was essential to the commission of the offense until 1879, at which time a crime related to burglary was formulated to eliminate this element. The North Carolina legislature passed "An Act to Punish the Entering of a Dwelling House in the Nighttime *otherwise than by Breaking,*"[23] (Emphasis added) the very title of which suggests the object: to make indictable the entry into a dwelling house in the night time by other than a burglarious breaking.[24] Under this section, now part of G. S. § 14-54, a breaking has never been a prerequisite of guilt, and proof thereof is not required.[25]

[16] State v. Rowe, 98 N. C. 629, 4 S. E. 506 (1887).
[17] *Ibid.*
[18] State v. Johnson, 61 N. C. 186 (1865). See also State v. Mordecai, 68 N. C. 207 (1873).
[19] State v. Rodgers, 216 N. C. 572, 5 S. E. 2d 831 (1939).
[20] 12 Anne c. 7, s. 3 (1713).
[21] See further 12 C. J. S., *Burglary* § 15 (1944).
[22] N. C. GEN. STAT. §14-53 (1953).
[23] Public Laws 1879, c. 323; this act amended an act of 1875, which had been a legislative attempt to extend limited protection to buildings other than dwelling houses. See State v. Hughes, 86 N. C. 662 (1882).
[24] State v. Alston, 233 N. C. 341, 64 S. E. 2d 3 (1950); State v. Chambers, 218 N. C. 341, 11 S. E. 2d 280 (1940); State v. McBryde, 97 N. C. 393 (1886). For a development of this statute, see Laws of 1874-5, c. 166; 1879, c. 323; CODE, s. 996 (1883); REV., s. 3333 (1905); C. S., s. 4235 (1919); 1955, c. 1015; N. C. GEN. STAT. §14-54 (Supp. 1955).
[25] State v. Mumford, 227 N. C. 132, 41 S. E. 2d 201 (1946).

Both at common law and under G. S. § 14-51, the offense of burglary is not committed unless there is an entry. However, "entry" does not require intrusion of the entire body into the building, but may consist of the insertion of any part thereof for the purpose of committing a felony, such as a hand, arm, or foot through the place broken.[26] Entry of any part of the body is sufficient if the ultimate intent is to commit a felony, although the immediate intent may be only to make a further opening for the body. It is not even necessary that the entry be by any part of the body. It can be by instrument, as where a hook is put into a dwelling to take out goods, or a pistol with intent to kill.[27] There is no North Carolina case to demonstrate that a breaking without an entry is sufficient to constitute the offense created by G. S. § 14-54, although it would probably be sufficient to constitute an "attempt" under either G. S. § 14-51 or G. S. § 14-54.

Neither breaking nor entering is essential for a conviction under G. S. § 14-55,[28] originally passed in 1883, which makes it a crime to make "preparation to commit burglary or other housebreakings," and includes the possession, without lawful excuse, of implements of housebreaking, making separate the crimes of *preparation* and *possession.* This statute is designed to allow the apprehension of potential offenders before their criminal intent is fulfilled by a burglary or an attempt.

Probably the greatest modifications in the concept of burglary have taken place in the definition of the "dwelling house." Laborious distinctions have been made in defining which buildings fall within the definition. Such distinctions as "buildings within the curtilage,"[29] or "buildings appurtenant to the dwelling,"[30] and the exceptions to these general rules were all defined, including a rebuttable presumption that buildings contiguous to the dwelling were prima facie within the coverage of burglary;[31] all were utilized to bring the building within the definition of a "dwelling house," upon which, occupied or not, burglary could be committed. In 1875, the predecessor of G. S. § 14-54 was

[26] The North Carolina Supreme Court has not been faced with the delineation of these borderline areas, since the question has never been raised on appeal. See, however, 9 AM. JUR., *Burglary,* § 16 (1937); 12 C. J. S., *Burglary* §§ 10-12 (1944).

[27] 9 AM. JUR., *Burglary,* § 16 (1937); 12 C. J. S., *Burglary* §§ 10-12 (1944).

[28] N. C. GEN. STAT. § 14-55 (1953). For a general development of this statute, see CODE, s. 997 (1883); REV., s. 3334 (1905); 1907, c. 822; C. S., s. 4236. See also State v. Surles, 230 N. C. 272, 52 S. E. 2d 880 (1949); State v. Baldwin, 226 N. C. 295, 37 S. E. 2d 898 (1946); State v. Boyd, 223 N. C. 79, 25 S. E. 2d 456 (1943); State v. Vick, 213 N. C. 235, 195 S. E. 779 (1938).

[29] State v. Wilson, 2 N. C. 202 (1795). See also State v. Whit, 49 N. C. 349 (1857).

[30] State v. Twitty, 2 N. C. 102 (1794).

[31] State v. Langford, 12 N. C. 253 (1827). See also State v. Jenkins, 50 N. C. 430 (1858).

enacted; and in 1889, with the passage of the now G. S. § 14-51, burglary became a crime of degrees, as follows:

1) Breaking and entering an *occupied* dwelling house is first degree burglary, punishable by death;[32]

2) breaking and entering an *un*occupied dwelling house, or *any house within the curtilage* of a dwelling house, is second degree burglary, punishable by life imprisonment or a term of years, in the discretion of the court;[33]

3) breaking *or* entering otherwise than by a burglarious breaking into any storehouse, shop, warehouse, banking-house, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, is punishable as a felony by imprisonment of not more than ten years;[34]

4) merely being *found in* "a dwelling, or *other building whatsoever,*" with intent to commit a felony or other infamous crime therein, is a felony punishable by fine or imprisonment;[35]

5) breaking into *or* entering *railroad cars* containing any thing of value has been a crime since 1907, punishable by not more than five years; and this section is accompanied by the statutory presumption that "any person found unlawfully in such car shall be presumed to have entered in violation of this section."[36] Thus, from occupied dwelling houses to railroad cars, protection has been extended to an ever increasing area. The gradual expansion of protection from the dwelling to the curtilage to the warehouse to the railroad car demonstrates the shift to the policy of property protection.

To constitute burglary, the common law required the felonious breaking and entering to be in the night time, defined as "insufficient light to discern a man's face."[37] This is still the law in North Carolina as to first and second degree burglary. However, it seems clear that the words of G. S. § 14-54 ". . . otherwise than by a burglarious breaking . . ." would include a breaking or entering in the day time as well. This applies to both G. S. § 14-55 ("Preparation to commit burglary or other housebreakings")[38] and G. S. § 14-56 ("Breaking

[32] N. C. GEN. STAT. § 14-51 (1953). [33] *Ibid.*
[34] N. C. GEN. STAT. § 14-54 (Supp. 1955).
[35] N. C. GEN. STAT. § 14-55 (1953). [36] N. C. GEN. STAT. § 14-56 (1953).
[37] State v. McKnight, 111 N. C. 690, 16 S. E. 319 (1892). See also State v. Whit, 49 N. C. 349 (1857).
[38] As to the evolution of the now N. C. GEN. STAT. § 14-54: the original act (1874-5, c. 166) made no mention of the element of "night time"; however, the subsequent act in 1879 (1879, c. 323) specifically mentioned "in the night time"; by the time the Code of 1883 (sec. 996) was printed, the words "in the night time" were omitted. An amending act causing this revision cannot be found in the laws of 1881, where it would logically seem to be. However, it is a fairly safe presumption that the omission was deliberate.
In the case of the present N. C. GEN. STAT. § 14-55, however, the words "by

into or entering railroad cars") since both specifically omit reference to day or night time. However, G. S. § 14-57[39] ("Burglary with explosives") defines the crime ". . . either by day or by night."

At common law, a criminal intent to commit a felony at the time of the breaking and entering was an essential element of the crime of burglary.[40] It was among the few offenses, if not the only one, where crime in the highest degree was not dependent upon the execution of the felonious intent. The offense was complete when the dwelling house was entered with the required intent; what the accused did afterward was merely evidence of his intent at the time of the entering.[41] It was, therefore, no defense that the intent was abandoned after entry[42] or before actually being committed; or that the defendant changed his mind and committed . . . or attempted to commit . . . a different crime,[43] or that the circumstances prevented him from carrying out his intent.[44] This concept of intent to commit a felony runs through the statutory crimes associated with burglary as an integral part of first and second degree burglary, of the crime of breaking out, of the crime of "non-burglarious breaking or entering," of the crime of preparation to commit burglary, and of breaking into or entering railroad cars. "Intent to commit *crime*" is essential under G. S. § 14-57 ("Burglary with explosives"), while the offense of having implements of housebreaking requires a negative "without lawful excuse."[45] The latter phrase is the only apparent effort to depart from the requirement of the proof of intent until the 1955 amendment to G. S. § 14-54, which made it a misdeameanor to wrongfully break or enter *without* intent to commit a felony or other infamous crime.[46]

Thus, the full cycle in the breakdown of the common law elements has been reached. It has been suggested[47] that the delineation between first and second degree burglary (depending upon whether or not the dwelling house is occupied) would suggest a concern for the protection of *life and limb* rather than the one-time rationale of the protection of the security of the habitation. Further, the words in G. S. § 14-54 ". . .

night," present in the original (24, 25 Vict. c. 96, s. 58) enactment in the North Carolina Code of 1883, were specifically omitted by 1907, c. 822.

[39] N. C. GEN. STAT. § 14-57 (1953).

[40] State v. Spears, 164 N. C. 452, 79 S. E. 869 (1913); State v. Boon, 35 N. C. 244 (1852). See also *supra*, note 7.

[41] State v. Bowden, 175 N. C. 714, 95 S. E. 145 (1918); see also 2 N. C. L. REV. 110 (1924).

[42] State v. Boon, 35 N. C. 244 (1852).

[43] State v. Reid, 230 N. C. 561, 53 S. E. 2d 849 (1949).

[44] State v. McDaniel, 60 N. C. 245 (1864). See further State v. Hooper, 227 N. C. 633, 44 S. E. 2d 42 (1947).

[45] N. C. GEN. STAT. § 14-55 (1953).

[46] N. C. Sess. Laws 1955, c. 1015. See further 33 N. C. L. REV. 538 (1955).

[47] See *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411 (1951).

where . . . other personal property shall be . . ." in context with the corresponding extensions of the other statutory crimes, suggest that the true purpose is the protection of *property* and not the sanctity of the home.

FRANKLIN A. SNYDER

Criminal Law—Presumption of Coercion—Crimes Committed by Wife in Husband's Presence

With the exception of certain crimes, when a wife commits a criminal offense in the presence of her hubsand, there arises a common-law presumption that she was acting under his threats, commands, or coercion;[1] thus, in the absence of any rebutting evidence, the wife must go free.[2] The two basic requisites to the raising of this presumption are that there must have been a marriage,[3] and that the criminal act must have been committed in the physical or constructive presence of the husband.[4] Although there is a tendency in the courts recently to hold that the presumption is a slight one and more or less easily rebuttable

[1] State v. Kelly, 74 Iowa 589, 38 N. W. 503 (1888); Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105 (1813); Davis v. State, 15 Ohio 72, 45 Am. Dec. 559 (1846); 1 BURDICK, CRIME p. 210 (1946).

[2] This defense of marital coercion, even without the accompanying presumption, is different from the general defense of coercion. In order to obtain benefit of the general defense, "one must have acted under apprehension of imminent and impending death, or of serious and immediate bodily harm. Fears . . . of future bodily harm do not excuse an offense. . . ." 1 BURDICK, CRIME p. 262 (1946). A wife on the other hand is excused if she committed the criminal act under her husband's coercion, 1 BURDICK, CRIME p. 210 (1946), which does not require "apprehension of imminent and impending death, or of serious and immediate bodily harm." The defense has been allowed when the husband was in jail at the time of the criminal offense and therefore could have done no more than make threats of future consequences. State v. Miller, 162 Mo. 253, 63 S. W. 692 (1901).

Quaere whether or not the defense of marital coercion and the general defense of coercion had the same historical basis. The general defense seems to be based on the doctrine that: "Since every crime requires a willing or voluntary mind, it may be a defense to a criminal charge that the criminal act was not committed voluntarily but was the result of coercion, compulsion, or necessity." 1 BURDICK, CRIME p. 260 (1946). The basis for the defense of marital coercion is less certain. One theory is that it is based on the principal that a wife owes her husband the highest obedience. 1 HAWKINS, PLEAS OF THE CROWN p. 4, n. 7 (Curwood ed. 1824). Others suggest that the defense arose from the practice of granting the husband benefit of clergy and leaving the wife to bear the harsh punishments that were administered for relatively minor crimes. 1 BURDICK, CRIME p. 209 n. 84 (1946).

[3] Davis v. State, 15 Ohio 72, 45 Am. Dec. 559, 560 (1846).

[4] State v. Shee, 13 R. I. 535 (1882). Although it is agreed that the act must have been committed in the presence of the husband in order for the presumption to apply, there arises the problem of what constitutes presence within the meaning of the rule. It has been held in an extreme case that a wife was in her husband's constructive presence when he was confined in jail and she took him a revolver to aid in his escape. The court there held that the wife was entitled to the benefit of the presumption. State v. Miller, 162 Mo. 253, 63 S. W. 692 (1901). It is not the intention of this note to deal with the problem of presence. See Annot., 4 A. L. R. 266 (1919), 71 A. L. R. 1118 (1931).

by the state,[5] still the wife cannot be convicted for most offenses committed in the presence of her husband without the introduction of some rebutting evidence tending to show that she was acting voluntarily and of her own free will.[6] It is a jury question whether or not the presumption was rebutted by the state's evidence.[7]

Where the common law has not been changed by statute, this presumption of coercion has traditionally been subject to several exceptions, but it has never been agreed specifically which offenses fall within the exceptions. In each jurisdiction in which a statute has been passed approving or modifying the defense of presumed coercion arising from a wife's commission of an offense in her husband's presence, provision has been made in the statute to exclude specific offenses. Thus in those jurisdictions, all uncertainty as to the inclusion of specific offenses is removed; the problem remains only in those states still following the common-law rule. This note will first discuss the common-law exceptions to the presumption and will then deal with the legislative and judicial action taken in the various states relative to this common-law doctrine of presumed coercion.

COMMON-LAW EXCEPTIONS TO PRESUMPTION OF COERCION

Text writers and courts have frequently referred to crimes such as those "forbidden by the law of nature, which are *mala in se*"[8] as being excepted from the rule. Others prefer an affirmative rule, saying that benefit of the presumption is granted only in cases involving crimes "of minor grade."[9] However, since this is so indefinite that it would be of little help in a concrete case, a study of the cases themselves is needed.

When on trial for murder or treason, the wife is almost universally denied the benefit of the presumption that she was coerced.[10] Perjury, at least in the case of a wife's testifying at her husband's criminal trial, is generally excepted also, since a wife cannot be compelled to testify against her husband.[11] Likewise excluded from the favorable presumption are the domestic offenses of maintaining a brothel and maintaining

[5] O'Donnel v. State, 73 Okla. Crim. 1, 117 P. 2d 139 (1941).

[6] State v. Kelly, 74 Iowa 589, 38 N. W. 503 (1888); CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES p. 123 (5th ed. 1952).

[7] State v. Carpenter, 67 Idaho 277, 176 P. 2d 919 (1947).

[8] Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105, 106 (1813).

[9] State v. Shee, 13 R. I. 535, 536 (1882) (dictum) (an action for maintaining a nuisance in which the decision was based on the finding that the husband was not present at the time of the offense).

[10] Bibb v. State, 94 Ala. 31, 10 So. 506 (1892); Cothron v. State, 138 Md. 101, 113 Atl. 620 (1921); Martin v. Commonwealth, 143 Va. 479, 123 S. E. 348 (1925); CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES p. 123 (5th ed. 1952). But see State v. Kelly, 74 Iowa 589, 38 N. W. 503 (1888).

[11] Commonwealth v. Moore, 162 Mass. 441, 38 N. E. 1120 (1894); Smith v. Meyers, 52 Neb. 1, 74 N. W. 277 (1898).

a gaming house.[12] This exception is based on two principles. First, these offenses are in a class considered activity normally carried on by women.[13] Second, these are offenses concerned with the management of the house, and it is assumed that the wife has at least an equal part in its management.[14] The exception for maintaining a brothel has carried over into the closely related field of transportation of a girl for the purpose of prostitution, since this too is generally considered activity more likely to be engaged in by women.[15]

Manslaughter remains a question mark, without direct holdings either way and with conflicting dicta on the question. It has been said that the wife gets the benefit of the presumption in a case involving murder,[16] which would seem to include manslaughter; on the other extreme it has also been stated that the presumption applies only to crimes "of minor grade."[17] No conclusion is drawn here on which view the courts are likely to accept. Another crime which is in a somewhat questionable category is robbery. Some text writers say that robbery is *probably* one of the exceptions in which the presumption does not arise.[18] However, all of the direct holdings found on this point are to the contrary,[19] and thus it would seem that benefit of the presumption is given the wife in robbery cases.

In conspiracy cases the general, but not unanimous, view is that a husband and wife cannot be convicted of conspiring to commit an offense without the involvement of a third person.[20] This is based partially on the presumption that the wife was coerced by her husband,[21] but primarily on the basic assumption of the law that husband and wife are one person and thus cannot conspire.[22] The entry of a third person into the alleged conspiracy rebuts all such defenses, however, and both

[12] State v. Gill, 150 Iowa 210, 129 N. W. 821 (1911); State v. Grossman, 95 N. J. L. 497, 112 Atl. 892 (1921); Hudson v. Jennings, 134 Ga. 373, 67 S. E. 1037 (1910).

[13] State v. Gill, *supra* note 12; State v. Grossman, *supra* note 12.

[14] State v. Gill, *supra* note 12.

[15] Dawson v. United States, 10 F. 2d 106 (9th Cir. 1926), *cert. denied* 271 U. S. 687 (1926).

[16] State v. Kelly, 74 Iowa 589, 38 N. W. 503 (1888).

[17] State v. Shee, 13 R. I. 535, 536 (1882) (dictum) (action for maintaining a nuisance).

[18] MILLER, HANDBOOK OF CRIMINAL LAW p. 142 (1934); see BURDICK, CRIME p. 211 (1946).

[19] People v. Wright, 38 Mich. 744, 31 Am. Rep. 331 (1878); State v. Murray, 316 Mo. 31, 292 S. W. 434 (1927); Davis v. State, 15 Ohio 72, 45 Am. Dec. 559 (1846); Miller v. State, 53 Okla. Crim. 247, 10 P. 2d 292 (1932); Regina v. Dykes, 15 Cox Crim. Cas. 771 (1885); Regina v. Torpey, 12 Cox Crim. Cas. 45 (1871).

[20] People v. Miller, 82 Cal. 107, 22 Pac. 934 (1889); Gros v. United States, 138 F. 2d 261 (9th Cir. 1943); Dawson v. United States, 10 F. 2d 106 (9th Cir. 1926).

[21] Dalton v. People, 68 Colo. 44, 189 Pac. 37 (1920) (presumption not allowed because of statute).

[22] People v. Gilbert, 26 Cal. App. 2d 1, 78 P. 2d 770 (1938).

husband and wife may be convicted;[23] this is true even when the third person is not tried at the same time.[24]

Benefit of the presumption has also been given to the wife in cases involving arson,[25] battery,[26] larceny,[27] forgery,[28] liquor law violations,[29] illegal possession of narcotics,[30] maintaining a nuisance,[31] and sale of obscene cards.[32] In one rather unusual case, benefit of the presumption was granted to a wife charged with aiding and abetting her husband in the crime of statutory rape.[33]

TREATMENT OF THIS COMMON-LAW DOCTRINE IN THE VARIOUS STATES

There is little uniformity in the different states as to what should be done with the common-law doctrine of presumed coercion. Treatment has varied from complete abolition of the defense of marital coercion at the one extreme to recognition of it by statute at the other: four states have abolished the defense entirely; nineteen (fourteen by statute, five by court decision) have abolished the presumption but left the defense; sixteen still recognized the doctrine when the issue was last before the court; and three have specifically provided for the presumption by statute.

In one group of four states—Minnesota, New York, Washington, and Wisconsin[34]—"the defense of marital coercion . . . has been abrogated . . ."[35] by statute. Virtually the same wording is used in the statutes of Minnesota and Washington as that in the New York statute: "It is not a defense to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband."[36] The Wisconsin statute is even stronger in its wording: "It is no defense . . . that the alleged crime was committed by command of

[23] *Ibid.*
[24] *Ibid.*
[25] Davis v. State, 15 Ohio 72, 45 Am. Dec. 559 (1846).
[26] Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105 (1813).
[27] State v. Buchanan, 111 W. Va. 142, 160 S. E. 920 (1931); State v. Hollis, 163 La. 952, 113 So. 159 (1927).
[28] State v. Palton, 347 Mo. 303, 147 S. W. 2d 467 (1941); Zammer v. State, 51 Okla. Crim. 125, 300 Pac. 325 (1931).
[29] Kelso v. State, 255 P. 2d 284 (Okla. Crim. 1953); Paris v. State, 60 Okla. Crim. 236, 90 P. 2d 1078 (1939). However, when the illegally possessed liquor is found in the home, some courts tend to consider the act as one of the domestic offenses and therefore do not allow the presumption. See Crocker v. State, 148 Tenn. 106, 251 S. W. 914 (1923).
[30] Winer v. State, 36 Okla. Crim. 316, 253 Pac. 1025 (1927).
[31] State v. McMillan, 144 S. C. 121, 142 S. E. 236 (1928).
[32] State v. Martini, 80 N. J. L. 685, 78 Atl. 12 (1910).
[33] Commonwealth v. Balles, 62 Montg. 293 (Pa. Quar. Sess. 1946).
[34] MIN. STAT. ANN. § 610.06 (1947); N. Y. PEN. LAW § 1092 (1944), United States v. Swierzbenski, 18 F. 2d 685 (W. D. N. Y. 1927); WASH. REV. STAT. § 10.46.150 (1952); WIS. STAT. § 939.46 (1955).
[35] United States v. Swierzbenski, *supra* note 34, at 685.
[36] N. Y. PEN. LAW § 1092 (1944).

her husband. . . ."[37] Thus the legislatures of four states have said that a married woman will not be excused from criminal acts even though she could prove that she was acting under the command of her husband, unless she could also prove the elements of the general defense of coercion.[38] These legislatures apparently feel that married women today are not under the control of their husbands to the extent of committing criminal offenses under their orders.

Fourteen other states have taken legislative action to modify the common-law rule by statute without abolishing the defense entirely. These include Arizona, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Maryland, Michigan, Montana, Nevada, New Jersey, Texas, and Utah.[39] In these jurisdictions, statutes have been passed abolishing the presumption of coercion which arose from the fact of coverture when the crime was committed in the husband's presence. The defense itself continues to be available to the accused, but the burden is on her to prove that she was acting in her husband's presence and under his coercion, rather than leaving the burden on the state to rebut the presumption. Thus, in these states, a married woman could be convicted for an offense committed in the presence of her husband without the state's offering any proof to show that she acted of her own free will. It would seem, then, a rebuttable presumption would exist that she was acting of her own free will and not under the coercion of her husband.

These fourteen states have used several different approches in abolishing the old presumption. Of these states, five[40] have enacted statutes listing various classes of people who under certain circumstances cannot be punished for their acts. Included in the typical statute are "married women . . . acting under the threats, command or coercion of their husbands. . . ."[41] The Arkansas statute says much the same thing but uses the words it must "appear from the facts that"[42] she was coerced. Colorado, Georgia, Illinois, and Nevada go a little farther than the others in this group by requiring that *violent* threats, command, or coercion be used in order to relieve the liabilty for an offense. This approaches but does not go so far as the position taken by the first group

[37] WIS. STAT. § 939.46 (1955). This statute then goes on to say that married women will be judged under the standards of the general defense of coercion.

[38] See note 2 *supra* for the requirements of the general defense of coercion.

[39] ARIZ. PEN. CODE § 43-114 (1939); ARK. STAT. ANN. § 41-114 (1947); CAL. PEN. CODE ANN. § 26 (1956); COLO. REV. STAT. ANN. § 40-1-8 (1953); GA. CODE ANN. § 26-401 (1953); IDAHO CODE § 18-201 (1948); ILL. ANN. STAT. § 38-596 (1935); MD. ANN. CODE art. 35-6 (1951); MICH. STAT. ANN. § 28.1071 (1954); MONT. REV. CODE § 94-201 (1947); NEV. COMP. LAWS § 9952 (1929); N. J. STAT. ANN. § 2:103-3 (1939); TEX. PEN. CODE ANN. art. 32 (1952); UTAH CODE ANN. § 76-1-41 (1953).

[40] Arizona, California, Montana, Utah, and Idaho.

[41] ARIZ. PEN. CODE § 43-114 (1939).

[42] ARK. STAT. ANN. § 41-114 (1947).

of states mentioned above, where it must appear that the act was committed under fear of "imminent and impending death, or of serious and immediate bodily harm."[43] "A married woman acting under the threats, command or coercion of her husband shall not be found guilty . . . provided it appears from all the facts and circumstances of the case that *violent* threats, command or coercion were used. . . ."[44] (Emphasis added.) Maryland, Michigan, and New Jersey simply make statements to the effect that the presumption will no longer be indulged. Maryland goes on to say that "it shall be a good defense for her to prove"[45] that she was coerced. Texas takes an unusual position by abolishing the presumption and then providing that if a wife were so acting under her husband's coercion, she would, in non-capital cases, receive only one-half the punishment that would otherwise be administered, and in capital cases, be punished only by imprisonment.[46] Thus, Texas has modified the common law rule to such an extent that coercion, when proved, does not excuse the crime, but only serves to mitigate the punishment.

England has also abolished by statute the presumption of coercion, but preserved the defense with the burden of proof on the wife. The statute, after abolishing the presumption, provides that "it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."[47]

The question has arisen as to what effect the Married Woman's Acts in the various jurisdictions have had on the presumption of coercion. Four state courts which have passed directly on this point are evenly split. Kentucky and Tennessee have held that the acts giving married women equal property and political rights have, by implication, abolished the presumption,[48] since the husband no longer has control over the wife's person and property. On the other hand, Alabama and Missouri have held that the presumption was not affected by these statutes giving equal rights to women.[49] In the Alabama case, the court said: "These rules of the common law are adapted to and are necessary for the well-being of society, and the various statutes of this state relative to married women and their rights to property do not change this rule."[50]

Courts in other states have gone ahead without relying on legisla-

[43] 1 BURDICK, CRIME p. 262 (1946).
[44] COLO. REV. STAT. ANN. § 40-1-8 (1953).
[45] MD. ANN. CODE art. 35-6 (1951).
[46] TEX. PEN. CODE ANN. art. 32 (1952).
[47] CRIMINAL JUSTICE ACT, 1925, 15 & 16 GEO. 5, c. 86, § 47.
[48] King v. City of Owensboro, 187 Ky. 21, 218 S. W. 297 (1920); Morton v. State, 141 Tenn. 357, 209 S. W. 644 (1919).
[49] Braxton v. State, 17 Ala. App. 167, 82 So. 657 (1919); State v. Murray, 319 Mo. 31, 292 S. W. 434 (1927).
[50] Braxton v. State, 17 Ala. App. 167, 82 So. 657, 659 (1919).

tive implication and have declared that the presumption no longer exists because of the changing times. Such is the case in Iowa, Kansas, and Nebraska.[51] The Iowa court held that since the reason for the rule had long since ceased to exist, it followed that the rule itself should be discarded.[52] In Kansas it was said that the law presumes "that all persons of mature age and sound mind act upon their own volition,"[53] and that they should thereby be responsible for their acts. Nebraska added: "Such a presumption runs . . . counter to the reason of men, in view of the domestic relations as they now exist. . . . A wife is no longer a marionette, moved at will by the husband, either in fact or in law."[54]

In a majority of jurisdictions in which the legislature has not taken action, the presumption apparently is still the law, having been recognized the last time the issue came before the courts. This largest single group includes Alabama, Delaware, Florida, Indiana, Louisiana, Maine, Massachusetts, Missouri, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina Virginia, and West Virginia.[55] The courts of many of these states, however, have not had occasion to pass on the question for some years,[56] nevertheless, very few states have abolished the presumption without legislative action, and the assumption can be made that most of these courts will continue to apply the doctrine in the absence of statutory change.

The North Carolina Supreme Court first passed on the question in *State v. Williams*,[57] a case in which a man and wife had been convicted of assault and battery without instructions on the question of coercion. Reversing the wife's conviction, the court said: "if a wife commit any felony (with certain exceptions not material now to consider) in the presence of her husband, it shall be presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and she is there-

[51] State v. Renslow, 211 Iowa 642, 230 N.W. 316, 71 A.L.R. 1111 (1930); State v. Hendricks, 32 Kan. 559, 4 Pac. 1050 (1884); Smith v. Meyers, 54 Neb. 1, 74 N. W. 277 (1898).

[52] State v. Renslow, *supra* note 51.

[53] State v. Hendricks, 32 Kan. 559, 564, 4 Pac. 1050, 1053 (1884).

[54] Smith v. Meyers, 54 Neb. 1, 7, 74 N. W. 277, 278 (1898).

[55] Braxton v. State, 17 Ala. App. 167, 82 So. 657 (1919); State v. Clark, 9 Houst. 536, 33 Atl. 310 (Del. Gen. Sess. 1891); Conner v. State, 95 Fla. 765, 117 So. 852 (1928); Tomasello v. State, 91 Ind. App. 670, 173 N. E. 235 (1930); State v. Hollis, 163 La. 952, 113 So. 159 (1927); State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422 (1871); Commonwealth v. Helfman, 258 Mass. 410, 155 N. E. 448 (1927); State v. Ready, 251 S. W. 2d 680 (Mo. 1952); State v. Asper, 35 N. M. 203, 292 Pac. 225 (1930); State v. Cauley, 244 N. C. 701, — S.E. 2d — (1956); Tabler v. State, 34 Ohio St. 127 (1877); Commonwealth v. Hand, 59 Pa. Super. Ct. 286 (1915); State v. Boyle, 13 R. I. 537 (1882); State v. Minor, 171 S. C. 120, 171 S. E. 737 (1934); Martin v. Commonwealth, 143 Va. 479, 129 S. E. 348 (1925); State v. Buchanan, 111 W. Va. 142, 160 S. E. 920 (1931).

[56] Dates of cases cited note 55 *supra* represent most recent decisions found for each state.

[57] 65 N. C. 398 (1871).

fore execused."[58] In *State v. Nowell*[59] the court approved a charge to the jury which included the same doctrine as presented in the *Williams* case. In *State v. Seahorn*[60] the majority upheld the conviction of husband and wife for liquor law violation on the grounds that the charge to the jury had substantially complied with the doctrine as set forth in the previous North Carolina cases. Chief Justice Clark wrote a concurring opinion[61] in which he strongly advocated abolishing the presumption by court decision without waiting for legislation, in order to bring the rule in accordance with Twentieth Century conditions. These three cases, all of which recognized the presumption, are the only ones found in which the North Carolina Supreme Court has been called upon to decide the issue.*

In addition to those states which have continued to apply the common-law presumption, three others—Oklahoma, Oregon, and South Dakota—have enacted statutes which specifically provide that the law will presume coercion when the wife commits an offense in the presence of her husband.[62] The Oregon statute lists various presumptions which the law of that state recognizes; among them: "A wife acting with her husband in the commission of a felony, other than murder, acted by coercion and without guilty intent."[63] Thus it would seem Oregon requires not only that the act charged must have been committed in the presence of her husband, but also that she must have been acting in concert *with* him. Oklahoma and South Dakota have similar statutes saying that subjection will be inferred when the offense was committed "in the presence and with the assent of her husband,"[64] followed by a list of crimes which are specifically exempt from the presumption. Oklahoma lists eighteen such exceptions; South Dakota, even though it lists twenty-three exceptions, provides that in the event duress is shown the wife will be excused from punishment even for those crimes.

The remaining six states—Connecticut, Mississippi, New Hampshire, North Dakota, Vermont, and Wyoming—so far as could be determined

[58] State v. Williams, 65 N. C. 398, 399 (1871).
[59] 156 N. C. 648, 72 S. E. 590 (1911).
[60] 166 N. C. 376, 81 S. E. 687 (1914).
[61] State v. Seahorn, 166 N. C. 376, 378, 81 S. E. 687, 689 (1914).
*In a recent decision handed down since this material first went to press, the North Carolina Supreme Court reaffirmed the doctrine of presumed coercion in the much publicized child-beating case of State v. Cauley, 244 N. C. 701, — S. E. 2d — (1956). Here the husband was charged under N. C. GEN. STAT. § 14-32 (1953) with assault with a deadly weapon with intent to kill inflicting serious injuries; and the wife was charged with aiding an abetting in the assault. Both were convicted, and both appealed. The court held that the presumption did exist, and granted the wife a new trial on the judge's failure to instruct the jury accordingly.
[62] OKLA. STAT. ANN. tit. 21, § 157 (1951); ORE. REV. STAT. § 41.360 (1955); S. D. CODE § 13.0503 (1939).
[63] ORE. REV. STAT. § 41.360 (1955).
[64] OKLA. STAT. ANN. tit. 21, § 157 (1951); S. D. CODE § 13.0503 (1939).

have not passed on this question either by court decision or by legislative action.

It is the conviction of this writer that the presumption should be abolished. At the time of its creation the presumption was in keeping with the then prevailing domestic relations; today it has no sound basis. However, the doctrine should not be abrogated in its entirety. Even now there still may be a few women who, either because of a marriage vow to obey their husbands or for other reasons, would follow their husband's orders—even to the extreme of violating the law. These women should be entitled to prove coercion as a defense. It is therefore suggested that a statute on the order of the English act[65] should be passed placing the burden of proof on the wife, yet allowing her the opportunity to prove actual coercion and be excused.

DAVID S. EVANS

Criminal Law—Sentences to Different Places of Confinement—Concurrent or Consecutive under North Carolina Law

A new statute[1] was enacted during the 1955 session of the North Carolina General Assembly which provides as follows:

> "When by a judgment of any court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement."

This note is an attempt to analyze the effect of this statute on the law of North Carolina. The determination of this question necessitates a review of the North Carolina case law governing the imposition of concurrent and consecutive sentences prior to the enactment of the 1955 legislation.

The great weight of authority in this country takes the view that a court has power derived from the common law to impose consecutive or cumulative sentences on the conviction of separate offenses charged in separate indictments or separate counts of the same indictment.[2] North

[65] CRIMINAL JUSTICE ACT, 1925, 15 & 16 GEO. 5, c. 86, § 47: "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

[1] N. C. GEN. STAT. § 15-6.2 (1955).
[2] 15 AM. JUR., *Criminal Law* § 464 (1938).

Carolina is in accord with this view;[3] but as in all other jurisdictions the exercise of that power must conform with certain standards in order for the court's intention to impose consecutive sentences to be effectuated: (1) The last sentence must explicitly state that the latter term of imprisonment is to commence at the expiration of the former.[4] (2) The reference to the former sentence in the latter must be so certain and definite that there can be no doubt as to the times at which the latter term of imprisonment will begin and expire.[5] The Supreme Court has declared that uncertainties and ambiguities contained in sentences purporting to be consecutive will not be resolved by resort to evidence *dehors* the record.[6] The court has required of the trial courts a great degree of particularity in the imposition of consecutive sentences,[7] but the standard of certainty required is in no event higher than the nature of the case will permit.[8] The reasons underlying these requirements of certainty and definiteness have been explained by the Supreme Court:

"The question here is not merely one of the intention of the

[3] State v. Duncan, 208 N. C. 316, 180 S. E. 595 (1938) where defendant was convicted of several offenses charged in separate counts of same indictment; *In Re* Black, 162 N. C. 457, 78 S. E. 273 (1913) where defendant was convicted of several offenses charged in separate indictments and tried by the same court; *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945) where defendant was convicted of several offenses charged in separate indictments and tried in different courts.

[4] *In Re* Black, 162 N. C. 457, 78 S. E. 273 (1913); State v. Duncan, 208 N. C. 316, 180 S. E. 595 (1938); State v. Stonestreet, 243 N. C. 28, 89 S. E. 2d 734 (1955).

[5] *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945). Petitioner was sentenced to seven years in the State prison for automobile theft by the Lenior County Superior Court. After his escape and before his recapture, he was sentenced to three years in the State prison for larceny by the Martin County Superior Court, that sentence "to begin at the expiration of the sentence in case number C. P. 31355." Evidence *aliunde* showed that the letters "C. P." meant Central Prison and that the numbers following designated the number attached to the case by the prison for administrative purposes. The court held that this was not a sufficient reference to the previous sentence, that the second sentence was indefinite and ambiguous, and that the sentences must therefore run concurrently.

[6] *Id.* at 374, 35 S. E. 2d at 172: "It is true, of course, that the intention of the court imposing the sentence should prevail where clearly expressed. . . But we do not think this implies that such intention should be sought through evidence *dehors* the record—at least such as is here made necessary;—that it is open to the same sort of proof as if the judge were writing a will or making a contract."

[7] *Id.* at 372, 35 S. E. 2d at 171. The court cited certain deficiencies in the second sentence which caused it to run concurrently with the first: "It does not name the county or court in which trial was had and in which the judicial record was made and is kept, or the date or term of court, or even the name of the defendant; nor does it give any description of the offense for which the defendant was convicted, or designate the term of the sentence imposed—by means of which the Lenoir County sentence, the expiration of which is to determine from the beginning of the Martin County sentence, could be identified from the judicial records themselves and the sentence given significance." However the court in *In Re* Smith, 235 N. C. 169, 69 S. E. 2d 174 (1952), declared that it did not intend that the indicia listed in the Parker case should be all-inclusive in every case.

[8] State v. Cathey, 170 N. C. 794, 87 S. E. 532 (1915). A reversal of a previous sentence or a diminution of a previous sentence for good conduct will not cause a subsequent sentence to begin on the expiration of the previous sentence to fail.

> judge imposing the sentence, and the method of ascertaining it; it is also a question of the adequate expression of that intent within acceptable standards of certainty in dealing with the liberty and lives of those charged with violations of the law."[9]

If the intention of the court to impose consecutive sentences is not adequately expressed in accordance with the above requirements of certainty and definiteness, the sentences will be presumed to run concurrently. The rule as stated in several decisions of the North Carolina Supreme Court is as follows:

> "In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving sentence."[10]

The state has the burden of showing that the sentences are consecutive; this burden is carried when the sentence is certain and definite within itself.[11] The court has declared that no presumption will be indulged in favor of sustaining a sentence as cumulative.[12]

In *In Re Smith*,[13] however, the court held that sentences to different places of confinement are by their very nature cumulative and that two sentences in order to run concurrently must be to the same place of confinement. In that case defendant, already serving a sentence in the State prison, was sentenced to the Jackson County jail for a term of eighteen months to be assigned to the roads under the supervision of the State Highway and Public Works Commission. The court stated that the sentences could not run concurrently even if it were conceded that the second sentence lacked the required degree of certainty and definiteness to impose consecutive sentences in a situation where the place of confinement in each sentence is the same. The rule of *In Re* Smith was reiterated in a recent decision of the North Carolina Court[14] where the sentences were imposed prior to the enactment of the 1955 statute above. The court commented that the statute had apparently changed the rule of *In Re Smith* as to sentences imposed after the enactment, but unfortunately made no further observations on the effect of the statute on North Carolina law.

[9] *In Re* Parker, 225 N. C. 369, 373, 35 S. E. 2d 169, 172 (1945).
[10] *Id.* at 372, 35 S. E. 2d at 171; *In Re* Smith, 235 N. C. 169, 171, 69 S. E. 2d 174, 175 (1952).
[11] *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945).
[12] *Ibid.*
[13] 235 N. C. 169, 69 S. E. 2d 174 (1952). See also *Ex Parte* Bentley, 240 N. C. 112, 81 S. E. 2d 206 (1912), in accord with *In Re* Smith.
[14] *In Re* Swink, 243 N. C. 86, 89 S. E. 2d 792 (1955).

The provisions of the 1955 enactment present difficulties of interpretation important not only to those concerned with the administration of the law but perhaps even more so to those whose lives and liberty are directly affected by the legislation. A comparison of the statute with prior North Carolina case law raises these questions:

(1) To what extent is the rule of *In Re Smith* abrogated? If a sentence to confinement in the State prison is imposed upon one previously sentenced to confinement in a county jail or any other place of confinement, the statute clearly provides that the difference of places of confinement is not enough in itself to cause the sentences to run consecutively. This is a clear departure from prior North Carolina law and the weight of authority in this country.[15]

If the writer might speculate, the intention of the legislature in enacting the new law would seem to be a grant to the courts of the power of discretion necessary to render justice in all cases, *i.e.,* to impose sentences in a manner most compatible with the public good and the rehabilitation of the individual prisoner. The rule of *In Re Smith* was apparently repugnant to the senses of the enactors. If this assumption is true, then the statute may fall short of the goal set for it. The statute speaks only of "additional time in prison"; its language does not provide that a prisoner shall not be required to spend additional time in a county jail when it is the desire of the court to impose a subsequent jail sentence to run concurrently with a previous sentence to a term in the State prison. If the word "prison" is given a literal construction, that it means the State prison, then it would seem that the rule of *In Re Smith* is still applicable in this situation. On the other hand, if "prison" is construed to mean any place of confinement, then the statute would accomplish its purpose in this situation. In view of the fact that the word "prison" has been used previously in the same statute to mean the State prison as opposed to all other places of confinement, the latter construction would be liberal indeed.[16] The statute is at least an important step toward the elimination of the *In Re Smith* doctrine, a stringent rule which in some cases may be a stumbling block to the

[15] 24 C. J. S., *Criminal Law* § 1996 (1941). But the new North Carolina rule imposed by the statute is not without legal precedent. See Capone v. United States, 51 F. 2d 609 (7th Cir. 1931), *cert. denied,* 284 U. S. 669 (1931), where it was held that a sentence to a county jail ran concurrently with a sentence to a federal prison. This case is an exception to the federal rule usually stated. See United States v. Remus, 12 F. 2d 239 (6th Cir. 1926), *cert. denied,* Remus v. United States, 271 U. S. 689 (1926).

[16] Quaere: Should not the word "prison" as used in the phrase "any additional time in prison" be construed as meaning any place of confinement even though such construction would violate the rule that identical words used in the same section of a statute should be given like meanings? All laws are to be construed sensibly; what otherwise would be a strained construction is unobjectionable if necessary to avoid a foolish or unjust result.

administration of justice; however whether it constitutes such a complete rejection of the North Carolina law that a court is now vested with the power to use its discretion as to the imposition of concurrent or consecutive sentences in this situation depends upon the extent to which the Supreme Court is willing to pursue the apparent intention of the legislature.

The imposition of several sentences to terms in separate county jails raises still another problem under the new enactment. In no sense does the 1955 statute authorize the imposition of concurrent sentences to confinement in separate jails; however there is some doubt as to whether the rule of *In Re* Smith prohibited such concurrent sentences. The rule was stated: "Two sentences, in order to run concurrently, must be to the same place of confinement."[17] "Place" would seem to indicate geographical position rather than a type of penal institution; however in the *Smith* case the sentences in question were to terms in separate types of institutions, *viz.* the State prison and the Jackson County jail. The rule as stated in some jurisdictions is that the presumption of concurrency of sentences exists when the sentences are to imprisonment in the same institution or same type of institution.[18] This latter rule, rather than a strict interpretation of the rule of the *Smith* case, has been adopted in effect by the State Highway and Public Works Commission as a matter of practice, but only where both of the sentences to separate county jails provide that the prisoner is to work under the supervision of that commission. It would appear likely that the Supreme Court would interpret the rule of the *Smith* case to conform with this logical administrative policy.

However, where a prisoner has been sentenced to a term in a county jail and assigned to the jail itself or some other county institution other than under the State Highway and Public Works Commission, a subsequent sentence to a different county jail regardless of assignment has been administratively construed to run consecutively to the first sentence because of the *In Re Smith* rule. The same is true where the chronological order of such sentences is reversed. The statute is not applicable in this situation. Unless the *Smith* rule is construed to mean that two sentences in order to run concurrently must be to the same institution or the same type of institution, two such sentences could not run concurrently particularly in the absence of the connotation of "same place" furnished by provisions in both sentences for assignment to the State Highway and Public Works Commission.

(2) How is the presumption of concurrency of sentences affected by the statute? The presumption as declared by the Supreme Court arose

[17] 235 N. C. 169, 172, 69 S. E. 2d 174, 176 (1952).
[18] 24 C. J. S., *Criminal Law* § 1996 (1941).

only when two sentences were imposed against the same person to the same place of confinement.[19] Now that a prison sentence may be imposed to run concurrently with any other sentence, it would logically follow that the presumption of concurrency should arise in this situation, notwithstanding that the places of imprisonment are different. Stated another way, *cessante ratione legis cessat.* It would seem that the presumption should exist in every situation where one sentence may run concurrently with another. The statute was apparently intended to eliminate every vestige of the old rule that a sentence to the State prison could not run concurrently with any other sentence.[20] With that objective as a background for the interpretation of the statute, it would seem the better view that in the absence of a definite and certain expression of the intention of the court to the contrary, one sentence shall be presumed to run concurrently with any other unless the sentences are cumulative as a matter of law. If the difference in places of confinement is no ground for holding that one sentence must run consecutively to a prior sentence, it can only be fair to the prisoner that the state must show the required certainty and definiteness of the latter sentence in order to make the sentences run consecutively.

The questions presented here must be dealt with when this statute is presented to the courts for construction. If the intention of the enactors is to grant to the courts the power of discretion to impose concurrent or consecutive sentences as they deem appropriate, that intention may well be frustrated as a result of the restrictive wording of the statutory provisions. The power of discretion to impose concurrent or consecutive sentences necessary to a court in order to render justice in all cases would be most effectively afforded by a remedial statute proposed as follows:

Concurrent Sentences for Offenses of Different Grades or to be Served in Different Places.

Where two or more sentences to confinement are imposed against the same person, regardless of whether said sentences are to different places of confinement or are for different grades of offenses, it shall be presumed that the sentences are to be served concurrently unless the contrary clearly appears; and any reasonable doubt or ambiguity must be resolved in favor of the prisoner.

ROBERT B. MIDGETTE

[19] See note 10 *supra.*
[20] *In Re* Smith, 235 N. C. 169, 69 S. E. 2d 174 (1952).

Criminal Law—Sufficiency of Indictments in Statutory Language

The North Carolina Constitution declares that every person charged with a crime has the right to be informed of the accusation made against him.[1] In considering this section of our Constitution, the North Carolina Supreme Court has observed that it is "an embodiment of the common law rule requiring the charge against the accused to be set out in the indictment or warrant with sufficient certainty to identify the offense with which he is sought to be charged, protect him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment according to law in case of conviction."[2]

For statutory offenses, the general rule is that an indictment or warrant charging an offense in the language of the statute is sufficient.[3] Exceptions to this general rule were rare in North Carolina until recent years. Though our court has been reluctant to require more than the language of the statute, many cases involving this problem have been decided by a divided court. Gradually exceptions have been engrafted upon this general rule of pleading statutory offenses, and in three recent cases[4] the court ruled that an indictment in the language of the statute is not sufficient.

Determining the sufficiency of an indictment in statutory language is not a new problem in North Carolina. In a very early case[5] the majority decided that an indictment for murder must state the length and depth of the mortal wounds of the deceased. Even the majority expressed dislike for requiring such detail in an indictment but thought the problem should be left to the legislature for correction. Consequently in 1811 an act[6] was passed which stipulated that the charge for a criminal offense be stated only in a plain, intelligible, and explicit

[1] N. C. CONST. art. I, § 11 (1868): "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self incriminating evidence, or to pay costs, jail fees, or necessary witness fees for the defense, unless found guilty."

[2] State v. Jenkins, 238 N. C. 396, 397, 77 S. E. 2d 796, 797 (1953).

[3] JOYCE, INDICTMENTS § 454 (1924); United States v. Hess, 124 U. S. 483 (1887); United States v. Simmons, 96 U. S. 360 (1877); State v. Jackson, 218 N. C. 373, 11 S. E. 2d 149 (1940); State v. Williams, 146 N. C. 618, 61 S. E. 61 (1908); State v. Howe, 100 N. C. 449, 5 S. E. 671 (1888); State v. Liles, 78 N. C. 496 (1878); State v. Stanton, 23 N. C. 424 (1841).

[4] State v. Cox, 244 N. C. 57, 92 S. E. 2d 413 (1956); State v. Powell, 244 N. C. 121, 92 S. E. 2d (1956); State v. Lucas, 244 N. C. 53, 92 S. E. 2d 401 (1956).

[5] State v. Owen, 5 N. C. 452 (1810).

[6] Now N. C. GEN. STAT. § 15-153 (1811): "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment."

manner. Our court decided cases involving sufficiency of indictments again in 1819[7] and 1829[8] and in these decisions expressed pleasure in not having to require the formality and detail that obtained prior to the Act of 1811.

During the next seventy-five years the sufficiency of a number of indictments was questioned in cases in which the statutory language was not followed, and in every case the court required strict adherence to the statutory language.[9] Undoubtedly these cases served to mold an opinion among state law enforcement officials and members of the bar that an indictment following statutory language would be sufficient.

However, as previously noted, exceptions to this general rule were soon to be made and the court usually explained these exceptions by pointing out that the statute was written in mere general or generic terms, that the statute did not sufficiently define the crime, or that all essential elements of the crime were not included in the statute. In *State v. Whedbee*[10] an indictment for obtaining goods under false pretense was drawn in the words of the statute.[11] The court held the indictment insufficient in that it failed to inform the defendant of the offense charged as required by the North Carolina Constitution.[12] In *State v. Cole*[13] the indictment was drawn in the language of the statute declaring it unlawful to make a false entry in bookkeeping.[14] After reviewing the authorities concerning the general rule on indictments in statutory language, the court held that this statute did not set forth all essential elements of the offense and therefore an indictment in the language of this statute is insufficient.

The court has twice considered the sufficiency of an indictment drawn in the language of the statute making it an offense to assault a

[7] State v. Cherry, 7 N. C. 7 (1819).

[8] State v. Johnson, 12 N. C. 360 (1827).

[9] State v. Mays, 132 N. C. 1020, 43 S. E. 819 (1903); State v. Bagwell, 197 N. C. 859, 12 S. E. 254 (1890); State v. Noblett, 47 N. C. 418 (1855); State v. Hathcock, 29 N. C. 52 (1846).

[10] 152 N. C. 770, 67 S. E. 60 (1910).

[11] N. C. GEN. STAT. § 14-100 (1811): "If any person shall knowingly and designedly by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation . . . with intent to cheat or defraud . . . shall be guilty of a felony . . . Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security. . . ."

[12] For an illustration of a sufficient indictment charging violation of N. C. GEN. STAT. § 14-100 see State v. Howley, 220 N. C. 113, 16 S. E. 2d 705 (1941).

[13] 202 N. C. 592, 163 S. E. 594 (1932).

[14] N. C. GEN. STAT. § 53-129 (1921): ". . . whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificate, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank . . . shall be guilty of a felony. . . ."

person with an intent to kill and the infliction of serious injury not resulting in death.[15] In *State v. Battle*[16] the court explained that the term "serious injury" used in an indictment drawn in statutory language was too vague and indefinite. Then forty-one years later in *State v. Gregory*[17] the court held that it was unnecessary to describe the extent of a serious injury in an indictment as the extent of injury became a matter of proof upon trial and an indictment in statutory language in this case was sufficient. Thus the latter decision removed an exception to the general rule of indicting in statutory language.

The court held that more was required than mere statutory language in three cases involving the "resisting arrest" statute.[18] In *State v. Jenkins*[19] and *State v. Scott*[20] the warrants were drawn according to the language of the statute, but the court refused to allow prosecution without specific statements as to the official character of the person alleged to have been resisted. In *State v. Eason*,[21] although the defendant was charged in the language of the statute, the arresting officer was not named, the official duty he was performing was not shown, and the manner in which the defendant resisted, delayed, or obstructed arrest was not stated. Because of the omission of these facts, the warrant was declared insufficient and the court explained that statutory words must be supplemented if necessary to set forth every essential element of the offense, so as to leave no doubt in the minds of the accused and court as to the specific offense intended to be charged.

State v. Burton[22] presents an example of the difficulties encountered in drafting that most frequent indictment, violation of a municipal ordinance. The warrant charged violation of a parking meter ordinance but failed to give the exact location of the defendant's car at the time of the offense. In explanation, the court said that the location of the parking meter must be stated so the defendant or his attorney can go to the city ordinance and see if parking at that time and place constituted a violation.[23]

The North Carolina statute pertaining to offering of bribes[24] was be-

[15] N. C. GEN. STAT. § 14-32 (1919): "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony. . . ."

[16] 130 N. C. 655, 41 S. E. 66 (1902).

[17] 223 N. C. 415, 27 S. E. 2d 149 (1943).

[18] N. C. GEN. STAT. § 14-223 (1889): "If any person shall willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor."

[19] 238 N. C. 396, 77 S. E. 2d 796 (1953).

[20] 241 N. C. 178, 84 S. E. 2d 654 (1954).

[21] 242 N. C. 59, 86 S. E. 2d 774 (1955).

[22] 243 N. C. 277, 90 S. E. 2d 390 (1955).

[23] This would seem to require a warrant charging multiple violations of a parking meter ordinance to state the exact time and location of each violation.

[24] N. C. GEN. STAT. § 14-218 (1870): "If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony. . . ."

fore our court in *State v. Greer*.[25] It was held that an indictment in the language of this statute was insufficient. The court pointed out that this statute neither defines bribery, nor sets forth its essential elements and declared that the statutory words must be supplemented by other allegations which would set forth the essential elements of the offense.

In *State v. Lucas*,[26] the Court noted that the commission of perjury is a basic element of the offense of subornation of perjury. Therefore, the court held that an indictment drawn in the language of G. S. 15-146, the subornation of perjury statute, is insufficient since the indictment must include the matter alleged to have been falsely sworn by the person suborned and also that the suborner knew such to be false or was in conscious ignorance of its truth. The court said that this statute must be read in conjunction with G. S. 15-145, the perjury statute, and indictments drawn accordingly.

A striking example of the difficulties encountered in drafting indictments for statutory offenses is furnished by the cases dealing with indictments under subsection 7 of our aiding and abetting prostitution statute.[27] The first six subsections of this statute described specific ways of violations; subsection 7 is the familiar "catch all" phrase and concludes by saying "by any means whatsoever." Even a cursory examination of cases dealing with indictments in the language of subsection 7 of this statute reveals the oscillation of the court's views on the matter of sufficiency. Indictments in the language of subsection 7 have been before the North Carolina Supreme Court four times in the past twenty-two years. In *State v. Waggoner*[28] it was decided that the indictment was in the language of subsection 7 and therefore sufficient. Then in *State v. Johnson*[29] the majority opinion declared an indictment in the language of this subsection was sufficient to afford the accused his constitutional rights. Thus indictments drawn in the words of subsection 7 came under the general rule of being sufficient. In the recent case of *State v. Cox*[30] the court overruled the *Johnson* case by declaring that indictments drawn in the language of subjection 7 are no longer sufficient.[31] The court explained that "by any means whatsoever" can cover a multitude of acts and therefore the warrant must charge the par-

[25] 238 N. C. 325, 77 S. E. 2d 917 (1953).
[26] 244 N. C. 53, 92 S. E. 2d 401 (1956).
[27] N. C. GEN. STAT. § 14-204 (1919): "It shall be unlawful: . . . (7) to engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsover."
[28] 207 N. C. 306, 176 S. E. 566 (1934).
[29] 220 N. C. 773, 18 S. E. 2d 358 (1941).
[30] 244 N. C. 57, 92 S. E. 2d 413 (1956).
[31] It should be noted that all these decisions pertained only to subsection 7 of the statute and so an indictment in the language of the first six paragraphs presumably would be sufficient.

ticular acts and circumstances constituting the offense. In an even more recent case,[32] the court reaffirmed its ruling set out in the *Cox* case.

From this brief review of the North Carolina cases of indictments in statutory language it might be concluded that at least seven exceptions to the general rule of charging an offense in the language of the statute now exist in North Carolina. Indictments or warrants charging offenses under the statutes pertaining to false pretense, false entry in bookkeeping, resisting arrest, offering of bribes, local ordinance on parking, subornation of perjury, and aiding and abetting prostitution have all been declared exceptions by the North Carolina Supreme Court in recent years. The solicitors and law enforcement officers of our state might take note of the tendency of our court to declare exceptions to the general rule and pay heed to the language in *State v. Albarty*:[33]

> "There can be no valid trial, conviction, or punishment for a crime without a formal and sufficient accusation. As a consequence it is impossible to overmagnify the necessity of the rules of pleading in criminal cases. The first rule of pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed."[34]

While it seems that most of the North Carolina Statutes defining or creating criminal offenses are so worded that the statutory language is sufficient for the indictment or warrant, exceptions do obviously exist. Those charged with the responsibility of preparing warrants and indictments would do well to note these exceptions.[35]

A study of the cases in which the indictment in statutory language has been declared insufficient reveals the most common fault to be a failure to describe the manner of circumstances under which the offense was committed. Although a rather general one, the best test for the drafter of an indictment for a statutory offense would seem to be:

> Are the circumstances surrounding the offense and the manner in which it was committed so specified that the defendant can prepare for trial and, if convicted, that he could not be tried again for this offense?

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[32] State v. Powell, 244 N. C. 121, 92 S. E. 2d 681 (1956).
[33] 238 N. C. 130, 76 S. E. 2d 381 (1953).
[34] *Id.* at 131, 76 S. E. 2d at 382.
[35] State v. Thorne, 238 N. C. 392, 395, 78 S. E. 2d 140, 141 (1953); "Scant heed was paid to the rules of pleading in criminal cases in the preparation of the warrant in the instant action."

Criminal Law—The Sleeping Motorist

In the recent case of *State v. Mundy*,[1] the Supreme Court of North Carolina for the first time considered the criminal liability of the sleeping motorist.[2] The defendant, a highway patrolman, went off duty shortly before 4:00 a.m. after eighteen hours' continuous duty. Driving home with two friends the defendant apparently went to sleep allowing his car to run off the the highway into a parked auto. One of his guest passengers was killed in the collision. The defendant was tried and convicted of involuntary manslaughter.[3] In reversing the conviction for an erroneous charge, the Supreme Court stated its position in regard to the criminal liability of the sleeping motorist, saying:

> ". . . [The] mere fact that the operator of a motor vehicle involuntarily goes to sleep while operating his automobile does not, nothing else appearing, constitute culpable negligence. In determining the question of culpable negligence, the focal point of inquiry is whether the operator, because of drowsiness, previous tiring activities, or other premonitory symptoms of sleep, became aware of the likelihood of falling asleep, but nevertheless continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others upon the highway, proximately resulting in injury or death."[4]

The inference from this case is that the court has adopted the test of the majority of the courts in the United States that have considered the question. The majority of the cases state that if the state only proves the act of falling asleep while driving a motor vehicle, a nonsuit

[1] 243 N. C. 149, 90 S. E. 2d 312 (1955).

[2] The number of cases involving the sleeping motorist has constantly increased since the invention of the automobile. During the years 1900 to 1919, there was only one decision considering the liability of the sleeping motorist. However, this number increased to 40 cases from 1940 to 1949. Kaufman and Kantrowitz, *The Case of the Sleeping Motorist*, 25 N. Y. U. L. Q. REV. (1950). In 1948, approximately 4 per cent of the deaths resulting from automobile accidents throughout the United States were attributed to the driver falling asleep or becoming unconscious. ACCIDENT FACTS (National Safety Council 1948). In North Carolina during 1955, the sleeping motorist was involved in slightly more than 3 per cent of the fatal accidents, or 32 fatal accidents and 651 accidents. NORTH CAROLINA ANNUAL MOTOR VEHICLE ACCIDENT SUMMARY (1955).

[3] The court in State v. Whaley, 191 N. C. 387, 389, 132 S. E. 6, 8 (1926) said, "The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessess or carelessness as is incompatible with a proper regard for human life. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

[4] State v. Mundy, 243 N. C. 149, 153, 90 S. E. 2d 312, 315 (1955).

for defendant would be proper.[5] Therefore, a driver who while asleep has driven his automobile so as to kill someone is not guilty of negligent homicide unless he had such warning of falling asleep that under all the circumstances he drove recklessly or in marked disregard of the safety of others and such driving was the proximate cause of the death.

However in *State v. Olsen*,[6] the Utah Supreme Court took a contrary view. In this case the court held that the fact of going to sleep while driving an automobile, without more, at least presents a question for the jury as to whether the driver was negligent and that the jury could find that the defendant, in allowing himself to go to sleep, was guilty of negligence manifesting a marked disregard for the safety of others on the highway. The significance of this case is that upon the state proving that the defendant went to sleep, the defendant must come forward with evidence to show that he did not have any prior warning of going to sleep or else take the chance that the jury may find him guilty of involuntary manslaughter.

Involuntary manslaughter in North Carolina is based on culpable negligence, which is such conduct that evinces a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others.[7] Although the above rule is not controlling in civil actions, it may aid the treatment of this problem to see how the courts have treated the sleeping motorists in civil cases involving negligence.

The cases of *Baird v. Baird*[8] and *Hobbs v. Queen City Coach Co.*[9] seem to give a good indication of the civil liability of the sleeping motorist in actions based on ordinary negligence in North Carolina. The cases indicate that the Supreme Court of North Carolina will adopt the majority rule in the United States. The majority rule is that if in an action based on ordinary negligence, the plaintiff proves that the defendant went to sleep while driving, that fact alone justifies an inference of ordinary negligence sufficient to make out a prima facie case and make it a question for the jury.[10]

In *Baird v. Baird* the court applying the law of New York, because the accident occurred there, could find no New York case dealing with this question but found the applicable law in a case dealing with a sleeping passenger. The court said:

[5] Johnson v. State, 148 Fla. 510, 4 So. 2d 671 (1941); People v. Robinson, 253 Mich. 507, 235 N. W. 236 (1931); Novesky v. Mac Duff, Commissioner of Motor Vehicles, 280 App. Div. 953, 116 N. Y. S. 330 (1952); State v. Champ, 172 Kan. 737, 242 P. 2d 1070 (1952); *In re* Lewis, 11 N. J. 217, 94 A. 2d 328 (1952).

[6] State v. Olsen, 108 Utah 377, 160 P. 2d 427 (1945).

[7] See note 3 *supra*.

[8] 223 N. C. 730, 28 S. E. 2d 225 (1943).

[9] 225 N. C. 323, 34 S. E. 2d 211 (1945).

[10] See Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); which is apparently the leading case in the United States on civil liability of the sleeping motorist. See also 28 A. L. R. 2d 1, 45 (1953).

> "Ordinarily, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, and it lies within his own control to keep awake or to cease from driving, and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case against him for injuries sustained by another while so driving and sufficient for a recovery if no circumstances tending to excuse or justify his conduct are proven."[11]

Although this statement was dictum in the case and the court expressly said that this decision would not be binding upon later cases in North Carolina, it seems to be a sound inference that the court would adopt such a rule when faced with a case involving the liability of the sleeping motorist based on ordinary negligence.

This inference is strengthened by the case of *Hobbs v. Queens City Coach Co.* where the driver of a bus ran out of his lane of traffic thereby running into the automobile of the plaintiff who was in his proper lane. After the accident the driver remarked that he must have fallen asleep. Although the court made no direct statement that sleeping while driving a motor vehicle was negligence, it did say that it was a general rule of law that operators of a motor vehicle must exercise the care which an ordinary prudent person would exercise under similar circumstances. The court went farther to say that in the exercise of such duty it is incumbent upon the operator to be reasonably vigilant. Although the court did not speak the word "sleep" in this statement, its relationship to vigilance will be clarified by referring to the statement in *Baird v. Baird,* where the court said that ordinarily one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires. Therefore it is a logical inference that the court in speaking of the operator having a duty to be reasonably vigilant, meant that a person has a duty to keep awake while driving a motor vehicle and proof that he went to sleep is an inference of negligence without showing more.

The court in *Baird v. Baird,* explains the rationale of this rule by saying:

> "The approach of sleep, 'tired nature's sweet restorer,' is usually indicated by certain premonitory symptoms, and does not come upon one unheralded. His negligence, if any, lies in the fact that he does not heed the indications of its approach or the circumstances which are likely to bring it about."[12]

[11] Baird v. Baird, 223 N. C. 730, 732, 28 S. E. 2d 225, 227 (1943).
[12] *Id.* at 732, 28 S. E. 2d at 227.

In view of this the test would seem to be whether the defendant was negligent in permitting himself to fall asleep in the first place. This logic would be in accord with the reasoning of the well-settled rule that one who is involved in a collision due to sudden paralysis or unexpected epileptic seizure is not negligent.[13] It would follow that one overcome by sleep without warning could not be said to be negligent, but it should be up to him to prove that he did not have any warning.[14]

Some of the most frequent circumstances said to impute warning of sleep by other states are: (1) lack of sleep; (2) length of time at the wheel; (3) presence of premonitory symptoms (frequent yawning, drowsiness, prior napping); and (4) driving under the influence of liquor.[15]

North Carolina is not concerned with different degrees of negligence as are other states with guest statutes. However, in *Farfour v. Fahad*,[16] our court, interpreting the law of Virginia which requires gross negligence, followed the majority rule as to gross negligence. It held that the mere falling asleep while driving does not give rise to an inference of gross negligence necessary to make a prima facie case.[17] The majority of cases requiring a finding of wilful and wanton negligence apparently apply the same rule.[18] The court unaminously agreed that the driver of an automobile who falls asleep while driving is grossly negligent if he had some *prior warning* of the likelihood of his going to sleep. Therefore, if the plaintiff in an action based on gross or wilful and wanton negligence shows merely that the operator of the motor vehicle fell asleep while driving, a directed verdict for the defendant is proper. Most of the cases of the sleeping motorist involving gross and wilful and wanton negligence come up in states having guest[19] statutes which require gross or wilful and wanton negligence for liability.[20]

[13] 1 VARTANIAN, THE LAW OF AUTOMOBILES IN NORTH CAROLINA, 85 (3d ed. 1947). Also see Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925) for the medical basis for the rule.

[14] In forecasting what the Supreme Court of North Carolina will do in cases involving civil liability of the sleeping motorist in actions based on ordinary negligence, it is interesting to note that no case has been found in which the operator of a motor vehicle who fell asleep has been absolved of liability in an action based on ordinary negligence, unless there were other circumstances to relieve the defendant of liability. 5 AM. JUR., AUTOMOBILES § 180 (1956 Supp.).

[15] See 28 A. L. R. 2d 1 §§ 26, 27, 28, 29 (1953).

[16] 214 N. C. 281, 199 S. E. 521 (1938).

[17] *Id.* at 287.

[18] For example, see Covington v. Carley, 197 Miss. 535, 19 So. 2d 817 (1947) applying the law of Alabama; Phillips v. Harper, 60 Cal. App. 2d 298, 140 P. 2d 686 (1943); Secrist v. Raffleson, 326 Ill. App. 489, 62 N. E. 2d 399 (1941); Butine v. Stevens, 319 Mich. 176, 29 N. W. 2d 325 (1947).

[19] A "Guest" in an automobile is one who takes ride in automobile driven by another person, merely for his own pleasure or on his own business, and without making any return or conferring any benefit to the automobile driver. BLACK, LAW DICTIONARY (4th ed. 1951).

[20] Statutes which relieve the owner or operator of a motor vehicle of liability for injury to a guest unless he has been grossly negligent or wilful or intentional

Continuing to drive under the following conditions which resulted in falling asleep have justified a finding of gross or wilful and wanton negligence; (1) drinking of intoxicating beverages; (2) prior warning, refusal of relief; (3) excessive length of time at the wheel; and (4) statutes limiting driving time.[21]

While the threat of civil liability serves as a deterrent to drivers falling asleep while driving, a look at accident statistics indicates that more extreme measures should be taken. Since the Supreme Court of North Carolina apparently has adopted the rule as set out in *State v. Mundy* regarding criminal liability, this writer would like to see the legislature pass a statute similar to a recent Michigan statute.[22] Although this statute does not speak expressly of sleeping at the wheel, it does make negligence of a lesser degree than wilful and wanton, resulting in death, a misdemeanor. Thus, if the rationale inferred in *Baird v. Baird* and *Hobbs v. Queen City Coach Co.* is followed, the state could get a conviction under this statute by proving the fact of falling asleep alone without more. Such a measure should have some effect in reducing highway fatalities.

PARKS ALLEN ROBERTS

Descent and Distribution—The Right of a Prospective Heir to Release or Assign an Expectancy

During his lifetime, deceased entered into an agreement with four of his eight children whereby in consideration of $6,000.00 paid to each of them by him they released all interest and right of inheritance in his estate. After the death of the deceased, the administrator of the estate brought an action in which he sought to have the court rule upon the legal effect of the instrument purporting to be a release. The North Carolina Supreme Court unanimously held that the release was binding and enforceable in equity if fairly made upon a valuable consideration

misconduct have been enacted in many states. These are commonly denominated "guest" statutes. Certain things may amount to gross negligence or wilful and wanton misconduct within the meaning of the guest statutes. Whether or not there is such negligence as the statute requires is ordinarily a question for the jury. With its conclusion the courts do not ordinarily interfere. 5 AM. JUR., *Automobiles*, 237, 240 (1933). Also see cases cited note 18 *supra*.

[21] For example, see Belletete v. Morin, 322 Mass. 214, 76 N. E. 2d 660 (1948); Oast v. Mopper, 58 Ga. App. 566, 199 S. E. 249 (1938); Smith v. Williams, 180 Ore. 232, 178 P. 2d 710 (1947); Masters v. Cardi, 186 Va. 261, 42 S. E. 2d 203 (1947).

[22] MICH. STAT. ANN. c. 286a, § 28.556 (1954), which reads: "Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a [misdemeanor] punishable by imprisonment in the state prison not more than two years or by a fine of not more than $2,000.00. . ." Also see 49 Cal. Code, Penal § 500 (1956); Kan. Gen. Stat. § 8-529 (1947).

and not accompanied by fraud or undue influence.[1] Thus, the four releasing children were estopped to claim any part of the estate.

Prior to the above case, *Price v. Davis*,[2] there were only three cases decided in North Carolina which considered the right of a prospective heir to release[3] his expectancy[4] in his ancestor's estate.[5] The first of these cases, *Cannon v. Nowell*,[6] decided in 1859, held that a release of this kind was invalid and unenforceable. Ruffin, J., said: "Heirs take by positive law when the ancestor dies intestate and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties."[7] The court in the *Price* case would not accept *Cannon v. Nowell* as still being the law in North Carolina, probably because it was an action at law rather than equity before the fusion of the two in this state. It seems to be the universal rule that the release of an expectancy is recognized only in equity.[8]

Not until 1938 and 1939 did the question arise again in the cases of *Allen v. Allen*[9] and *Coward v. Coward*,[10] which involved agreements in the nature of a release. In the *Allen* case the parents of one of the plaintiffs agreed with each other and with their children to pool their separately held real estate and divide it during their lifetime among their children. Two of the children received deeds for their shares; the deeds made to the other children were never delivered to them. On the death of the parents, one of the sons and the children of his deceased sister sought to share with the other children in the real estate left by the parents. The court held the plaintiffs estopped from taking any real estate since that son and the sister had accepted the deeds as their full shares of the lands belonging to their mother and father. Barnhill, J., said: "It would be contrary to all principles of equity to permit them

[1] Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956).

[2] 244 N. C. 229, 93 S. E. 2d 93 (1956).

[3] By a release is meant "the relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." BLACK, LAW DICTIONARY 1453 (4th ed. 1951).

[4] "An expectancy is the possibility of an heir apparent or presumptive that he may inherit land; the possibility of the prospective next of kin that he acquire personalty by a distribution or intestacy; and the possibility of a prospective legatee or devisee that he may acquire property by will on the death of the testator." SIMES & SMITH, FUTURE INTERESTS § 391 (2d ed. 1956).

[5] Coward v. Coward, 216 N. C. 506, 53 S. E. 2d 537 (1939); Allen v. Allen, 213 N. C. 264, 195 S. E. 801 (1938); Cannon v. Nowell, 51 N. C. 436 (1859).

[6] 51 N. C. 436 (1859).

[7] Cannon v. Nowell, 51 N. C. 436, 437 (1859).

[8] *In re* Edelman, 148 Cal. 233, 82 Pac. 692 (1905); *In re* Simon, 158 Mich. 256, 122 N. W. 544 (1909); Nesmith v. Dinsmore, 17 N. H. 515 (1845); Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956); Power's Appeal, 63 Pa. 443 (1869); Gore v. Howard, 94 Tenn. 577, 30 S. W. 730 (1895); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895).

[9] 213 N. C. 264, 195 S. E. 801 (1938).

[10] 216 N. C. 506, 5 S. E. 2d 537 (1939).

[the plaintiffs] now to disavow the conditions upon which the deed was given to them and to successfully assert a further interest in the real estate of their parents."[11] "They accepted the benefits of the gift or advancement and must abide by the conditions upon which it was made."[12] Except for the parties, the facts in the *Coward* case were identical to those in the above case, and the court cited *Allen v. Allen* with approval. The recent *Price* case predicated its decision mainly on these two cases,[13] and as a result there can now be no doubt that North Carolina is in line with the greater weight of authority in holding such contracts for the release of an expectancy valid and enforceable.

The majority jurisdictions[14] enforce the release on various theories. It is frequently held that the release operates as an equitable estoppel,[15] with some courts enforcing the release in equity because they presume that the ancestor relied upon the agreement and, except for it, would have made a will,[16] and because the heir should be compelled to abide by his promise in order to prevent the expectation of the ancestor from being disappointed.[17] One court applies the equitable estoppel theory in order to secure equality among those who have equality of right.[18] Several courts hold that the release acts as an extinguishment of the

[11] Allen v. Allen, 213 N. C. 264, 271, 195 S. E. 801, 805 (1938).

[12] *Id.* at 269, 195 S. E. at 804. The court seems to have based its decision in part on the theory that the deeds constituted an advancement liquidated by agreement as to each child's share in the realty.

[13] Price v. Davis, 244 N. C. 229, 233-34, 93 S. E. 2d 93, 96-97 (1956).

[14] *Arkansas:* Leggett v. Martin, 203 Ark. 88, 156 S. W. 2d 71 (1941); Felton v. Brown, 102 Ark. 658, 145 S. W. 552 (1912); *California: In re* Estate of Wickersham, 153 Cal. 603, 96 Pac. 311 (1908); *In re* Garcelon's Estate, 104 Cal. 570, 38 Pac. 414 (1894); *Georgia:* Barham v. McKneely, 89 Ga. 812, 15 S. E. 761 (1892); Newsome v. Cogburn, 30 Ga. 291 (1860); *Illinois:* Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956 (1890); *Indiana:* Brown v. Brown, 139 Ind. 653, 39 N. E. 152 (1894); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1915); *Iowa:* Stennett v. Stennett, 174 Iowa 431, 156 N. W. 406 (1916); Jones v. Jones, 46 Iowa 466 (1877); *Maine:* Hilton v. Hilton, 103 Me. 92, 68 Atl. 595 (1907); Smith v. Smith, 59 Me. 214 (1871); *Massachusetts:* Kenney v. Tucker, 8 Mass. 143 (1811); *Michigan: In re* Simon's Estate, 158 Mich. 256, 122 N. W. 544 (1909); *New Hampshire:* Nesmith v. Dinsmore, 17 N. H. 515 (1845); *New Jersey:* Phillips v. Phillips, 122 Atl. 620 (N. J. Ch. 1923); Havens v. Thompson, 26 N. J. Eq. 383 (1875); *New York:* Kinyon v. Kinyon, 72 Hun 452, 25 N. Y. S. 225 (1893); *North Carolina:* Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956); *Pennsylvania:* Estate of Summerville, 129 Pa. 631, 18 Atl. 554 (1889); *West Virginia:* Adams v. Adams, 82 W. Va. 244, 95 S. E. 859 (1918); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *Wisconsin:* Lifinger v. Field, 78 Wis. 367, 47 N. W. 613 (1890); *England:* Medcalf v. Medcalf, 1 Atk. 64, 26 Eng. Rep. 42 (Ch. 1737); *Canada: In re* Lewis, 29 Ont. 609 (1898).

[15] *In re* Edelman, 148 Cal. 233, 82 Pac. 692 (1905); Pylant v. Burns, 153 Ga. 529, 112 S. E. 455, 28 A. L. R. 423 (1922); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1916); Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181 and 14 Atl. 894 (1888); SIMES & SMITH, FUTURE INTERESTS § 394 (2d ed. 1956).

[16] Eissler v. Hoppel, 158 Ind. 82, 62 N. E. 692 (1901); Brands v. DeWitt, *supra* note 15; Martin v. Martin, 222 S. W. 291 (Tex. Civ. App. 1920).

[17] Cases cited note 16 *supra.*

[18] Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181 and 14 Atl. 894 (1888).

heir's right to take by descent.[19] Once the consideration vests in the releasor, it is held that the contract becomes binding in equity.[20] The minority jurisdictions[21] on the other hand base their view on the reasoning of the common law in holding that a man cannot release what he does not have[22] and that the course of descent cannot be altered by any agreement of the parties.[23]

If the releasor dies before his ancestor, the release will bind the releasor's heirs taking by representation.[24] This is based on the idea that since the releasor would be estopped if he were alive from asserting any claim in the estate, his heirs should likewise be estopped.[25] However, the release is not literally enforced in all cases. In Georgia it was held that where the effect of the release is to disinherit a sole lineal heir in favor of collateral heirs, the release will not be enforced because it is opposed to that state's statute of distribution requiring the estate to descend to heirs of the first degree and because disinheritance of a sole descendant heir would be an unreasonable construction of the release.[26] A contract of release between a grandparent and a grandchild made during the life of the grandchild's parents releasing the child's expectancy in his parent's estate has been held unenforceable because it violates the law of descents and distributions and cuts off the grandchild's right to take by inheritance his due proportion of his parent's estate.[27]

If fraud and gross inequality are not present, the consideration for

[19] Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956 (1890); Phillips v. Phillips, 122 Atl. 620 (N. J. Ch. 1923).

[20] *In re* Edelman's Estate, 148 Cal. 233, 82 Pac. 962 (1905); *In re* Garcelon's Estate, 104 Cal. 570, 38 Pac. 414 (1894); Donough v. Garland, 269 Ill. 565, 109 N. E. 1015 (1915).

[21] *Kentucky:* Elliott v. Leslie, 124 Ky. 553, 99 S. W. 619 (1907); *Tennessee:* DeVault v. DeVault, 48 S. W. 361 (Tenn. Ch. App. 1898); *South Dakota: In re* Thompson's Estate, 26 S. D. 576, 128 N. W. 1127 (1910); *Virginia:* Headrick v. McDowell, 102 Va. 124, 45 S. E. 804 (1903); *accord: Florida:* Towles v. Roundtree, 10 Fla. 299 (1863); *Ohio:* Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85 (1857); *Vermont:* Simonds v. Simond's Estate, 96 Vt. 110, 117 Atl. 103 (1922); see RESTATEMENT, PROPERTY § 316 (1940).

[22] Elliott v. Leslie, *supra* note 21; Ferendaugh v. Ferendaugh, 104 Ohio St. 556, 136 N. E. 213 (1922); Simonds v. Simond's Estate, *supra* note 21.

[23] Towles v. Roundtree, 10 Fla. 299 (1863); Elliott v. Leslie, 124 Ky. 553, 99 S. W. 619 (1907); Needles v. Needles, 7 Ohio St. 432 (1857); Headrick v. McDowell, 102 Va. 124, 45 S. E. 804 (1903).

[24] Simpson v. Simpson, 114 Ill. 603, 4 N. E. 137 and 7 N. E. 287 (1885); Smith v. Smith, 59 Me. 214 (1871); Allen v. Allen, 213 N. C. 264, 195 S. E. 801 (1938); Powers Appeal, 63 Pa. 443 (1869); Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29 (1915); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *In re* Lewis, 29 Ont. 609 (1898). "It would seem that if the releasing child and all his brothers and sisters predecease the source, the shares of the grandchildren should not be affected by the release." ATKINSON, WILLS § 130 (2d ed. 1953).

[25] See note 24 *supra*.

[26] Pylant v. Burns, 153 Ga. 529, 112 S. E. 455 (1922). *Contra,* RESTATEMENT, PROPERTY § 316, comment *f* and illustration 6 (1940).

[27] Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29 (1915).

the release will usually be held fair even though its amount may later turn out to be an inadequate share of the estate.[28] The burden of proving want of consideration is on the party asserting such want.[29] All that is required of the instrument to constitute a release which will bar the releasor's descendants is that it meet the formalities of an ordinary written contract.[30] However, the release must be certain, clear and unambiguous,[31] executed by one competent to contract,[32] and sufficient to satisfy the local Statute of Frauds.[33] This would indicate that the courts do not favor a release by implication and that a draftsman might well use the word "release" and specifically provide for the bar of the releasor's descendants in case he should predecease his ancestor.

Another type of transaction closely related to and resembling the release of an expectancy is the assignment of an expectancy. In most states[34] equity will enforce the assignment[35] of an expectancy to a third

[28] Eissler v. Hoppel, 158 Ind. 82, 62 N. E. 692 (1902); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1916); Kenney v. Tucker, 8 Mass. 143 (1811); *In re* Simon, 158 Mich. 256, 122 N. W. 544 (1909); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *In re* Lewis, 29 Ont. 609 (1898).

[29] *In re* Edelman, 148 Cal. 233, 82 Pac. 962 (1905); Summerville's Estate, 129 Pa. 631, 18 Atl. 554 (1889); Mow v. Baker, 24 S. W. 2d 1 (Tex. Com. App. 1930).

[30] Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1915); Rodemeier v. Brown, 169 Ill. 347, 48 N. E. 468 (1897); Binns v. Dazey, 147 Ind. 536, 44 N. E. 644 (1896); Brown v. Brown, 139 Ind. 653, 39 N. E. 152 (1894); Swigt v. Miles, 75 Ind. App. 85, 130 N. E. 130 (1921); Stolenburg v. Dierchs, 117 Iowa 25, 90 N. W. 525 (1902).

[31] Williams v. Swango, 365 Ill. 549, 7 N. E. 2d 306 (1937); Mires v. Laubenheimer, *supra* note 30.

[32] Bishop v. Davenport, 58 Ill. 105 (1871).

[33] Gary v. Newton, 201 Ill. 170, 66 N. E. 267 (1903); Chidester v. Harlan, 180 Iowa 171, 159 N. W. 659 (1916); Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609 (1903); Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894 (1888). However, the agreement may be oral if the parent has carried out the agreement. Mixture Guano Co. v. McKoone, 168 Ga. 317, 147 S. E. 711 (1929); Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916).

[34] *Alabama:* Fuller v. Nichols, 219 Ala. 58, 121 So. 52 (1929); *California:* Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149 (1912); *Connecticut:* Brown v. Brown, 66 Conn. 493, 34 Atl. 490 (1895); *Idaho:* Casady v. Scott, 40 Idaho 137, 237 Pac. 415 (1925); *Illinois:* Thornton v. Louch, 297 Ill. 204, 130 N. E. 467 (1921); *In re* Landis, 41 F. 2d 700 (7th Cir.) *cert. denied,* 282 U. S. 872 (1930); *Iowa:* Burk v. Morain, 223 Iowa 399, 272 N. W. 441 (1937); Mally v. Mally, 121 Iowa 169, 96 N. W. 735 (1903); *Kansas:* Clendening v. Wyatt, 54 Kan. 523, 38 Pac. 792 (1895); *Maine:* Curtis v. Curtis, 40 Me. 24 (1855) (family agreement); *Maryland:* Keys v. Keys, 148 Md. 397, 129 Atl. 504 (1925); *Massachusetts:* Gadsby v. Gadsby, 275 Mass. 159, 175 N. E. 495 (1931); *Missouri:* Bank of Moberly v. Meals, 222 Mo. App. 862, 5 S. W. 2d 1113 (1928); *New Hampshire:* Peterborough Sav. Bank v. Hartshorn, 67 N. H. 156, 33 Atl. 729 (1891); *New Jersey:* Bacon v. Bonham, 33 N. J. Eq. 614 (1881); *New York: In re* Strange, 164 Misc. 929, 300 N. Y. S. 23 (Surr. Ct. 1937); *North Carolina:* Boles v. Caudle, 133 N. C. 528, 45 S. E. 835 (1903); Mastin v. Marlow, 65 N. C 695 (1871); McDonald v McDonald, 58 N C. 211 (1859); *accord,* Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315 (1905); *Ohio:* Hite v. Hite, 120 Ohio St. 253, 166 N. E. 193 (1929); *Oklahoma:* Kaylor v. Kaylor, 172 Okla. 535, 45 P. 2d 743 (1935); *Pennsylvania: In re* Norris, 329 Pa. 483, 198 Atl. 142 (1938); *South Carolina:* Wallace v. Quick, 156 S. C. 248, 153 S. E. 168 (1930); *Tennessee:* Tate v. Greenlee, 141 Tenn. 103, 207 S. W. 716 (1918); *Texas:* Young v. Hollings-

person if made free from fraud and oppression and in good faith upon a valuable consideration by one *sui juris* who survives the ancestor.[36] Another element necessary in some but not all of the majority rule states is that the ancestor consent to the assignment of the expectancy.[37] Equity treats the assignment as an executory contract to convey the property to the assignee if and when it ceases to be an expectancy and comes into the assignor's possession as a vested estate or interest, and specific performance of the contract itself is decreed.[38] In this situation the purchaser receives only what the seller has; therefore, if the assigner dies before his ancestor, no interest has ever vested in the seller nor will any vest in his estate which will pass to his assignee. Thus, the assignor's heirs are not bound by the assignment because in such case they take directly as heirs of the ancestor.[39]

North Carolina has for a long time followed the majority rule and enforces the assignment of an expectancy to a third person.[40] In *McDonald v. McDonald*,[41] decided in 1859, Battle, J., said: "[The assignor] had a right to make a contract to convey whatever interest he might in future have in his cousin's property; and such a contract, when fairly made upon a valuable consideration, the Court of Chancery will enforce whenever the property shall come into his possession."[42] As in other

worth, 16 S. W. 2d 844 (Tex. Civ. App. 1929); *Vermont:* Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313 (1889) (family agreement); *Virginia:* Lewis v. Madisons, 15 Va. (1 Munf.) 303 (1810) (family agreement); *Wisconsin:* Hofmeister v. Hunter, 230 Wis. 91, 283 N. W. 335, 121 A. L. R. 444 (1939); *England:* Bennett v. Cooper, 9 Beav. 252, 50 Eng. Rep. 340 (Rolls Ct. 1845).

[35] By assignment is meant a transfer of the expectancy to a third party, stranger or co-heir, who is not the ancestor of the assignee.

[36] See cases cited note 34 *supra.*

[37] Consent required: McClure v. Raben, 133 Ind. 507, 33 N. E. 275 (1893); Farmers Loan & Trust Co. v. Wood, 78 Ind. App. 147, 134 N. E. 899 (1922); Curtis v. Curtis, 40 Me. 24 (1855); Stevens v. Stevens, 181 Mich. 438, 148 N. W. 225 (1914). *Contra:* Gannon v. Graham, 211 Iowa 516, 231 N. W. 675 (1930); Gadsby v. Gadsby, 275 Mass. 159, 179 N. E. 495 (1931); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313 (1889); Hofmeister v. Hunter, 230 Wis. 81, 283 N. W. 330 (1939); inference that no consent needed: Stover v. Eycleshimer, 3 N. Y. 620 (1867); McDonald v. McDonald, 58 N. C. 211 (1859); Fritz's Estate, 160 Pa. 156, 28 Atl. 642 (1894); Steele v. Frierson, 85 Tenn. 430, 35 S. W. 649 (1887).

[38] *In re* Barnett, 124 F. 2d 1005 (2d Cir. 1942); Hooker v. Hooker, 130 Conn. 41, 32 A. 2d 68 (1943); Clendening v. Wyatt, 54 Kan. 523, 38 Pac. 792 (1895); Donough v. Garland, 269 Ill. 565, 109 N. E. 1015 (1915); *In re* Strange's Estate, 164 Misc. 929, 300 N. Y. S. 23 (Surr. Ct. 1937); McDonald v. McDonald, 58 N. C. 211 (1859); Bayler v. Commonwealth, 40 Pa. 37 (1861); Tate v. Greenlee, 141 Tenn. 103, 207 S. W. 716 (1918); Hale v. Hollon, *supra* note 37; Hofmeister v. Hunter, *supra* note 37.

[39] Donough v. Garland, *supra* note 38; Benson v. Benson, 180 N. C. 106, 104 S. E. 68 (1920); Johnson v. Breeding, 136 Tenn. 528, 190 S. W. 545 (1916); French v. McMillon, 79 W. Va. 639, 91 S. E. 538 (1917).

[40] Boles v. Caudle, 133 N. C. 528, 45 S. E. 835 (1903); Mastin v. Marlow, 65 N. C. 695 (1871); McDonald v. McDonald, 58 N. C. 211 (1859).

[41] 58 N. C. 211 (1859).

[42] *Id.* at 214.

jurisdictions, the assignment is treated as an executory contract entitling the assignee to a specific performance as soon as the assignor has acquired the power to perform it.[43]

Where there is an assignment of a possibility coupled with an interest, equity will also take cognizance of the transaction.[44] A possibility coupled with an interest is a contingent one created in an instrument, such as an executory devise, contingent remainder, springing use, or shifting use.[45] Such a future interest may be sold, transmitted, or devised since it is a present contingent interest in an estate.[46] The validity of the assignment of a possibility coupled with an interest "has been sustained as an executory contract to convey, passing no present interest or estate, but a mere right in equity, to be enforced by suit when the contingency upon which the estate vests occurs. Such assignments are sometimes sustained upon the doctrine of estoppel, especially when the deed contains a warranty of title. It has also been held that an assignment of such interest, while not passing any present legal title or estate, does pass the equitable title of the assignor, which is perfected by converting the assignor into a trustee for the benefit of the assignee when the estate vests."[47]

Neither the release nor the assignment of an expectancy are favorites of the courts and such transactions are examined with caution.[48] They may result in the taking of undue advantage of an heir in distressed and unfortunate circumstances.[49] Both are in disfavor because they allow an expectant heir to spend his inheritance before it comes into his possession.[50] The assignment has been the special object of criticism; it has been called a gambling contract and therefore held unenforceable in at least one jurisdiction.[51] Also it has been said that an assignment tends to destroy or lessen the ancestor's control over the expectant heir by giving him independent means of gratifying his desires, thus encouraging extravagance and vice on his part.[52] It may also create a

[43] McDonald v. McDonald, 58 N. C. 211 (1859).

[44] Kornegay v. Miller, 137 N. C. 659, 50 S. E. 1015 (1915); SIMES & SMITH, FUTURE INTERESTS § 402 (2d ed. 1956); *see also* SIMES, FUTURE INTERESTS § 712 (1st ed. 1936).

[45] Kornegay v. Miller, *supra* note 44, at 665, 50 S. E. at 318 (dictum).

[46] Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315 (1905); Bodenhamer v. Welch, 89 N. C. 79 (1883).

[47] *Id.* at 664, 50 S. E. at 317.

[48] Grimm v. Grimm, 26 Cal. 2d 173, 157 P. 2d 841 (1945); Kaiser v. Cobbey, 400 Ill. 214, 79 N. E. 2d 604 (1948); Gannon v. Graham, 211 Iowa 516, 231 N. W. 675 (1930); Kornegay v. Miller, *supra* note 46; Hite v. Hite, 120 Ohio St. 253, 166 N. E. 193 (1929); McConnell v. Corgey, 153 Tex. 49, 262 S. W. 2d 944 (1954); Graef v. Kanouse, 205 Wis. 597, 238 N. W. 377 (1931).

[49] Boynton v. Hubbard, 7 Mass. 112 (1810); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).

[50] Kornegay v. Miller, 137 N. C. 659, 669, 50 S. E. 315, 319 (1905) (dictum); SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).

[51] McClure v. Raben, 125 Ind. 139, 25 N. E. 179 (1890).

[52] *Id.* at 147, 25 N. E. at 182.

desire in the purchaser for the early death of the ancestor.[53] And, in addition, it has been held that an assignment operates as a fraud upon the ancestor, perhaps deluding him into leaving his property not to the person intended but to a stranger.[54] Thus it would appear that of the two, the release is looked on less harshly because it generally keeps the inheritance in the family and is more in the nature of a family settlement, which is favored by the courts.[55]

It would appear that *Allen v. Allen* and *Coward v. Coward* actually left little room for doubt as to the validity of the relase of an expectancy in North Carolina. However, the seemingly square holding contra in *Cannon v. Nowell* caused confusion in this area. *Price v. Davis* has at last removed this confusion.

THOMAS STEPHEN BENNETT

Fire Insurance—Estate by the Entirety—Insurable Interest—Right to Proceeds

A husband and wife own an estate in land as tenants by the entirety. The spouses are separated, the husband remaining the occupant of the dwelling-house. He insures the home in his name alone for $4,000 and pays the premiums from his own funds. The home burns and pending payment of the claim by the insurance company the spouses obtain an absolute divorce. To whom do the proceeds of the policy belong?

The above facts presented a case of first impression in North Carolina.[1] The supreme court, reversing the decision of the trial court, held in *Carter v. Continental Ins. Co.*[2] that the husband's interest in the property was not insurable for his benefit alone as a separate moiety apart from the estate owned by him and his wife and the proceeds of a policy so taken inured to the benefit of the entire estate. Thus, upon absolute divorce the wife was entitled to one half of the proceeds,[3] even though she was not named as insured or beneficiary in the policy and had not contributed to the payment of premiums.

Ordinarily a fire insurance policy is a personal contract to indemnify the insured for a loss sustained;[4] and where one has an insurable in-

[53] McClure v. Raben, 125 Ind. 139, 147, 25 N. E. 179, 182 (1890).
[54] *In re* Edelman's Estate, 148 Cal. 233, 82 Pac. 962 (1905); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); See SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).
[55] Bank of Wadesboro v. Hendley, 229 N. C. 432, 50 S. E. 2d 302 (1948); Redwine v. Clodfeter, 226 N. C. 366, 38 S. E. 2d 203 (1946); Fish v. Hanson, 223 N. C. 143, 25 S. E. 2d 461 (1943).

[1] Carter v. Continental Ins. Co., 242 N. C. 578, 89 S. E. 2d 122 (1955).
[2] 242 N. C. 578, 89 S. E. 2d 122 (1955).
[3] Divorce converts a tenancy by the entirety into a tenancy in common.
[4] VANCE, INSURANCE § 13 (1951).

terest in the property and pays the premiums from his own funds, the proceeds inure to his sole benefit.[5] Normally, one not a party to a fire insurance contract can have no lawful claim in any amount realized by the insured.[6] In view of these general insurance principles, it is interesting to observe the rationale of the court in reaching a seemingly contrary result in the *Carter* case. The facts of the case raise questions concerning theories which the court did not consider in its opinion. It is the purpose of this note to explore these questions. There seem to be relatively few cases concerning the points of law involved; therefore analogies must be drawn from related cases.

It is seemingly well settled in most jurisdictions that the husband has an insurable interest[7] in the whole of the premises held by him and his wife as tenants by the entireties.[8] The case of *Conley v. Fidelity-Phenix Fire Ins. Co.*[9] presented an interesting problem. The husband and wife owned certain property by the entireties which included a $4,000 home. The husband insured the home for $2,000 and loss occurred. The insurance company resisted on the ground that the husband's interest was limited to half of the value of the policy since the wife had an equal interest in the property. The court held that he was entitled to the full amount of the insurance, saying that the policy covered the interest of the insured—which in a tenancy by the entirety is of the whole and not of the moiety.[10]

[5] Wattenbarger v. Tullock, 280 S. W. 2d 925 (Tenn. 1955).

[6] See Lynch v. Johnson, 196 Va. 516, 523, 84 S. E. 2d 419, 423 (1954): ". . . if the insurance so procured exceeds the value of the insured's insurable interest, then the excess is of no concern to any other person who also has an interest in the property, but it is a question exclusively between the insured and the insurer."

[7] See Federal Land Bank v. Atlas Assurance Co., 188 N. C. 747, 125 S. E. 631 (1934) (any interest is insurable if peril insured against would bring pecuniary loss upon insured by immediate and direct effect); BLACK, LAW DICTIONARY 942 (4th ed. 1951) (all that is required for an insurable interest is ". . . such a real and substantial interest in specific property as will prevent the contract from being a mere wager policy"). The exact nature of of the husband's interest in an estate by the entirety might be one or more of the following: (1) right of survivorship (2) right of usufruct (3) his interest in the estate (4) the joint interest in the estate.

[8] North British & Mercantile Ins. Co. v. Sciandra, 256 Ala. 409, 54 So. 2d 764, 27 A. L. R. 2d 1047 (1951) (where husband and wife each owned undivided one-half interest in property destroyed, *held:* husband's insurable interest under the policy in his name was not confined to his estate in the property but his interest extended to pecuniary benefit expected from its continued existence); Emery v. Clark, 303 Mich. 461, 6 N. W. 2d 746 (1942) (where creditor sought to have policy issued in name of husband on tenancy by the entirety reformed to include the wife in order to get judgment against both, *held:* husband had insurable interest in the whole of the premises in his own right and policy may not be reformed); Clawson v. Citizen's Mut. Fire Ins. Co., 121 Mich. 591, 80 N. W. 573, 68 A. L. R. 365 (1899); Miotke v. Milwaukee Mechanics' Lien Ins. Co., 113 Mich. 166, 71 N. W. 463 (1897); Lux v. Milwaukee Mechanics' Ins. Co., 30 S. W. 2d 1090 (Mo. App. 1930).

[9] 102 F. Supp. 474 (W. D. Ark. 1952).

[10] See 2 AMERICAN LAW OF PROPERTY § 6.6. (Casner ed. 1952): each spouse is seised *per tout et non per my.*

In some jurisdictions the failure of the husband to disclose the interest of his wife may void the policy for breach of warranty that he was sole and unconditional owner of the fee in the premises.[11] However, G. S. § 58-180.1[12] removes this from consideration in the instant case, since it provides that the naming of either spouse alone shall be sufficient and the policy shall not be void for a failure to disclose the interest of the other spouse.[13] It may be noted that the statute does not state that the insurer will be liable for the full value of the policy but *only* that it shall not be void. In the principal case the insurer admitted liability on the policy; thus the litigation concerned only the rights of the respective spouses to the proceeds of the policy paid into court.

The estate by the entirety exists in North Carolina as at common law with all its incidents.[14] These incidents were vividly set out by the late Chief Justice Stacy in his notable opinion in *Davis v. Bass*[15] and were relied on by the court in the *Carter* case. Those pertinent to the instant case appear to be:

(a) The estate is based on the common law doctrine that a husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person.
(b) Each spouse is seised *per tout et non per my,* each being seised of the whole and not of a moiety or undivided portion.
(c) The husband is entitled to the rents and profits of the land for his life (unsufruct).
(d) The estate is only severed by absolute divorce or by consent of both parties.
(e) One spouse, without the consent of the other can neither have the property partitioned nor sell the whole or a part thereof.
(f) Upon the death of either spouse the entire estate vests in the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee.

[11] Cook v. Farmers' Mut. Fire Ass'n, 139 W. Va. 700, 83 S. E. 2d 71 (1954) *But see* Connecticut Fire Ins. Co. v. McNeil, 35 F. 2d 675 (6th Cir. 1929). The latter case said that under the law of Tennessee there is but one owner; the legal existence of the wife is incorporated into that of the husband. Thus insurance in the name of the husband procured on an estate by the entirety satisfies the policy requirement of sole and unconditional ownership.

[12] N. C. GEN. STAT. § 58-180.1 (1950): *"Policy issued to husband or wife on joint property.*—Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof."

[13] See N. C. GEN. STAT. § 58-30 (1950) which provides that statements in an application of insurance shall be deemed representations and not warranties.

[14] Nesbitt v. Fairview Farms Inc., 239 N. C. 481, 86 S. E. 2d 472 (1954).

[15] 188 N. C. 200, 204-09, 124 S. E. 566, 567-71 (1924).

Legal separation does not affect the rights of the parties in the estate,[16] but divorce absolute converts the tenancy by the entirety into a tenancy in common by operation of law.[17]

In the *Carter* case the supreme court did not comment on an interesting theory which prevails in some jurisdictions. In *Scutella v. County Fire Ins. Co.*[18] a husband took out insurance in his name alone on property held by himself and his wife as tenants by the entireties. It was held that when the husband died, after loss but pending payment of the claim, the wife was entitled to the whole of the proceeds by right of survivorship.[19] This would seem to import the idea that the proceeds due on the policy in one sense replaced the property destroyed and were impressed with its real property characteristics.[20] If this were the position of North Carolina it would greatly simplify the situation in the *Carter* case. It seems that North Carolina, however, follows a contrary view in this type of situation.[21] An analysis of a few similar cases seems to verify this proposition. It is well settled that a tenancy by the entirety does not exist in personal property in North Carolina.[22]

It has been held that a life tenant insuring his interest is entitled to the proceeds of the policy without having to share with the remainderman.[23] The life tenant may recover not merely in proportion to the value of his life estate but for the full amount due under the policy up to the fee value of the property destroyed.[24] In *In re will of Wilson*[25] the husband held a life estate by curtesy right after his wife

[16] Freeman v. Belfer, 173 N. C. 581, 92 S. E. 486 (1917). The majority of the court were of opinion that divorce *a mensa et thoro* did not sever the marital relationship and thus did not affect the rights of the spouses in a tenancy by the entirety. There were vigorous dissents.

[17] McKinnon v. Caulk, 167 N. C. 411, 83 S. E. 559 (1914). It severs the unity of person, one of the five unities required in the holding of the title as tenants by the entireties.

[18] 231 App. Div. 343, 247 N. Y. S. 689 (4th Dep't 1931).

[19] Rigby v. Allegany County Cooperative Fire Ins. Co., 242 App. Div. 809, 275 N. Y. S. 211 (4th Dep't 1934) (memorandum decision following the *Scutella* case as conclusive).

[20] Rolater v. Rolater, 198 S. W. 391 (Tex. Civ. App. 1917) (a similar line of reasoning was used: where a home is destroyed by fire, the proceeds of insurance thereon stand in place of and instead of the insured property and has the same character, community or separate, as the insured property); *In re* Hickman's Estate, 41 Wash. 2d 519, 250 P. 2d 524 (1953).

[21] See Wilson v. Ervin, 227 N. C. 396, 42 S. E. 2d 468 (1947); Stockton v. Maney, 212 N. C. 231, 193 S. E. 137 (1937). *But see* Campbell v. Murphy, 55 N. C. 357 (1856); Graham v. Roberts, 43 N. C. 99 (1851).

[22] Bowling v. Bowling, 243 N. C. 515, 91 S. E. 2d 176 (1956); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923); Note, 6 N. C. L. Rev. 342 (1928).

[23] Stockton v. Maney, 212 N. C. 231, 193 S. E. 137 (1937). Where husband held a life estate by curtesy right and insured the property, *held:* nothing else appearing the husband insured only his interest in the dwelling and upon destruction by fire he was entitled to the entire proceeds of the policy and the remainderman had no interest in the real property bought by the life tenant with the proceeds.

[24] *Ibid.*

[25] 224 N. C. 505, 31 S. E. 2d 543 (1944).

died intestate. He insured the home for its full value and it was destroyed by fire. The heirs of the deceased wife brought suit for their ratable portion of the proceeds. The court held that unless an intention to insure for the benefit of the heirs appeared, the husband was entitled to the whole amount of the insurance. The rationale of this view appears to be: (1) that the interest of the life tenant and the remainderman are entirely separate (2) that the insurance arises not out of the propery itself but from an independent contract.

However, the situation seems otherwise if a testator devises property on which he holds insurance and loss occurs after his death. It has been held that a life tenant under the devise receives the interest on the proceeds in lieu of the use of the destroyed property and at his death the principal passes to the remainderman.[26] Apparently this is one instance where North Carolina has followed the view that the proceeds in a sense replace the property and retain its characteristics.[27]

In another analogous insurance situation it has been held that one joint owner may insure his interest to the exclusion of the other,[28] and in most instances collect the total amount of the insurance proceeds for his sole benefit.[29] Where a wife and husband held property by joint tenancy and the wife insured the family dwelling as sole owner for its full insurable value and paid the premiums from her own earnings, it was held that she was entitled to the whole of the proceeds and the husband could not maintain an action in law or equity for any portion thereof.[30] In this and other cases the courts declined to set up a fixed rule as to the right of the non-insuring joint owner to share in the proceeds. Rather the decision appeared to depend on "the equities of the particular case" in deciding whether the other joint owner had a right to share in the proceeds of the insured's personal contract.[31]

It seems clear in North Carolina that when an estate by the entirety is sold the funds derived from the sale become personalty[32] and are held

[26] Graham v. Roberts, 43 N. C. 99 (1851). VANCE, INSURANCE § 133 (1951) says that since the insurance policy is a personal contract, the right of action is in the personal representatives of the deceased who hold the proceeds in trust for those entitled to succeed by inheritance or devise to the insured property. This doctrine applies only to inheritance or devise and not grants inter vivos.

[27] See Graham v. Roberts, *supra* note 26; *cf.* Campbell v. Murphy, 55 N. C. 357 (1856).

[28] 14 AM. JUR., *Cotenancy* § 23 (1938).

[29] Clapp v. Farmers Mutual Fire Ins. Assn, 126 N. C. 388, 35 S. E. 617 (1900); American Cent. Ins. Co. v. Harrison, 205 S. W. 2d 417 (Tex. Civ. App. 1947).

[30] Miles v. Miles, 211 Ala. 26, 99 So. 187 (1924); *accord,* Bell v. Barefield, 219 Ala. 319, 122 So. 318 (1929).

[31] Currier v. North British Etc. Co., 98 N. H. 366, 101 A. 2d 266 (1953); Godfrey, *Some Limited-Interest Problems,* 15 LAW & CONTEMP. PROB. 415, 423 (1950).

[32] Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923) (where husband and wife sold an estate by the entirety and received mortgage secured by bonds,

by the parties as tenants in common.[33] In *Wilson v. Ervin*[34] the husband and wife sold property held by the entireties and the money was deposited in the bank in the husband's name. After the death of the husband, the wife asserted that she was entitled to the whole amount of the money by right of survivorship. It was held that no right of survivorship existed in such funds and she was entitled to only half. The rationale of this view seems to be: (1) the sale of the property terminates the estate by the entirety by joint act and consent of both spouses, making them each entitled to half the proceeds as tenants in common. (2) the money or claim for money replaces the property *only* in the sense that it represents the value.[35] Similar cases in other jurisdictions have held that such sale proceeds go by right of survivorship.[36]

The court might have considered the theory that the husband in the *Carter* case insured the property in trust for himself and his wife. It seems clear that there was no intention present which is essential to the existence of an express or implied trust.[37] A constructive trust might be plausible.[38] Constructive trusts are *created* by courts of equity[39] and arise entirely by operation of law without reference to any actual or supposed intention to create a trust but often contrary to such intention.[40] Generally a constructive trust is declared only when equity finds that one has obtained or now retains title to property by any kind of wrongdoing; or where, although title was obtained originally without fraud or wrong, it is against equity that the property should be retained by him

held: the bonds were personal property and at the death of the husband jus accrescendi did not apply to vest the whole of the proceeds in the wife); Moore v. Greenville Banking and Trust Co., 178 N. C. 118, 100 S. E. 269 (1919); Note, 13 N. C. L. REV. 256 (1935). *But cf.* Place v. Place, 206 N. C. 676, 174 S. E. 747 (1934); Isley v. Sellars, 153 N. C. 374, 69 S. E. 279 (1910).

[33] Honeycutt v. Citizens Nat'l Bank, 242 N. C. 734, 89 S. E. 598 (1955).

[34] 227 N. C. 396, 42 S. E. 2d 468 (1947).

[35] For an excellent discussion of this doctrine see *In re* Estate of Blumenthal, 236 N. Y. 448, 141 N. E. 911, 30 A. L. R. 901 (1923).

[36] Koehring v. Bowman, 194 Ind. 433, 142 N. E. 117 (1924) (tenancy by the entirety does not exist in personalty except as to personal property directly derived from real estate held by that title such as proceeds arising from the sale of property so held); Brell v. Brell, 143 Md. 443, 122 Atl. 635 (1923); Johnson v. Johnson, 268 S. W. 2d 439 (Mo. App. 1954) (where husband and wife sold an estate by the entirety and the money was deposited in the bank in the name of the husband, *held:* proceeds of sale retained all features and characteristics of an estate by the entiretly and upon the death of the husband the wife was entitled to the whole amount of the deposit by right of survivorship); Citizens Sav. Bank and Trust Co. v. Jenkins, 91 Vt. 13, 99 Atl. 250 (1916).

[37] BOGERT, TRUSTS § 77 (1952).

[38] See Connecticut Fire Ins. Co. v. McNeil, 35 F. 2d 675, 678 (6th Cir. 1929) (dictum): "Nor do we decide that the husband is entitled to the sole and exclusive enjoyment of the proceeds of the policy. . . . It might well be that the proceeds are held by the husband as trustee for the wife and the wife's interest thus preserved." See note 11 *supra* for facts and holding of this case.

[39] Lefkowitz v. Silver, 182 N. C. 339, 109 S. E. 56 (1921).

[40] Speight v. Branch Banking & Trust Co., 209 N. C. 563, 183 S. E. 734 (1936).

who holds it.[41] Evidence to establish a constructive trust must be clear, strong, cogent, and convincing.[42] It does not appear that in the principal case the husband was guilty of any wrongdoing or that it would be against equity to allow him to recover the full amount of the proceeds. The wife could have protected her own interest by insuring the property in her own behalf.

The supreme court in the instant case did not comment on the possibility that the insurance proceeds might have been impressed with real property characteristics or that the husband procured the insurance in trust for his wife. Rather it based the decision on the common law nature of the estate. Since the husband and wife were each seised *per tout et non per my,* there was no moiety of interest which the husband could insure for his sole benefit.[43] It seems both have an equal interest in the res, but that interest is not severable.[44] This distinguishes the instant case from the analogous insurance cases previously considered. Joint tenants are seised *per tout et per my*[45] and tenants in common are seised *per my et non per tout.*[46] In each instance there is a *per my* interest, a moiety, which one cotenant may claim as his own.

This apparently means that in North Carolina a husband must have a moiety of interest in order to insure for his separate benefit. Is this not contrary to accepted insurance theories?[47] The decision in the *Carter* case does not appear to rest on any presumption that the husband insures for the benefit of both spouses.[48] Rather the rationale of the court seems to be: (1) that the insurance policy as written and the loss benefits created thereby inured to the benefit of the *entire state* as owned by both husband and wife (2) that since the entire estate, as so insured, was severed by absolute divorce, it *necessarily* follows that the wife is entitled to half the proceeds of the policy. Though there was no express reference to the proceeds taking the characteristics of real property the rationale seems to imply that the court treated the proceeds as being endowed with the characteristics of an estate by the entireties before the divorce and necesarily taking the characteristics of tenancy in

[41] Teachey v. Gurley, 214 N. C. 288, 199 S. E. 83 (1938).
[42] Atkinson v. Atkinson, 225 N. C. 120, 33 S. E. 2d 666 (1945).
[43] *But see* Ross v. Ross, 35 N. J. Super. 242, 113 A. 2d 700 (1955). New Jersey has modified the common law and asserts that in a tenancy by the entirety the wife holds in her possession during their joint lives one half of the estate in common with her husband and as between themselves the respective rights of the parties are those of tenants in common.
[44] Strauss v. Strauss, 148 Fla. 23, 3 So. 2d 727 (1941); New York Life Ins. Co. v. Oates, 122 Fla. 540, 166 So. 269 (1936).
[45] 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).
[46] 2 AMERICAN LAW OF PROPERTY § 6.5 (Casner ed. 1952).
[47] See note 7 *supra.*
[48] *Cf.* 48 C.J.S., *Joint Tenancy* § 14 (1947) which says where the act of one joint tenant is beneficial to his cotenant, his act is regarded as the act of all so far as sharing in the benefit of the act is concerned.

common after divorce, thus enabling the wife to share in the proceeds. This might mean then that the wife could have recovered half the proceeds prior to divorce absolute.

It may be noted in the instant case that the policy was issued in the name of the husband. The question arises whether the result would have been the same had the policy specifically excluded the wife. Apparently this is the only further action which the husband here could have been taken to manifest an intention that payment should be made to him alone.[49]

CONCLUSION

It is the opinion of the writer that by this decision the supreme court has placed a restriction on the tenancy by the entirety which has not before been judicially recognized. Just as neither spouse alone can have the estate partitioned and neither alone can alienate his interest, so likewise in North Carolina neither spouse can insure the property to the exclusion of the other. Thus it appears that it becomes another incident of the tenancy by the entirety which the parties accept when they choose to hold such an estate.

WILLIAM H. KIRKMAN, JR.

Joint Tort-Feasors—Contribution—Effects of Statute on Covenant Not to Sue

A recent New Jersey case, *Smootz v. Ienni*,[1] involved a problem which has not been decided in North Carolina. The plaintiff was a passenger in the defendant's cab and was injured in an accident between the cab and a vehicle operated by a third party. In the plaintiff's action, the defendant cab company filed a third party complaint against the other driver for relief under the New Jersey Joint Tortfeasors Contribution Law.[2] The other driver had obtained a covenant not to sue[3] from the

[49] The equities of the instant case seem to be heavily in the husband's favor since: (1) he had paid all the premiums from his own funds; (2) he had the policy issued in his name alone; (3) the husband and wife were living separate and apart when the policy was issued; (4) the insurance covered the homestead in which the husband was residing.

[1] 237 N. J. Super. 529, 117 A. 2d 675 (1955).

[2] N. J. STAT. ANN. §§ 2A:53A-1 to -3 (1952): "For the purpose of this act the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. . . . The right of contribution exists among joint tortfeasors. . . . [Where a joint tortfeasor pays all or part of a judgment] he shall be entitled to recover contribution from the other . . . joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought. . . ."

[3] Where there are joint tort-feasors there can be but one recovery and a settlement with one is a release of the others. Howard v. Plumbing Co., 154 N. C.

plaintiff and because of this moved for a summary judgment.[4] This motion was granted, but the court also entered an order to the clerk to reduce any judgment of the plaintiff against the original defendant by one half of the verdict.

The court rested its decision on a deliberate dictum written the previous year by Justice Brennan for the Supreme Court of New Jersey.[5] The justice had said that the basis of the statute allowing actions among the joint tort-feasors was to assure that none paid in excess of his pro rata share,[6] thus achieving the result dictated by equity and justice. He stated two alternative ways of gaining equality between the tort-feasors in this type of case: (1) letting the plaintiff get a judgment for his total damage less the amount he received for his covenant, giving the tort-feasors who pay more than their pro rata share the right to contribution against the one who settled; or (2) reducing the plaintiff's verdict by a credit in the amount of the settler's full pro rata share of the verdict instead of the mere amount paid to the plaintiff for the covenant not to sue. Justice Brennan expressed a fear that the first alternative would encourage collusive settlements; and, this was said to be a mischief incident to the common law denial of the right of con-

224, 70 S. E. 285 (1911); Sircy v. Reese, 155 N. C. 297, 71 S. E. 310 (1911). But there is an exception where there is not a release but a covenant not to sue given to one tort-feasor, in which case the money paid is simply a credit to be entered on the total recovery. Holland v. Utilities Co., 208 N. C. 289, 170 S. E. 592 (1935); Braswell v. Morris, 195 N. C. 127, 131, 141 S. E. 489, 491 (1928); Slade v. Sherrod, 175 N. C. 346, 95 S. E. 557 (1918); Mason v. Stephens, 168 N. C. 370, 84 S. E. 527 (1915). For an example of a statute changing the above common-law distinction between the release and the covenant not to sue: "A release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount paid for the release, or in any amount or proportion by which the release provides that the claim shall be reduced, if greater than the consideration paid." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT [1939] § 4, 9 U. L. A. 161 (1951).

[4] The original defendant opposed the motion for judgment on the ground that he was entitled to get an adjudication of joint tort-feasorship between himself and the third party defendant as a basis for his statutory claim for contribution. He argued that private accord between the plaintiff and the third party defendant could neither defeat his right to the adjudication nor serve as a substitute in the light of the express statutory definition. The New Jersey statute requires joint liability rather than any joint judgment as a condition precedent to contribution. In deciding against the contention of the original defendant, the court merely admitted that the argument had a certain "logical appeal" and never squarely met it. It would seem that in case the plaintiff recovers a verdict against the original defendant the joint liability required by statute might be furnished here by some kind of estoppel of the plaintiff for selling the covenant not to sue.

[5] Judson v. Peoples Bank & Trust Co., 17 N. J. 67, 92-93, 110 A. 2d 24, 36-37 (1954) (dictum).

[6] Ordinarily a sued tort-feasor will have an action only for the amount he has paid in excess of his proportionate share; if there are two tort-feasors and one of them is forced to pay the entire liability, he may recover only one half of the amount paid. 13 AM. JUR., *Contribution* § 57 (1938). Pro rata means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard. Hendrie v. Lowmaster, 152 F. 2d 83, 85 (1945) (dictum).

tribution which was one of the reasons for the statutory change. Moreover, the settler's adjustment with the injured party would not end the matter between them because the settler could still be sued by his co-wrongdoers for contribution. Thus the settlement would lack finality, and the basic policy of encouraging compromise would be stifled.

If the second alternative were taken, according to Justice Brennan, collusive settlements would be made wholly ineffective since a credit of the settler's pro rata share would be the required result of any settlement. This would be fair to the other tort-feasors, requiring them to pay only their portion of the liability; it would also be fair to the injured party because the reduction would be a direct result of his own act of deliberately accepting less than he might possibly have gotten from this particular tort-feasor had he not compromised. Since compromises are almost always made on the basis of the plaintiff's own appraisal of the risks of recovery, the court felt it unlikely that he would be especially deterred here because of the uncertainty of what might be lost by the compromise. Unlike the first alternative, this solution assures the settling tort-feasor of the finality of his settlement.[7]

Unlike New Jersey, North Carolina not only gives the right of contribtuion between joint tort-feasors but also expressly provides in its contribution statute for a defendant's bringing in a joint tort-feasor as a third party defendant.[8] This statute created a new right, no right of action existing at common law between joint tort-feasors who stood in pari delicto.[9] Joint tort-feasors, within the contemplation of the statute, are those who act together in committing a wrong, or whose acts, though independent of each other, unite in causing a common injury.[10]

Where two or more tort-feasors are jointly liable to the plaintiff, the plaintiff has the option of suing any or all of them.[11] If the action is brought against only one, then so far as the plaintiff is concerned the others are not necessary parties and he may not be compelled to bring

[7] Neither alternative necessarily affected the question of need for adjudication of joint tort-feasorship under the statute. This problem did not arise in the *Judson* case, according to Justice Brennan, because the plaintiff had originally served all of the alleged joint tort-feasors with process. The contribution issue emerged when the plaintiff settled and took a nonsuit as to two of them.

[8] N. C. GEN. STAT. § 1-240 (1953).

[9] Potter v. Frosty Morn Meats, 242 N. C. 67, 86 S. E. 2d 780 (1955). The right of contribution is purely statutory and must be enforced in accord with the provisions of the statute. Hunsucker v. High Point Bending & Chair Co., 237 N. C. 559, 75 S. E. 2d 768 (1953); Tarkington v. Rock Hill Printing Co., 230 N. C. 354, 53 S. E. 2d 269 (1949); Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. 2d 736 (1943).

[10] White v. Keller, 242 N. C. 97, 86 S. E. 2d 795 (1955).

[11] Glazener v. Safety Transit Lines, 196 N. C. 504, 146 S. E. 134 (1929); Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928).

them in.[12] They may, however, be brought in by the original defendant on a cross-claim for contribution in case the plaintiff recovers judgment against him.[13] To maintain this cross-claim the original defendant must allege facts sufficient to show that if he is liable to the plaintiff both he and the additional defendant are liable as joint tort-feasors.[14] The original defendant cannot rely upon the liability of the third party to the plaintiff, but must recover, if at all, upon the liability of such party to him.[15] If the original defendant files a cross-claim asking that a tort-feasor be brought in, the plaintiff may not take a voluntary nonsuit as to the joint tort-feasor since the original defendant requested affirmative relief against the tort-feasor and is enitled to hold him as a party under the statute.[16]

North Carolina has not passed on the question of whether a covenant not to sue exempts a defendant from his duty to contribute, but there are three cases, discussed below, which present a close analogy.[17] In *Hunsucker v. High Point Bending & Chair Co.*,[18] an employee covered by the North Carolina Workmen's Compensation Act[19] was injured by the concurring negligence of the employer and two other joint tort-feasors. The employer paid the employee workmen's compensation on account of his injury. The employee then brought action against the other tort-feasors alleging that his injury was caused by their combined actionable negligence. The tort-feasor filed a cross-complaint against the employer, asking that he be brought into the case for the purpose

[12] Jones v. Otis Elevator Co., 231 N. C. 285, 56 S. E. 2d 684 (1949); Watts v. Lefler, 194 N. C. 671, 140 S. E. 435 (1927).

[13] Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954); Wilson v. Massagee, 224 N. C. 705, 26 S. E. 2d 911 (1943); Lackey v. Southern Railway Co., 219 N. C. 195, 13 S. E. 2d 234 (1941); Freeman v. Thompson, 216 N. C. 484, 5 S. E. 2d 434 (1939); Mangum v. Southern Railway Co., 210 N. C. 134, 185 S. E. 644 (1936).

[14] Freeman v. Thompson, *supra* note 13. The defendant's cross-claim in Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. 2d 736 (1943) read: "That if this defendant was guilty of any negligence, . . . said [third party] was liable therefor as a joint tort-feasor." Transcript of Record, p. 20, Godfrey v. Tidewater Power Co., *supra*. *But see* Potter v. Frosty Morn Meats, 242 N. C. 67, 86 S. E. 2d 780 (1955); Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954).

[15] Charnock v. Taylor, 223 N. C. 360, 363, 26 S. E. 2d 911, 914 (1943).

[16] Smith v. Kappas, 218 N. C. 758, 12 S. E. 2d 693 (1940).

[17] Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 WIS. L. REV. 467, noted that the problem could arise as to five principal individual defenses: (1) non-liability because of personal relationship between the injured party and the tortfeasor to be joined; (2) non-liability because the injured party is the employee of one tort-feasor and thus his suit is barred by the terms of the Workmen's Compensation Act; (3) non-liability because, as to the tortfeasor sought to be joined, the injured party had assumed the risk; (4) non-liability because the injured party has given a covenant not to sue to the tortfeasor sought to be joined; and (5) non-liability of one tortfeasor because, as to him, the statute of limitations has run on the injured party's claim.

[18] 237 N. C. 559, 75 S. E. 2d 768 (1953).

[19] N. C. GEN. STAT. §§ 97-1 through -122 (1950 and Supp. 1955).

of contribution. The court held that, under the North Carolina Workmen's Compensation Act, the liability of the employer is to be limited to the amount he has to pay under the statute,[20] and to force the employer to pay more indirectly through the hands of a third person is to "lose the substance of the law by grasping at its shadow."[21] The Workmen's Compensation Act removes the employer from the position of joint tort-feasor and instead makes him absolutely liable regardless of negligence.[22] Thus there can be no parity of status to furnish a basis for contribution between one liable only for negligence and another liable whether negligent or not. The same idea was controlling in a recent wrongful death case.[22a] The father sued as administrator for the death of his small child caused when the child was struck by the defendant's automobile. The defendant moved to have the mother joined as a defendant for contribution or for indemnity because of her negligence in permitting the child to go on the highway unattended. The court rejected this motion apparently on the simple basis that the mother was not liable at all[22b] and therefore could not be a joint tort-feasor, which status is seemingly a pre-requisite for either contribution or for indemnity under the theory of primary or secondary liability.

Although the preceding cases might seem to indicate that North Carolina would not enforce contribution where one joint tort-feasor has an individual defense, *Godfrey v. Tidewater Power Co.*[23] holds the other way. Here the plaintiff sued one joint tort-feasor shortly before the statute of limitations expired. After the statute had run, the original defendant made a motion to join the other joint tort-feasors. This motion was denied by the trial court; the supreme court reversed, saying that common liability to suit must have existed as a condition precedent to contribution, but that it was not essential that it continue to exist as to all of the joint tort-feasors. All joint tort-feasors to be made parties defendant may be brought in at any time before judgment so that

[20] "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article . . . shall exclude all other rights and remedies of such employee . . . as against his employer. . . ." N. C. GEN. STAT. § 97-10 (1950).

[21] Hunsucker v. High Point Bending & Chair Co., 237 N. C. 559, 571, 75 S. E. 2d 768, 777 (1953).

[22] Lovette v. Lloyd, 236 N. C. 663, 73 S. E. 2d 886 (1952); Brown v. Southern Railway Co., 202 N. C. 256, 162 S. E. 613 (1932); see Note, 42 VA. L. REV. 959 (1956).

[22a] Lewis v. Farm Bureau Mut. Automobile Ins. Co., 243 N. C. 55, 89 S. E. 2d 788 (1955).

[22b] N. C. GEN. STAT. § 28-173 (Supp. 1955) gives a cause of action for wrongful death against those whom the injured party could have sued had he lived; thus, technically, there was not merely an individual defense here, but no liability at all on the part of the mother. There is, then, a possible distinction between this case and one brought by the next friend of a child injured rather than killed.

[23] 223 N. C. 647, 27 S. E. 2d 736 (1943).

the whole controversy may be settled in a single suit.[24] The distinction to be made between this and the prior two cases is that no joint tort-feasorship was found in the first two situations. Yet once this relationship is clearly present, contribution seems to be regarded here as a substantive right of the defendant, apart from the rights of the plaintiff.[25] On this reasoning, it would appear arguable that North Carolina might allow joinder of and contribution from a joint tort-feasor given a covenant not to sue.

The problem has also arisen in New York. In the case of *Blauvelt v. Nyack*,[26] joinder was allowed and judgment was rendered against the defendant who had purchased the covenant not to sue, but he was credited on his pro rata share of the judgment with the amount he had paid for the covenant. However, in *Fox v. Western New York Motor Lines*,[27] the court held that the sued tort-feasor cannot compel the joinder of the other, since the New York statute permits joinder only of one who is liable to the sued tort-feasor by contract or status, and the other is not liable over to the sued tort-feasor until the right to contribution has been established by a joint judgment[28] against both tort-feasors.[29] But North Carolina does not require a joint judgment against the joint tort-feasor as a prerequisite to contribution,[30] so, if the North Carolina courts choose to follow the line of reasoning set down by the *Blauvelt* case, joinder would be allowed with the settling tort-feasor having to pay the remainder of his pro rata share.

The Uniform Contribution Among Tortfeasors Act of 1939 differed from the usual contribution statute in several notable respects. Under the act it was necessary for the covenant not to sue to contain an express provision for a reduction—to the extent of the pro rata share of the

[24] Freeman v. Thompson, 216 N. C. 484, 5 S. E. 2d. 434 (1939).

[25] See Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954); Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951); Powell v. Ingram, 231 N. C. 427, 57 S. E. 2d 315 (1950); see also Bass v. Ingold, 232 N. C. 295, 60 S. E. 2d 114 (1950) (when an additional defendant is brought in by the original defendant for the purpose of contribution under the statute, the propriety of such joinder will be determined by the pleadings of the original defendant, unaffected by any pleadings filed by the plaintiff); cases cited note 11 *supra*.

[26] 141 Misc. 730, 252 N. Y. S. 746 (Sup. Ct. 1931).

[27] 232 App. Div. 308, 249 N. Y. S. 623 (4th Dep't 1931).

[28] See N. Y. Civ. Practice Act § 211-a (Clenenger's 1956): "Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment . . . ."

[29] A joint judgment cannot be obtained upon the initiative of the original defendant because joinder of the second tort-feasor cannot be compelled by him. This ends, for all practical purposes, the value of the New York contribution statute to a joint tort-feasor in such a situation. Accordingly, joinder is always at the plaintiff's discretion.

[30] N. C. Gen. Stat. § 1-240 (1953).

released tort-feasor—of the injured person's damages recoverable against all the other tort-feasors.[31] This would seem to be the same rule as that said effective by operation of law in New Jersey. However, under the Uniform Act, the relative degrees of fault of the several tort-feasors were to be taken into consideration by the jury when it apportioned damages; there was no longer any requiring every tort-feasor, regardless of his degree of fault, to pay an equal share.[32] Thus, the introduction of a variable factor into the concept of pro rata share would tend to minimize similarities betwen the working of the two rules.

If, on the other hand, the covenant not to sue failed to contain a specific provision releasing the tort-feasor to the extent of his pro rata share, the tort-feasor would be liable for contribution and would only receive credit for the amount actually paid. In this, the act adopted the solution of the *Blauvelt* case. The act provided for such a reduction, according to the commissioners who drafted it, for the purpose of preventing the injured person from acting in collusion with one of the tort-feasors. Without such a provision, it would be possible for the plaintiff to place almost the entire burden of payment upon one tort-feasor by selling the other tort-feasor a covenant not to sue for a small price.

This provision was not effective. Not only was nothing done to prevent collusion, but this section of the act made it almost impossible for one tort-feasor alone to take a covenant not to sue and close the file on the case. Plaintiff's attorneys were refusing to give any covenant which contained a provision reducing the damages "to the extent of the pro rata share of the released tort-feasor" because they had no way of knowing what they were giving up. Under the section providing for the apportioning of liability according to relative degrees of fault, the plaintiff would not know whether he was giving up ten per cent of his claim or ninety per cent of it until the jury had established the comparative pro rata shares of the tort-feasors. Yet a defendant would not settle for a fixed amount without such a provision in the covenant because he would then remain open to contribution in an uncertain amount, determined on the basis of a judgment against another in a suit to which he would not be a party. Because of this, the 1939 Uniform Act has been said to make settlements with one joint tort-feasor impossible.[33]

The commissioners decided it was more important not to discourage settlements than to make a futile effort to prevent discrimination by plaintiffs, so a new version of the act was promulgated in 1955. Under

[31] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT [1939] § 5, 9 U. L. A. 163 (1951).

[32] *Id.* § 2(4).

[33] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 224 (1955).

the new act, a "release" again[34] does not release any of the other tort-feasors from liability, but it does reduce the claim against them by the amount stipulated by the covenant or by the amount paid for it, whichever is the greater.[35] By a new provision, a covenant or release will automatically discharge the tort-feasor to whom it is given from all liability for contribtuion to any other tort-feasor.[36] A change was also made in the method of determining the pro rata share of the tort-feasors, and the comparative liability doctrine was abolished. The revised act expressly says that the "principles of equity applicable to contribution generally"[37] are to be applied. The Comment of the commissioners recognized a "lack of need for a comparative negligence or degree of fault rule,"[38] and indicated that the exclusion of intentional, wilful, and wanton actors from the right to contribution substantially eliminates the need for such a rule.[39]

In my opinion North Carolina should follow the reasoning of Justice Brennan and credit any amount which the plaintiff receives in judgment with the settler's pro rata share of the verdict. The 1939 Uniform Contribution Among Tortfeasors Act was not effective because of the provision calling for apportionment of damages by the jury. The lack of acceptance of this particular provision is shown by the fact that it was adopted by only three states and Hawaii,[40] and was left out of the amended act in 1955. Without this provision the plaintiff would be able to figure on equal shares and would know as much about what he was giving up as the settler in any case. Also, the settling tort-feasor would be able to close his file on the case for good with the nonsettling tort-

[34] See note 3 *supra.*

[35] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT [1955] § 4(a), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 223.

[36] *Id.* § 4(b).

[37] *Id.* § 2(c), at 220.

[38] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 220 (1955).

[39] Changes in the 1939 act by the 1955 act, other than those already mentioned, include: (1) The definition of joint tort-feasor and the term itself have been eliminated. This was done because the different definitions used in different states were not all consistent with the one in the act. (2) Wrongful death has been added as giving rise to the right of contribution. (3) Right of contribution in favor of a tort-feasor who has intentionally caused or contributed to the injury or wrongful death is now expressly denied, whereas the former act was silent. (4) A liability insurer who has discharged in full or in part the liability of a tort-feasor and thus discharged in full its obligation as insurer, is subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the liability. (5) The rule of equity which requires class liability, such as that arising from vicarious relationships, to be treated as a single share is invoked. (6) A separate action to enforce contribution must be commenced within one year after the judgment has become final. (7) The judgment of the court in determining the liability of several defendants to the claimant for injury or wrongful death shall be binding as among such defendants in determining their right of contribution.

[40] 9 U. L. A. 160. The Uniform Act itself was adopted in: Arkansas, Delaware, Hawaii, Maryland, New Mexico, Rhode Island, and South Dakota. *Id.* at 153.

feasors being given the actual benefits of contribution. The commissioners were right in changing the act to encourage settlement, but in doing so they went too far and gave the plaintiff too big an advantage. The amended act allows the plaintiff to settle with one tort-feasor with no chance of suffering detriment by doing so. If it turns out that he settled with the tort-feasor for less than the tort-feasor's pro rata share, the nonsettling tort-feasor would have to pay the difference.[41] It is true that this solution would encourage settlement, but it would also impose too great a burden on a tort-feasor who decided to take his chance in court.[42]

WILBUR RITCHIE SMITH, JR.

Legislation—Control of Firearms

Commensurate with the greater regulation in all fields, firearms are becoming a subject of increasing legislative control as regards their purchase, sale, and posession. With very few exceptions,[1] the possession, sale and purchase of rifles and shotguns are not restricted by state legislation. The majority of restrictions are directed toward machine guns, presumably because of their capacity for rapid firing, and pistols,[2] because of their concealability and the ease with which they may be carried. The purpose of this note is to summarize the law of firearms in North Carolina as it pertains to machine guns and pistols, against the background of policies followed by other states.

A conviction of possessing a machine gun without permission was

[41] If the settling tort-feasor were joined under our statute, he could still be credited with his pro rata share. Would the court give effect to an indemnity clause in the covenant and allow a settlor, forced to contribute, to collect indemnity from the plaintiff? Or would the court make a tort-feasor with such a "credit" with the plaintiff contribute at all? Is there any likelihood that such a clause might be construed by the court as changing a covenant not to sue into a general release?

[42] The settler, it is thought, should not even be made a party to the action. By buying a covenant not to sue, he bought his peace and plaintiff, by giving the covenant, perhaps should be estopped from denying that the settler is a joint tort-feasor. See note 4 *supra*. North Carolina has actually reached the *result* of the rule applied in New Jersey. Although the employer covered by workmen's compensation and the beneficiary of the wrongful death proceeds are held not to be joint tort-feasors so that they may not be brought into the suit or be sued for contribution, the plaintiff's verdict in both cases may be reduced pro rata upon a contributory negligence theory. See Note, 42 VA. L. REV. 959, 967-69 (1956). The amount payable under workmen's compensation law is substracted from the employee's verdict against a third person when the employer contributed to the injury. Lovette v. Lloyd, 236 N. C. 663, 73 S. E. 2d 886 (1953). And where a parent immune from suit negligently contributes to the child's injury, the parent's share of the wrongful death proceeds is credited against the verdict. Pearson v. National Manufacture and Stores Corp., 219 N. C. 717, 14 S. E. 2d 811 (1941).

[1] FLA. STAT. ANN. § 790.05 (1943); W. VA. CODE § 6050 (1955).

[2] Due to common usage, the term "pistol" will be used in this note to apply to all types of firearms designed to be held in one hand when fired.

affirmed[3] by the Supreme Judicial Court of Massachusetts, even though the defendant did not have in his possession a clip or magazine for the weapon. There was expert testimony that "the magazine or clip was a vital and characteristic part of the sub-machine gun for purpose of automatic, rapid and successive firing, that without the said magazine or clip it was incapable of firing more than one shot without reloading."[4] From the above evidence, it was the defendant's contention that the absence of a clip or magazine caused the weapon to lose its character as a machine gun, in which contention he was unsuccessful. The court held that the weapon, by reason of the absence of a clip or magazine, did not lose its character as a machine gun any more than the absence of a bullet would destroy the character of a rifle. Emphasis was placed upon a prior Massachusetts case[5] in which the same statute was involved,[6] where convictions of two defendants for possession of a Thompson .45 caliber sub-machine gun were upheld, even though the weapon was incapable of being fired due to the absence of a firing pin.[7]

From these two cases it would seem that the attitude of Massachusetts is rather extreme against the possession of automatic weapons. From a reference to the laws of other states, this attitude does not seem unusual. Tweny-nine states,[8] six of which have adopted the Uniform Machine Gun Act,[9] have direct legislation against the possession of machine guns. Although in some of the states it is possible to possess a machine gun by means of a license,[10] and in others possession of them is legal if the weapons are unservicable as such and are kept as mementos, souvenirs, or ornaments,[11] in many the mere possession of such a firearm constitutes a felony.[12]

[3] Commonwealth v. Colton, — Mass. —, 132 N. E. 2d 398 (1956).
[4] *Id.* at —, 132 N. E. 2d at 399.
[5] Commonwealth v. Bartholomew, 326 Mass. 218, 93 N. E. 2d 551 (1950).
[6] MASS. LAWS ANN. c. 269, § 10 (1956).
[7] The reason for the holding was that a firing pin could easily be machined from a piece of scrap metal, such as a nail.
[8] ARK. STAT. ANN. § 41-4507 to 41-4517 (1947); CAL. PEN. CODE § 12220 (1956); DEL. CODE ANN. 11 § 465 (1953); GA. CODE ANN. § 26-5109 (1933); IND. STAT. ANN. § 10-4712 (1956); KAN. GEN. STAT. ANN. 21-2601 (1949); LA. REV. STAT. 40: 1752 (1950); MD. CODE ANN. art. 27 § 439 to 450 (1951); MASS. LAWS ANN. c. 269 § 10 (1956); MICH. STAT. ANN. § 28.422 (1938); MINN. STAT. ANN. § 616.45 (1945); MO. STAT. ANN. § 564.590 (1953); MONT. REV. CODES 94-3101 to -3111 (1947); NEB. REV. STAT. § 28-1010 (1948); N. J. STAT. ANN. 2A:151-50 (1952); N. Y. PENAL LAW § 1897 (1) (a) (1944); N. C. GEN. STAT. 14-409 (1953); N. D. REV. CODE 62-0206 (1943); OHIO REV. CODE ANN. § 2923.04 (1953); ORE. REV. STAT. § 166.250 (1955); PA. STAT. ANN. 18 § 4629 (1949); R. I. GEN. LAWS c. 404, § 4 (1938); S. C. CODE LAWS § 16-123 (1952); S. D. CODE 21.0201 to .0209 (1939); TEX. PENAL CODE ANN. art. 489b, § 2 (1952); VA. CODE 18-135 to -145 (1950); WASH. REV. CODE 9.41.190 (1951); W. VA. CODE § 6050 (1955); WIS. CRIM. CODE 164.01 to .20 (1955).
[9] Arkansas, Maryland, Montana, South Dakota, Virginia, Wisconsin. See statutes cited note 5 *supra*.
[10] Georgia, Massachusetts, New Jersey, Ohio. See statutes cited note 5 *supra*.
[11] MINN. STAT. ANN. § 616.45 (1945); OHIO REV. CODE ANN. § 2923.06 (1953).
[12] DEL. CODE ANN. 11 § 465 (1953); IND. STAT. ANN. § 10-4712 (1956); GEN.

In North Carolina it is a misdemeanor for an individual to own or sell a machine gun unless he is a resident of the state and owned, as a relic or souvenir, a machine gun used in former wars at the time of the passage of the statute.[13] He must also report such ownership to the clerk of the superior court of his county of residence. Certain classes of officers in the performance of official duties are excepted, and businesses may secure a permit to possess such a weapon from the clerk of the superior court of the county in which the business is located.

Aside from the category of automatic weapons, most of the restrictions against firearms are directed at those which are easily concealable, hence the large amount of regulations concerning pistols. Unfortunate aspects of this type of regulation are the varying degrees of severity and the lack of uniformity among the several states, presenting a serious problem to the conscientious citizen who might wish to take a pistol from his home state to another, or to make a journey entailing travel through several states.

In one form or another, it is forbidden to carry concealed weapons in forty-five of the states,[14] with some states having provisions for citizens to obtain licenses upon a showing of good character or cause.[15] Provisions are frequently found which make possession of pistols illegal by aliens[16] and persons previously convicted of crimes of violence[17] or

STAT. KAN. ANN. 21-2602 (1949); MASS. LAWS ANN. c. 269, s. 10 (1956); MICH. STAT. ANN. § 28.422 (1948); MINN. STAT. ANN. § 616.45 (1945); MO. STAT. ANN. § 564.590 (1953); NEB. REV. STAT. § 28-1010 (1948); N. Y. PENAL LAW § 1897 (1) (a) (1944); N. D. REV. CODE 62-0206 (1943); OHIO REV. CODE ANN. § 2923.04 (1953); S. C. CODE LAWS § 16-127 (1952); WASH. REV. CODE 9.41.210 (1951).

[13] N. C. GEN. STAT. 14-409 (1953), N. C. Pub. Laws 1933, c. 261, § 1. This statute applies to weapons capable of firing sixteen shots or more automatically.

[14] ALA. CODE t. 14, § 175 (1940); ARIZ. CODE ANN. § 43-2205 (1939); ARK. STAT. ANN. § 41-450 (1947); CAL. PEN. CODE § 12025 (1956); COLO. REV. STAT. § 40-11-1 (1953); CONN. GEN. STAT. § 4166 (1949); DEL. CODE ANN. 11 § 461 (1953); FLA. STAT. ANN. § 790.01 (1943); GA. CODE ANN. § 26-5101 (1933); IDAHO CODE § 18-3302 (1947); ILL. STAT. ANN. c. 38, § 155 (1935); IND. STAT. ANN. § 10-4706 (1956); IOWA CODE ANN. § 695.2 (1951); KAN. GEN. STAT. ANN. 21-2411 (1949); KY. REV. STAT. § 435.230 (1953); LA. REV. STAT. 14:95 (1950); ME. REV. STAT. c. 137, § 19 (1954); MD. CODE ANN. a. 27, § 44 (1951); MASS. LAWS ANN. c. 269, § 10 (1956); MICH. STAT. ANN. § 28.424 (1938); MISS. CODE ANN. § 2079 (1942); MO. STAT. ANN. § 564.610 (1953); MONT. REV. CODES 94-3525, -3526 (1947); NEB. REV. STAT. § 28-1001 (1948); N. H. REV. STAT. ANN. 159:4 (1955); N. J. STAT. ANN. 2A:151-41 (1952); N. M. STAT. 40-17-1 (1953); N. Y. PENAL LAW § 1897 (4), (5) (1944); N. C. GEN. STAT. 14-269 (1953); N. D. REV. CODE 62-0301, -0105 (1943); OHIO REV. CODE ANN. § 2923.01 (1953); OKLA. STAT. ANN. 21 § 1271, 1272 (1937); ORE. REV. STAT. § 166.240 (1955); PA. STAT. ANN. act 443, H. B. 96 (1955); R. I. GEN. LAWS c. 404, § 4 (1938); S. C. CODE LAWS § 16-145 (1952); S. D. CODE 13.1613, 21.0105 (1939); TENN. CODE ANN. 39-4901 (1956); TEX. PEN. CODE ANN. art. 483 (1952); UTAH CODE ANN. 76-23-4 (1953); VA. CODE § 18-146 (1950); WASH. REV. CODE 9.41.050 (1951); W. VA. CODE § 6043 (1955); WIS. CRIM. CODE 941.23 (1955); WYO. COMP. STAT. ANN. 9-1203 (1945).

[15] See UTAH CODE ANN. 76-23-4 (1953).

[16] See NEV. COMP. LAWS § 2302 (1929).

[17] See MD. CODE ANN. a. 27 § 541 (1951).

of felonies,[18] sales and purchases are controlled,[19] and one state requires a written license to *possess* a firearm capable of being concealed on the person.[20]

In most instances the restricting legislation has stood the test of constitutionality. The Supreme Court of the United States has held that Amendment II of the United States Constitution, declaring that the right to keep and bear arms shall not be infringed, applies only to infringement on the part of the federal government, and state legislation must be tested in the light of state constitutions.[21]

The comparable section of the North Carolina Constitution, article I, section 24, was construed and interpreted in *State v. Kerner,*[22] where the defendant was indicted under a local statute which prohibited the carrying of a pistol by anyone in Forsyth County off his own premises, concealed or *otherwise,* unless a permit therefor had previously been obtained.[23] The facts of the case were that the defendant, after being accosted, procured a pistol in his store and carried it openly onto the streets of Kernersville in defense of his person, for which he was indicted. Upon a special verdict, the trial court declared the defendant not guilty upon the ground of unconstitutionality, which result was affirmed upon appeal by the State. The court held that the statute was void because as a regulation it was an unreasonable one, and further, for all practical purposes it was a prohibition of the constitutional right to bear arms.

Article I, section 24 of the North Carolina Constitution has two parts. The first declares that the right of the citizens to keep and bear arms shall not be infringed, the second, added by the Constitutional Convention of 1875, declares that nothing therein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice. This last clause, it was pointed out by Chief Justice Clark,[24] is an exception to the first and indicates the extent to which the right to bear arms can be restricted; i.e., the legislature can prohibit the carrying of concealed weapons, but no further. It was stated in the case of *State v. Speller*[25] that even without this constitutional provision the legislature may regulate the right to

[18] See MICH. STAT. ANN. § 28.92 (Supp. 1955).
[19] See VT. STAT. 8277 (1947).
[20] N. Y. PENAL LAW § 1897 (4) (1944).
[21] United States v. Cruikshank, 92 U. S. 542 (1875).
[22] 181 N. C. 574, 107 S. E. 222 (1921).
[23] N. C. Public-Local Laws 1919, c. 317, § 3. The statute required that in order to obtain a permit, the applicant apply to a municipal court if a resident of a town, and to the superior court if not residing in a town, describe the weapon, give the time and purpose for which the weapon was to be taken off his premises, pay the clerk of the court the sum of $5 for each permit, and file a bond in the penalty of $500 that he would not carry the weapon except as so authorized.
[24] State v. Kerner, 181 N.C. 574, 575, 107 S. E. 222, 223 (1921).
[25] 86 N. C. 697 (1882).

bear arms in a manner conducive to the public peace. Thus, as is intimated in the *Kerner* case, any reasonable regulation will be upheld.

North Carolina's concealed weapons law[26] has been in force since shortly after the Constitutional Amendment of 1875 declared the power of the legislature to control the practice of carrying concealed weapons.[27] The elements of the offense are: (1) the defendant must be off his own premises, (2) carrying a deadly weapon, and (3) the weapon must be concealed about his person.[28] Inasmuch as the area constituting a person's premises is fairly well an adjudicated matter in North Carolina, and the list of deadly weapons enumerated in the statute is extensive, the two principal questions raised by the statute become: (1) what constitutes the concealment prohibited by the statute, and (2) what location of a weapon will bring it within the statutory language, "about the person."

One of the first cases to arise was that of *State v. Woodfin,*[29] where the court approved a charge to the jury that the purpose for which the defendant carried a pistol is immaterial, yet if he carried it off his own premises concealed about his person, he is guilty. Strangely enough, in *State v. Gilbert,*[30] the case immediately following the *Woodfin* case in the Reports, this holding was modified. The jury found that the defendant was off his own premises, had a pistol in his overcoat pocket concealed from view, but had no *criminal intent* in carrying the pistol concealed, as he was a merchant, and was carrying it from the store where he purchased it to another for the purpose of having it packed with other goods. The question of guilt or innocence was submitted to the court, which found that the defendant was guilty. In reversing the judgment the supreme court based its decision squarely upon the ground of *intent,* saying, *"To conceal a weapon,* means something more than the mere act of having it where it may not be seen. It implies an assent of the mind, and a *purpose* to so carry it, that it may not be seen."[31]

Soon after the decision of the *Gilbert* case, it was used as precedent in reversing convictions in two cases, one in which the defendant was carrying a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it,[32] the other in which the pistol was carried concealed solely for the purpose of trading.[33] However, the *Gilbert* case was expressly overruled by *State v. Dixon,*[34] where the defendant

[26] N. C. GEN. STAT. 14-269 (1953). [27] N. C. Public Laws 1879, c. 127.
[28] State v. Williamson, 238 N. C. 652, 78 S. E. 2d 763 (1953).
[29] 87 N. C. 526 (1882). [30] 87 N. C. 527 (1882).
[31] *Id.* at 528.
[32] State v. Brodnax, 91 N. C. 543 (1884).
[33] State v. Harrison, 93 N. C. 605 (1885).
[34] 114 N. C. 850, 19 S. E. 364 (1894).

had carried a pistol concealed for the purpose of selling it. The court attempted to draw a line beyond which a person would be guilty by saying that the presumption of concealment raised by the statute may be rebutted by an express finding of absence of guilty intent, as where a pistol is carried from one store to another without intent to conceal it, or where, under some circumstances, it is carried by a messenger to be delivered to the owner. "But matter of excuse can be extended no further with safety and a due regard to the integrity of the statute."[35] The requisite guilty intent necessary for conviction was explained in *State v. Brown*[36] as not the intent to use the concealed weapon, but the intent to carry it concealed, the question being as to the manner of carrying, and not to the purpose. Thus it was held in *State v. Woodliff*[37] that carrying a pistol concealed for the purpose of self-defense was the very practice intended to be prohibited by the statute, and, instead of being an element in mitigation, as contended by counsel for the defendant, was in aggravation of the offense, since it tended to show an anticipation of use.[38]

Aside from the question of intent, where is the line drawn as to what is actually concealment and what is permissible under the statute? Possession of a deadly weapon by a person *off his own premises* will raise a presumption that the weapon is concealed, and the burden of showing that the weapon was not actually concealed must be borne by the accused.[39] However, a charge in the following terms, ". . . and if you find beyond a reasonable doubt that he had a pistol concealed on his person, or if you find beyond a reasonable doubt that he was in possession of a pistol on that occasion and find it beyond a reasonable doubt, then it would be your duty to convict," would entitle a defendant to a new trial, since the bare possession of a pistol by a person not on his own premises does not necessarily constitute a breach of the statute.[40] Similarly, a showing that two pistols were worn by the defendant buckled around him without scabbards and naked on a belt is sufficient to rebut the presumption of concealment.[41] Where a pistol was worn on the person under an overcoat, and it was not shown whether the overcoat was worn open or buttoned, but there was evidence that the pistol could be seen, it was held that the jury should determine whether the statutory presumption of concealment had been rebutted.[42] In *State v. Reams*[43] a pistol ten or eleven inches long was placed in an

[35] *Id.* at 854, 19 S. E. at 365.
[36] 125 N. C. 704, 34 S. E. 549 (1899).
[37] 172 N. C. 885, 90 S. E. 137 (1916).
[38] See also State v. Speller, 86 N. C. 697 (1882).
[39] N. C. GEN. STAT. 14-269 (1953).
[40] State v. Vanderburg, 200 N. C. 713, 158 S. E. 248 (1931).
[41] State v. Roten, 86 N. C. 701 (1882).
[42] State v. Lilly, 116 N. C. 1049, 21 S. E. 563 (1895).
[43] 121 N. C. 556, 27 S. E. 1004 (1897).

upper outside coat pocket so that the handle and two inches of the breech were exposed to view. The charge that if the jury believed from the evidence that *any part* of the pistol was concealed they should find the defendant guilty was disapproved. The supreme court stated that if the weapon is partly exposed to public view, it would be difficult and unreasonable to say, as a legal conclusion, that it is concealed.[44] In *State v. Mangum*,[45] upon evidence tending to show that when arrested the defendant had a pistol which protruded about an inch or so from his pocket, a conviction was not disturbed, the question of concealment being held a proper subject for the jury's determination.

The only North Carolina case found which deals with the corollary question of how close the weapon must be to a person in order to be "about the person" is *State v. McManus*.[46] The defendant in this case was in his wagon, and had a pistol in the dinner basket he was carrying, on top of the cloth which covered his dinner, and the basket was carried in his lap so that, he contended, it was clearly visible. The jury found that the defendant had and carried concealed about his person a pistol, off his own premises, as charged in the indictment. On appeal, it was the argument of the defense that the pistol, if in the basket and concealed, was not about the person of the defendant, though on his lap. In disallowing this contention, weight was given to the fact that the pistol was under the direct control of the defendant, within easy reach, so that he could promptly have used it. "It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged."[47] This ruling, placing emphasis upon the "control" element, raises the interesting and important question as to the status of pistols carried in automobiles: are they concealed within the meaning of the statute or not? Under the reasoning of the *McManus* case it would seem to be clear that the statute would not be applicable to a pistol carried in the trunk of an automobile, but what of a pistol carried in the glove compartment of the dashboard; would a person have sufficient control over the weapon so as to make it "about the person?"[48]

Aside from two amendments[49] and the provision for licenses to deal in pistols,[50] the remainder of the legislation regarding firearms in North Carolina, G. S. 14-402 to -408,[51] was passed in 1919. These statutes

[44] *Id.* at 558, 27 S. E. at 1006.
[45] 187 N. C. 477, 121 S. E. 765 (1924).
[46] 89 N. C. 555 (1883).
[47] *Id.* at 559.
[48] See Elza v. Commonwealth, — Ky. —, 269 S. W. 2d 275 (1954), where a conviction of carrying a concealed deadly weapon (pistol in glove compartment of automobile) was reversed. *Contra,* Hudspeth v. State, — Tex. Crim. —, 254 S. W. 2d 130 (1954).
[49] N. C. GEN. STAT. 14-402 (1953) was amended by N. C. Public Laws 1923, c. 106; N. C. Session Laws 1947, c. 781 (19).
[50] N. C. GEN. STAT. 105-80 (1950).
[51] N. C. GEN. STAT. 14-402 to -408 (1953).

control sales,[52] permits of sale and the description of their form issued by the clerk of the superior court,[53] conditions under and purposes for which the permits are issued,[54] record of permits issued kept by the clerk,[55] record of sales kept by dealers,[56] the listing of weapons for taxes,[57] and penalties.[58] From a study of these provisions, a general perception of the intention of the legislature may be obtained, but a literal interpretation of some of them proves confusing.

By G. S. 14-402 it is declared unlawful for any person, firm, or corporation to sell, give away, or dispose of, or to purchase or receive the weapons enumerated, including pistols, without first obtaining a permit from the clerk of the superior court of the county where the transaction is to take place. The question arises: must one who holds a dealer's license, authorizing him to sell pistols, obtain a permit to do so, and if one were desirous of selling a pistol, must he likewise obtain a permit, if the intended vendee were a *dealer?*[59] Further, by the second paragraph of the statute, which is the 1923 Amendment, it is declared unlawful to receive through the mails or by express the proscribed weapons, including pistols, without exhibiting at the time of delivery and to the person delivering the same, the permit from the clerk of the court. To the writer's knowledge, the following situation arises: an owner of a pistol sends it to the maker for repairs. Upon completion of the repairs it is sent back to the owner by express, and at delivery, the owner must show to the express agent a permit to "purchase" his own pistol.

The form of the permit to be issued by the clerk of the court for the purchase of a pistol is set forth in G. S. 14-403, in which the clerk certifies that the weapon is necessary for *self-defense* or the *protection of the home.* G. S. 14-404 requires the clerk to first satisfy himself as to the good moral character of the applicant, and that the possession of the weapon is required for "protection of the home," excluding any mention of self-defense. Assuming that this section, when considered together with the one preceding it, will be construed to apply equally to self-defense, should these two reasons be the *only* ones for which a person will be permitted to purchase a pistol?[60] Again using a literal

[52] N. C. GEN. STAT. 14-402 (1953).
[53] N. C. GEN. STAT. 14-403 (1953).
[54] N. C. GEN. STAT. 14-404 (1953).
[55] N. C. GEN. STAT. 14-405 (1953).
[56] N. C. GEN. STAT. 14-406 (1953).
[57] N. C. GEN. STAT. 14-407 (1953).
[58] N. C. GEN. STAT. 14-408 (1953).

[59] Many of the uncertainties in this area are probably due to the fact that G. S. 105-80, relating to dealers in pistols, was originally enacted in 1939, N. C. Public Laws 1939, c. 158, § 145, whereas G. S. 14-402 to -408, relating to purchases and sales, were originally enacted in 1919, N. C. Public Laws 1919, c. 197, §§ 1-7.

[60] A number of jurisdictions have excepted antique pistols from their provisions concerning purchase, possession, and sale if they are kept as ornaments or curios. See MD. CODE ANN. art. 27 § 543 (1951). The Internal Revenue Code of 1954 excepts weapons not firing "fixed ammunition," *i.e.,* metallic cartridges. INT. REV. CODE OF 1954, § 5848.

interpretation of the statutes, it would appear impossible for a citizen to go to the clerk of the superior court and obtain a permit to purchase a target pistol of .22 caliber.

It is suggested that the laws concerning firearms in North Carolina should be re-examined and clarified, with an underlying policy designed to resolve the conflict between the need for regulation and the prohibition of infringement of the right to keep and bear arms.

JOHN D. ELLER, JR.

Military Jurisdiction—Ex-Servicemen—Civilian Dependents

The United States Supreme Court in the greatly controverted *Quarles v. Toth* case[1] declared that ex-servicemen are not subject to military jurisdiction for crimes committed in the service where charges are not preferred prior to discharge.

In stating that Article 3(a)[2] of the Uniform Code of Military Justice,[3] which provided for such jurisdiction was unconstitutional, the Court held that Congress had no power to give military courts such jurisdiction either under its powers "To raise and support Armies,"[4] "To declare War,"[5] "To provide for organizing, arming, and disciplining, the militia,"[6] or "To punish . . . (offenses) . . . against the Law of Nations";[7] nor could such power be derived from the President's power as Commander-in-Chief or on any theory of martial law.

The Court further expressed its belief that "any expansion of court-martial jurisdiction like that in the 1950 Act *necessarily encroaches* on the jurisdiction of the federal courts set up under Article III of the Constitution. . . ."[8] (Emphasis added.)

Possibly the most dominant reason which led to the *Toth* decision was the effect of Article 3(a) on the constitutional safeguard of trial by jury. This appraisal is certainly apparent from Justice Black's statement, "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people [i.e., civilians]

[1] United States *ex rel* Toth v. Quarles, 350 U. S. 11 (1955). This case has been the subject of many comments; see: 67 HARV. L. REV. 479 (1954); 21 U. CHI. L. REV. 426 (1954); 41 CORNELL L. Q. 498 (1956); 33 TEX. L. REV. 932 (1955).

[2] "Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this Code, an offense against this Code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." 64 STAT. 109 (1950), 50 U. S. C. § 553(a) (1952).

[3] Hereinafter: U. C. M. J.

[4] U. S. CONST. art. I, § 8, cl. 12.

[5] U. S. CONST. art. I, § 8, cl. 11.

[6] U. S. CONST. art. I, § 8, cl. 16.

[7] U. S. CONST. art. I, § 8, cl. 10.

[8] 350 U. S. 11, 15.

charged with offenses for which they can be deprived of their life, liberty, or property."[9] The Court seemed extremely hesitant to deprive veterans of the protection afforded by jury trial and rejected the contention that power to circumvent such protection could be inferred through the "Necessary and Proper" clause.

Although the *Toth* Case apparently decided the question of military jurisdiction over ex-servicemen,[10] it left unanswered the question of whether the *Toth* decision would be extended to include other civilians who had theretofore been subject to various other sections[11] of the U. C. M. J., i.e., civilian dependents and civilians working for and with the armed forces overseas. The possibility of such an extention was apparent from the Court's comment, "For given its natural meaning the power granted Congress . . . would seem to restrict court-marital jurisdiction *to persons who are actually members or part of the armed forces.*" (Emphasis added.)[12]

At the end of the 1956 Spring Term, the Supreme Court in *Kinsella v. Krueger*[13] and *Reid v. Covert*[14] indicated that it was unwilling to extend the *Toth* philosophy any further than was necessary. Both cases involved dependent wives alleged to have murdered their husbands who were on active duty outside the continental limits of the United States. Trials by general court-martial were awarded each defendant, verdicts of guilty were found, and sentences imposed. Habeas corpus proceedings were instituted, and the two cases were reviewed before the Supreme Court which upheld the convictions,[15] declaring that Article 2(11)[16] of the U. C. M. J. was constitutional.

Justice Clark,[17] who wrote the majority opinions in these two subsequent cases, initially stated that Congress had the power to establish legislative courts[18] and that citizens of the United States are not

[9] *Id.* at 17.

[10] Prior to Quarles v. Toth there were conflicting views; see: United States *ex rel* Flannery v. Commanding General, 69 F. Supp. 661 (S. D. N. Y. 1946) and Kronberg v. Hale, 180 F. 2d 128 (9th Cir. 1950).

[11] U. C. M. J. art. 2, §§ 5, 7, 8, 10, 12. [12] 350 U. S. 11, 15.

[13] 351 U. S. 470 (1956). [14] 351 U. S. 487 (1956).

[15] Military courts are legislative courts; neither their finding or decisions are reviewable by any civil court, including the Supreme Court, except collaterally by means of habeas corpus proceedings. Burns v. Wilson, 346 U. S. 137 (1954); Collins v. McDonold, 258 U. S. 416 (1923); Torble's Case, 13 Wall. 397 (1871).

[16] Article 2 provides: "The following persons are subject to this code. . . . (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories; That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands." 64 STAT. 108 (1950), 50 U. S. C. § 551 (1952).

[17] Justice Clark was one of two justices who joined in all three majority opinions of the principal cases.

[18] 351 U. S. 470, 475-476.

guaranteed the right of trial by jury outside the continental limits of the United States, District of Columbia, Alaska, and Hawaii.[19]

Upon these foregoing premises the Court concluded, "If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment [Article 2(11)] must be sustained."[20]

Attention should be focused on the fact that Articles 3(a) and 2(11) of the U. C. M. J. are necessarily based upon the same constitutional provisions, yet the Court labeled the former unconstitutional in the *Toth* Case and the latter constitutional in the two more recent cases. Possibly the sole explanation for the above can be found obscurely embedded within footnote six[21] of the *Kinsella v. Krueger* opinion, where the Court narrowly construed the *Toth* ruling to a concise minimum: that Article 3(a) was unconstitutional because it "necessarily encroached on the jurisdiction of the federal courts set up under Article III of the Constitution."

Having established this restriction, the Court went on to say that there could be no such encroachment in the *Krueger* Case. However, the Court did not specifically say exactly why there could be no encroachment. Nevertheless, it could be assumed that the distinction was based upon the fact that Congress had not acted in giving the federal courts jurisdiction over the person or the crime. By so distinguishing the *Toth* Case the Court stated that it would not be necessary to justify the power of Congress with its [Congress's] constitutional limitations.

This latter statement of the Court raises two more questions which have not as yet been answered by the Court. Was there actually an encroachment in the *Toth* Case where the federal courts had in fact been given no jurisdiction over such crimes by Congress?[22] And secondly, if not: Was this encroachment the only justification for declaring Article 3(a) unconstitutional?

There seems to be two plausible alternatives which arise from the above analysis. Either the foundations of the *Toth* Case have been removed by the Court, leaving a mere legal mirage to support the final conclusion that ex-servicemen are free from military jurisdiction, or the Supreme Court has indirectly decided that it is not necessary for Congress to actually give the federal courts jurisdiction over crimes committed by ex-servicemen while they were in the service before

[19] There is considerable authority to support this premise; see: *In re* Ross, 140 U. S. 453 (1891); Reynolds v. United States, 98 U. S, 145 (1879); *In re* Berue, 54 F. Supp. 252 (S. D. Ohio 1944); United States v. Archer, 51 F. Supp. 708 (1944).

[20] 351 U. S. 470, 476.

[21] *Ibid.*

[22] This query was raised in Justice Reed's dissent, U. S. *ex rel* Toth v. Quarles, 350 U. S. 11, 24-28 (1955) (dissent).

a grant of such authority to a military court, in lieu thereof, will be termed an encroachment on the federal court's jurisdiction.[23]

The present status of the law seems to be that ex-servicemen cannot be tried by the military or civil courts for crimes committed while on active duty overseas, unless charges are brought prior to discharge.[24] In respect to civilian dependents and civilians working for and with the armed forces, the military courts continue to exercise jurisdiction. It also seems reasonable that the Supreme Court will extend the *Toth* ruling to exempt civilians subject to the U. C. M. J., who return to the United States before charges are preferred by the military authorities for crimes committed overseas.[25]

J. N. GOLDING

Taxation—Federal Income—Nonrestricted Stock Options—Proprietary and Compensatory Options—Taxability of Options upon Receipt[1]

In a recent Supreme Court decision, a serious blow was dealt taxpayers seeking to avoid income taxation arising out of certain employer-employee stock option plans. In *Commissioner v. LoBue*[2] the Court decided against a distinction supported in the Tax Court[3] and Courts of Appeals[4] which, for income tax purposes, divided employee stock option plans into two types.

The basic problem involved may be illustrated simply. *TP*, a key employee of *X* Corporation, is given an option by the corporation to

[23] It is likely that Congress will now give the federal courts jurisdiction over ex-servicemen and ex-dependents; such would be constitutional. U. S. CONST. art. III, § 2; Skiriotes v. Florida, 313 U. S. 69 (1941); United States v. Bowman, 260 U. S. 94 (1923); Jones v. United States, 137 U. S. 202 (1890).

[24] Military jurisdiction is not retroactive in regard to crimes committed prior to induction, although servicemen are presently on active duty; United States v. Logan, C. M. 248867, 31 B. R. 363 (1944); nor can it be revived as to crimes committed during the first enlistment, even though a second enlistment immediately follows; United States *ex rel* Herschberg v. Cooke, 336 U. S. 210 (1949). However, military jurisdiction does *not* cease while a discharged serviceman is serving his sentence; Kohn v. Anderson, 255 U. S. 1 (1921); and if charges are brought before discharge, military jurisdiction continues after said discharge; Carter v. McCloughry, 183 U. S. 365 (1902).

[25] 351 U. S. 487, 490.

[1] In 1950 Congress enacted what is now INT. REV. CODE OF 1954, § 421, which provides for capital gains treatment of certain "restricted stock options." If an option complies with § 421 the employee has to report no income until he sells the stock; and, then, any excess over the option price is taxed as a capital gain. However, any stock option plan which does not come within the restrictions of § 421 will not receive the special capital gains treatment. The taxability of these so-called nonrestricted options is the subject of this note.

[2] 351 U. S. 243 (1956).

[3] Malcolm S. Clark, P-H 1950 T. C. Mem. Dec. ¶ 50210; Norman G. Nicholson, 13 T. C. 690 (1949); Delbert B. Geeseman, 38 B. T. A. 258 (1938).

[4] Commissioner v. LoBue, 223 F. 2d 367 (3d Cir. 1955), *rev'd*, 351 U. S. 243 (1956); Commissioner v. Smith, 142 F. 2d 818 (9th Cir. 1944), *rev'd*, 324 U. S. 177 (1945).

buy a number of its shares of stock. On the date the option is given the option price may be about the same as the fair market value of the stock.[5] Later when *TP* exercises the option the fair market value of the stock has risen and *TP* purchases at a considerable saving. *TP*'s preference is to report no income upon receipt or exercise of the option and, upon subsequent sale or exchange of the stock, to report any profit as capital gains.

As early as 1923[6] the Commissioner urged that the spread or difference between the option price for the stock and the fair market value of the stock is taxable income to the employee exercising the option. The Board of Tax Appeals originally supported the Commissioner's contention.[7] Some Courts of Appeals, however, did not agree.[8]

The Board decided in 1938 that there were two types of employee stock option plans.[9] According to the Board's theory, one type of option is compensatory in nature and in fact intended as compensation to the employee.[10] The second type is proprietary in nature and intended only to give the employee a bargain purchase of the stock so that he might acquire an ownership interest in the corporation.[11] Only where the option is compensation to the employee would he be taxed on the spread between the option price and the fair market value of the stock. The Commissioner acquiesced[12] in this reasoning until 1945 when the Supreme Court in *Commissioner v. Smith*[13] gave him new hope that his original determination had been valid. In this decision the Supreme Court reinstated a finding of the Tax Court that an option was compensatory because of the intent of the parties, ignoring the proprietary option theory on which the Court of Appeals had reversed.

Following the *Smith* case the Commissioner ruled in T. D. 5507:[14]

[5] The relationship of the option price to the market value of the stock on the date the option is granted has been and will continue to be an important factor in employee stock option cases. Rossheim v. Commissioner, 92 F. 2d 247 (3d Cir. 1937); Omaha Nat'l Bank v. Commissioner, 75 F. 2d 434 (8th Cir. 1935); Wanda V. Van Dusen, 8 T. C. 388 (1947), *aff'd*, 166 F. 2d 647 (9th Cir. 1948); Albert R. Erskine, 26 B. T. A. 147 (1932).

[6] T. D. 3435, II-1 CUM. BULL. 50 (1923).

[7] Albert R. Erskine, 26 B. T. A. 147 (1932).

[8] Omaha Nat'l Bank v. Commissioner, 75 F. 2d 434 (8th Cir. 1935), *reversing* 29 B. T. A. 817 (1934); Rossheim v. Commissioner, 92 F. 2d 247 (3d Cir. 1937), *reversing* 31 B. T. A. 857 (1934).

[9] Delbert B. Geeseman, 38 B. T. A. 258 (1938).

[10] Van Dusen v. Commissioner, 166 F. 2d 647 (9th Cir. 1938); Connelly's Estate v. Commissioner, 135 F. 2d 64 (6th Cir. 1943); Edward J. Epsen, 44 B. T. A. 322 (1941).

[11] Malcolm S. Clark, P-H 1950 T. C. Mem. Dec. ¶ 50210; Norman G. Nicholson, 13 T. C. 690 (1949); James M. Lamond, P-H 1946 T. C. Mem. Dec. ¶ 46023.

[12] 1939-1 CUM. BULL. 13. The Commissioner also amended the regulations to conform with the Board's holding. The difference between the option price and the market price was to be taxable to the employee "to the extent that such difference is in the nature of (1) compensation for services rendered or to be rendered . . . ." T. D. 4879, 1939-1 CUM. BULL. 159.

[13] 324 U. S. 177 (1945).

[14] 1946-1 CUM. BULL. 18.

> "If property is transferred by an employer to an employee for an amount less than its fair market value, regardless of whether the transfer is in the form of a sale or exchange, the difference between the amount paid for the property and the amount of its fair market value is in the nature of compensation and shall be included in the gross income of the employee."

On the same day a statement amplifying and interpreting T. D. 5507 was issued:

> "If an employee receives an option . . . to purchase stock of the employer corporation, . . . and the employee exercises such option, the employee realizes taxable income by way of compensation on the date upon which he receives the stock to the extent of the difference between the fair market value of the stock when it is received and the price paid therefor."[15]

The Commissioner thus, in effect, revived his 1923 ruling; again, all options were taxable to the employee on the spread between the option price and market value of the stock when the stock is received.[16] The Commissioner's determinations, however, did not end the idea of proprietary stock options.[17]

In *Commissioner v. LoBue* the stock option had been awarded LoBue in recognition of his "contribution and efforts in making the operation of the company successful."[18] The Tax Court and Court of Appeals had both held that the option was proprietary.[19] In holding that the distinction between proprietary and compensatory stock options does not exist for income taxation purposes and that both should be taxed alike, the Supreme Court said:

> ". . . [T]here is not a word in section 22(a) which indicates that its broad coverage should be narrowed because of an employer's intention to enlist more efficient service from his employees by making them part proprietors of his business. In our view there is no statutory basis for the test established by the courts below. . . . Section 22(a) taxes income derived from compensation 'in whatever form paid.' And in another stock

[15] I. T. 3795, 1946-1 CUM. BULL. 15, 16.

[16] Usually the stock will be received at the same time the option is exercised. However, when the stock is received at a date later than the exercise the Supreme Court has held the spread to be taxable at the later time. Commissioner v. Smith, 324 U. S. 695, *denying rehearing of* 324 U. S. 177 (1945).

[17] Phillip J. LoBue, 22 T. C. 440 (1954), *aff'd* 223 F. 2d 367 (3d Cir. 1955), *rev'd* 351 U. S. 243 (1956); Robert A. Bowen, P-H 1954 T. C. Mem. Dec. ¶ 54206.

[18] Commissioner v. LoBue, 351 U. S. 243, 244 (1956).

[19] Philip J. LoBue, 22 T. C. 440 (1954), *aff'd* 223 F. 2d 367 (3d Cir. 1955), *rev'd* 351 U. S. 243 (1956).

option case we said that section 22(a) 'is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.' "[20]

Thus the Court in *LoBue* has abolished a complicated tax doctrine of eighteen years' standing[21] by taking a more realistic view than had the Courts below of the actual economic benefits derived by employees receiving options. Now that the Court has ruled that all nonrestricted[22] stock options are compensatory, the question remains as to when and at what valuation the gain should be reported.

TREATING THE RECEIPT OF THE OPTION ITSELF AS COMPENSATION

That the option itself may be the only intended compensation has been recognized, at least in dicta, by the Supreme Court. In *Commissioner v. Smith* the option involved had no value when received by the taxpayer. However, the Court stated: ". . . It of course does not follow that in other circumstances not here present the option itself, rather than the proceeds of its exercise, could not be found to be the only intended compensation."[23] The Court had in the opinion previously given an indication of what kind of option it might consider as compensation to the employee:

". . . When the option price is less than the market price of the property for the purchase of which the option is given, it may have present value and may be found to be itself compensation for services rendered. . . . The option could operate to compensate the taxpayer only as it might be the means of securing the transfer of the shares of stock from the employer to the employee at a price less than their market value, or possibly, which we do not decide, as the option might be sold when that disparity in value existed. . . ."[24]

If an employee successfully contends that his option is compensation when received his tax saving might be substantial. He would

[20] Commissioner v. LoBue, 351 U. S. 243, 247 (1956). The "another stock option case" was Commissioner v. Smith, 324 U. S. 177, 181 (1945). Note that the Court based its decision on INT. REV. CODE OF 1939, § 22(a), 52 STAT. 457 and not T. D. 5507 or I. T. 3795. Section 22(a) defined gross income as including "gains, profits, and income derived from . . . compensation for personal service . . . of whatever kind and in whatever form paid."

[21] For further discussion of the problems involved in determining whether an option is compensatory or proprietary, see Dillavou, *Employee Stock Options*, 20 ACCOUNTING REV. 320 (1945); Comment, 56 YALE L. J. 706 (1947); Note, 11 TAX L. REV. 179 (1956).

[22] See note 1 *supra*.

[23] Commissioner v. Smith, 324 U. S. 177, 182 (1945).

[24] *Id.* at 181.

report as ordinary income the value of the option the year received. Any subsequent gain realized on sale of the option or stock would be taxed under the lower capital gains rates.[25]

Aside from the dictum of the Supreme Court in the *Smith* case, the taxpayer may find support from two recent Courts of Appeals cases. In *McNamara v. Commissioner*[26] the option was assignable and was not conditioned on McNamara's continued employment with the corporation. A present value was indicated by the spread between option price and market value when the option was granted.[27] McNamara's uncontroverted evidence showed the intent[28] of the employer was that the option itself would be compensation to him in 1945, the year of its grant. For that year the corporation claimed a salary deduction in an amount representing the value it placed on the option, and McNamara reported the same amount as ordinary income.[29] The Commissioner, however, disallowed the employer's deduction and ruled that the transaction gave McNamara no income.

When McNamara exercised the option in subsequent years, the Commissioner assessed deficiencies, stating that the spread between option price and fair market value on the date the option was exercised and stock paid for was taxable income.[30] The Tax Court decided in favor of the Commissioner.[31]

In reversing the Tax Court, the Seventh Circuit Court of Appeals felt that the facts of the case established a situation such as the Supreme Court had described in the dictum of *Commissioner v. Smith*.[32] The

[25] Of course, the market price of the stock may decrease. This is the risk that the employee takes in reporting the value of the option as ordinary income. However, presumably the amount so reported would be reflected in the basis of the option and, upon subsequent exercise, the basis of the stock.

[26] 210 F. 2d 505 (7th Cir. 1954).

[27] The option granted a right to purchase a total of 12,500 shares during a two year period. The option price was $16 per share. On the date the option was granted the fair market value of the stock was $19 per share. The taxpayer and the corporation valued the option at $16,375.

[28] A board of directors resolution had stated that the option was "in addition" to the taxpayer's cash salary. In the yearly report to the Securities Exchange Commission, the corporation reported that the option was granted to the taxpayer for "services rendered or to be rendered."

[29] If the taxpayer does not report the value of the option as income in the year received, he may be estopped or deemed to have waived the right to claim the amount as income in that year. See Bothwell v. Commissioner, 77 F. 2d 35 (10th Cir. 1935).

[30] The difference between the option price and the market price of the stock when the option was exercised was $78,125 in 1946 and $77,343.75 in 1947.

[31] Harley V. McNamara, 19 T. C. 1001 (1953), *rev'd* 210 F. 2d 505 (7th Cir. 1954). The Tax Court said that the intended compensation was the profit to be derived upon exercise of the option and not the option itself. "This is not a case of the distribution of a stock option or warrant, which has a clearly ascertainable market value or which the employee could readily sell. Although there was no provision in the option forbidding assignment, it is nevertheless plain that no assignment or sale was ever contemplated by either party." *Id.* at 1010.

[32] 324 U. S. at 181-82. The finding of the Tax Court that the compensation

facts upon which the court relied were: (a) The taxpayer and the employer intended the option as compensation when granted; (b) the taxpayer and the employer both reported a valuation on the option itself in 1945; (c) the option had value when granted; (d) the option was assignable.

In *Commissioner v. Stone's Estate*[33] the taxpayer, Stone, was allowed to purchase one hundred warrants at a price of $10 per warrant. Each warrant entitled him to buy one hundred shares of the employer's stock at a certain price. On the date Stone obtained the warrants, the market price of the stock was below the warrant price. However, he reported $5000 compensation for that year as the total additional value of the one hundred warrants.[34] In the next year Stone sold eighty-nine of the warrants for $82,680, returning the rest to the corporation at the purchase price.

Stone sought to pay capital gain rates on the profit he realized from the sale. The Commissioner determined that the gain was ordinary income, falling within the scope of T. D. 5507 and I. T. 3795. He relied specifically on a part of I. T. 3795:[35]

> "If an employee transfers such option for consideration in an arm's length transaction, the employee realizes taxable income by way of compensation on the date he receives such consideration to the extent of the value of such consideration."

The Court of Appeals affirmed the Tax Court holding in favor of the taxpayer,[36] both courts relying on the dictum in the *Smith* case. The Court reasoned that the warrants had value when obtained by the taxpayer. This was illustrated by the following facts: (a) Stone bought the warrants and reported the amount by which his estimate of their value exceeded the purchase price as income; (b) the warrants were

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intended by the parties was not the value of the option itself but the spread between fair market value of the stock on the day of exercise and the option price was held "clearly erroneous" by the Circuit Court because not supported by substantial evidence. "It seems clear to us, from the language of the parties found in the written instruments they executed and from their actions, that they intended the option itself to be the additional compensation by the parties for petitioner's services." McNamara v. Commissioner, 210 F. 2d 505, 510 (7th Cir. 1954).

[33] 210 F. 2d 33 (3d Cir. 1954).

[34] The taxpayer's burden of proof on the value of the warrants was sustained by two expert witnesses. The Tax Court said it was convinced from the evidence that the 100 warrants were worth $6000 to Stone when he received them. However, exactly what data this valuation was based upon does not appear.

[35] 1946-1 CUM. BULL. at 16.

[36] Estate of Lauson Stone, 19 T. C. 872 (1953), *aff'd* 210 F. 2d 33 (3d Cir. 1954). The Tax Court reasoned that the warrants involved differed from the usual options given to employees. On this ground it is difficult to reconcile this decision with the Tax Court's decision in the *McNamara* case. However, in *McNamara* the Tax Court had held that the option itself had no ascertainable value; here, the warrants were held to have such a value. Accepting the court's findings of fact the opposite holdings by the Tax Court are reconcilable.

fully assignable by Stone; (c) the holder of the warrants was protected from dilution of his right to purchase stock.

The Supreme Court in *Commissioner v. LoBue* left the road open for further taxpayer arguments that the receipt of the option is compensation.

> "It is of course possible for the recipient of a stock option to realize an immediate taxable gain. . . . The option might have a readily ascertainable market value and the recipient might be free to sell his option. . . ."[37]

In future option cases the obstacle which employees will have to overcome will be the proving of a "present value" of the option when received, apparently required by the dictum in *Commissioner v. Smith.*[38] The Court's dictum can be interpreted to mean that in order to have present value the option price should be less than the market price of the stock. In the *LoBue* case the Court referred to a "readily ascertainable market value" and the right to sell the option. It cited the *McNamara* case as an idea of what it had in mind.[39] It may well be that the Supreme Court intended to imply that proof of the existence of both factors is essential for invocation of the *McNamara* rule.

As a summary, the following factors indicate a possibility that an option will be taxed when received: (1) The option has value on the date granted. Value means a present value and will usually be related to the spread between the option price and the fair market value of the stock. (2) The option is freely assignable by the employee.[40] (3) Circumstances surrounding the granting of the option indicate that the parties intend the option as compensation. (4) The employee includes the value of the option when granted in his tax return for that year.

Problems of valuation will not be too great for the employees of larger corporations whose stock is readily available on the exchanges. However, where a small corporation is involved, the value of the option when received will usually be a matter of some conjecture. In some tax matters the courts have been quite reluctant to evaluate property where its value is a matter of much uncertainty.[41] The Supreme Court

[37] Commissioner v. LoBue, 351 U. S. 243, 249 (1956).

[38] 324 U. S. at 181.

[39] The Court made no reference to Commissioner v. Stone's Estate, 210 F. 2d 33 (3d Cir. 1954).

[40] Where the option was not assignable it has been held not to be compensation to the employee at date of grant. Dean Babbitt, 23 T. C. No. 108 (Feb. 14, 1955); John C. Wahl, 19 T. C. 651 (1953). In *John C. Wahl* one half of the option could not be obtained unless taxpayer was still employed by the corporation. Taxpayer could not assign the option except to other employees. Such restrictions were held to make determination of a value impossible.

[41] In Burnet v. Logan, 283 U. S. 404 (1931), the Commissioner attempted to apportion amounts received and to be received by the taxpayer for sale of stock

in the *LoBue* case seemed to be emphasizing this very point when it referred to a "readily ascertainable market value." Rather than put a highly conjectural valuation on the stock, the courts might prefer to defer any taxable amount to the time the option is exercised.[42] In many cases this rule might prevent the small corporation employee's use of the lower tax rates as regards nonrestricted stock options.

CONCLUSION

Although *Commissioner v. LoBue* solved one problem of the Commissioner by eliminating proprietary stock options, it left him with another when the Court passed up the opportunity to stifle its own dictum in the *Smith* case. In the light of this new dictum in the *LoBue* case and the Court's apparent approval of the *McNamara* decision, the Commissioner may have to modify his position concerning the treatment of the option as compensation. Although valuation problems may prevent the treatment of the option as compensation by employees of small corporations, there appears a good chance for such treatment by employees of larger corporations.

DOUGLAS O. TICE, JR.

Wills—Admission of Extrinsic Evidence to Explain Ambiguities in Wills

In a recent case, *Wachovia Bank and Trust Co. v. Wolfe*,[1] the testatrix left a will which read in part as follows: "To my sister, Camille H. Wolfe, I leave my furniture, household effects and *personal property* (emphasis added). The balance of my estate, I leave to the National Red Cross Society of America." After payment of ascertained liabilities and other bequests there remained $911.42 cash, and $20,915.78 in bonds and securities exclusive of furniture and household effects. Both the Red Cross and Camille H. Wolfe claimed the cash, bonds, and securities under the will. The Red Cross contended that the words, "personal property," in the bequest to Mrs. Wolfe was limited to furniture, household effects, etc. and that they did not include stocks, bonds, and cash which they claimed passed under the residuary clause of the will. Mrs. Wolfe contended that the testatrix intended that the stocks, bonds, and cash be included under the term, "personal property." In trying to prove their contentions, both Mrs. Wolfe and the Red Cross

between return of capital and profit. The taxpayer argued that there was no ascertainable present value of the profit. The Court decided in taxpayer's favor. There would be no profit until taxpayer recovered her cost. See also Westover v. Smith, 173 F. 2d 90 (9th Cir. 1949).

[42] Burnet v. Logan, *supra* note 41.

[1] 243 N. C. 469, 91 S. E. 2d 246 (1956).

sought to introduce extrinsic evidence to aid in the construction of the will, which evidence was refused by the lower court. On appeal, the North Carolina Supreme Court reversed the lower court, holding that there was a patent ambiguity and that evidence of the surrounding circumstances at the time of the testator's death should be admitted.

Thus, it is often the case that an otherwise valid will presents difficult problems of construction because of ambiguities in the language employed. The question then presents itself: Under what circumstances is it possible to introduce extrinsic evidence to aid in the construction of the will?

The justification for admission of extrinsic evidence is the necessity of the sitaution; that is, an ambiguity in the will itself, and unless an ambguity exists, the testator's intention must be found only within the "four corners of the will."[2]

The courts have classified ambiguities into two categories, "latent" and "patent." A patent ambiguity arises when the will is ambiguous on its face; *i.e.,* from the very reading of the words of the will it is not clear what they mean or what the testator intended.[3] Thus, a will which read: "I give to my four daughters the plantations on which I now live. If any of my daughters die without issue, their portion is to be equally divided among the three survivors & co.,"[4] was held by our court to be a patent ambiguity because from the reading of the will the meaning of the phrase, "& co.," was not clear. Also, if a testator leaves one tract of land to two different people in the same will,[5] the ambiguity is apparent on the face of the instrument and is therefore patent.

The admissibility of extrinsic evidence to explain or resolve a patent ambiguity, has long been the subject of conflict among the courts. The broad rule laid down in such cases is that extrinsic evidence is not admissible in the case of a patent ambiguity, because the document was void upon its face due to the uncertainty, and no interpretation could be given to the words as there was nothing to interpret.[6] This rule is much too broad, however, when one considers the number of cases

[2] Wachovia Bank and Trust Co. v. Green, 239 N. C. 612, 80 S. E. 2d 771 (1954); R. J. Reynolds v. Safe Deposit and Trust Co., 201 N. C. 267, 159 S. E. 416 (1931); Kidder v. Bailey, 187 N. C. 505, 122 S. E. 22 (1924); Wooten v. Hobbs, 170 N. C. 211, 86 S. E. 811 (1915); 4 PAGE, WILLS § 1627 (3rd ed. 1941).

[3] Taylor v. Maris, 90 N. C. 619 (1884); Institute v. Norwood, 45 N. C. 65 (1853); 4 PAGE, WILLS § 1623 (3rd ed. 1941); 20 AM. JUR., *Evidence* § 1156 (1939).

[4] Taylor v. Maris, *supra* note 3.

[5] Bank of Manhatten v. Gray, 53 R. I. 377, 166 Atl. 817 (1933); 4 PAGE, WILLS § 1623 (3rd ed. 1941).

[6] Taylor v. Maris, 90 N. C. 619 (1884); Bailey v. Bailey, 52 N. C. 44 (1859); Barnes v. Simms, 40 N. C. 392 (1848); Bridges v. Pleasants, 39 N. C. 26 (1845); Field v. Eaton, 16 N. C. 483 (1829).

which admit some extrinsic evidence where the ambiguity was patent.[7]

The North Carolina Court has become more liberal in its attitude toward allowing extrinsic evidence to aid in the construction of a will where there is a patent ambiguity provided such extrinsic evidence is limited to what it calls "circumstances attendant."[8] Our court on numerous occasions has said that in the construction of a will the cardinal purpose is to ascertian and give effect to the intention of the testator as expressed in the words he has used, and, that to ascertain such intention, all the provisions may be examined in the light of the surrounding circumstances. These circumstances include the state of the testator's family at his death, the condition and nature of his property, and the relationship of the testator to his family and to beneficiaries named in the will.[9] For instance, in *Wooten v. Hobbs*[10] the court said, "The writing in which the will must be expressed, contains the only testamentary intention that the law will effectuate. This intention must be found within the instrument or nowhere. Hence, extrinsic evidence is inadmissible to show an intent not contained in the document itself. But when the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, so far as may be, in the position of the testator, that it may see things from his view point. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible." In other words, the court, in the case of a patent *ambiguity,* can hear evidence concerning the "circumstances attendant" to the making of a will so as nearly as possible to place itself in the position of the testator at the time he wrote the will in order to ascertain his intent. This evidence is to be considered by the court without the use of a jury.[11] The court may, however, in its discretion, submit questions of fact to a jury for determination.[12] It should be noted, however, that the evidence admitted is limited to the circumstances surrounding the making of the will, and declarations by the testator of his intention whether made before or after the execution of the will are inadmissible to show his intent.[13]

[7] Hubbard v. Wiggins, 240 N. C. 197, 81 S. E. 2d 174 (1954); *In re* Will of Johnson, 233 N. C. 570, 65 S. E. 2d 12 (1951); Cannon v. Cannon, 225 N. C. 611, 36 S. E. 2d 17 (1945); Heyer v. Bullock, 210 N. C. 321, 186 S. E. 356 (1936); Scales v. Barringer, 192 N. C. 94, 133 S. E. 410 (1926); Snow v. Boylston, 185 N. C. 321, 117 S. E. 14 (1923); 4 PAGE, WILLS § 1624 (3rd ed. 1941); 57 AM. JUR., *Wills* § 1043 (1948).

[8] *Ibid.*

[9] *Ibid.*

[10] 170 N. C. 211, 86 S. E. 811 (1915).

[11] Cecil v. Cecil, 173 N. C. 410, 92 S. E. 158 (1917).

[12] *In re* Housing Authority, 235 N. C. 463, 70 S. E. 2d 500; N. C. GEN. STAT. § 1-172 (1953).

[13] Holmes v. York, 203 N. C. 709, 166 S. E. 889 (1933); R. J. Reynolds v. Safe Deposit and Trust Co., 201 N. C. 267, 159 S. E. 416 (1931); Raines v. Osborne, 184 N. C. 599, 114 S. E. 849 (1922).

The true rule seems to be that if the ambiguity is patent and the intention of the testator cannot be discovered by a consideration of the facts and circumstances surrounding the testator at the time of execution, then the devise must fail since other evidence may not be introduced to show the testator's intention.[14]

The other type of ambiguity, which is designated as latent, does not appear on the face of the instrument, but becomes apparent when other evidence is introduced. The instrument seems unambiguous but it becomes ambiguous when an attempt is made to apply the words to existing facts.[15] It is generally stated that parol evidence can be admitted to explain a latent ambiguity.[16] If there is a latent ambiguity, the declarations of the testator as to his intentions, in contrast to the case of patent ambiguities, will be admitted to prove the testator's intention whether the declaration was made before or after the will.[17]

Latent ambiguities fall into three main groups: (1) Unambiguous and certain description of a person, but two persons answer the description equally well: Thus, in *Tilley v. Ellis*,[18] where the testator devised certain property to the "Methodist Episcopal Church" and the evidence disclosed that there were two branches thereof under similar names, the court said this was a latent ambiguity; or where the testator leaves certain property to Mary Jones and there is more than one Mary Jones, this is a latent ambiguity and extrinsic evidence may be admitted to show the intention of testator as to which Mary Jones was meant.[19] (2) Unambiguous and certain description of property but two properties answer the description equally well. So, when a testator devised what was called the "Linebarger Plantation" and it could not be determined from the will what specific piece of property was devised by this description, the court held this to be a latent ambiguity and admitted extrinsic evidence to explain it.[20] (3) Unambiguous and certain description of property or person, but the identity or location of the particular property or person needs to be determined: Thus, where the testator was ac-

[14] *Ibid.*

[15] Raines v. Osborne, *supra* note 13; 4 JONES, EVIDENCE § 1548 (2d ed. 1926); 4 PAGE, WILLS § 1623 (3rd ed. 1941).

[16] Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); Raines v. Osborne, 184 N. C. 603, 114 S. E. 846 (1922); McLeod v. Jones, 159 N. C. 74, 74 S. E. 733 (1912); Institute v. Norwood 45 N. C. 65 (1853); 9 WIGMORE, EVIDENCE §§ 2470-2472 (3rd ed. 1940).

[17] *In re* Will of Southerland, 188 N. C. 325, 124 S. E. 632 (1924); 9 WIGMORE, EVIDENCE § 2472 (3rd ed. 1940).

[18] 119 N. C. 233, 26 S. E. 29 (1896); See also: Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); Institute v. Norwood, 45 N. C. 65 (1853).

[19] McDaniel v. King, 90 N. C. 597, 603 (1883) (dictum); 57 AM. JUR., *Wills* § 1067 (1948).

[20] Kincaid v. Lowe, 62 N. C. 41 (1864); McDaniel v. King, *supra* note 19; 57 AM. JUR., *Wills* § 1087 (1948).

customed to call *X* by a nickname and the testator intended *X* to have the property devised, even though the name used in the will was the nickname, the court held this a latent ambiguity and extrinsic evidence was admitted to show the intention of the testator.[21]

At first blush, it would seem that the *Wolfe* case,[22] involved a latent ambiguity, since a mere reading of the will indicates the personal property is to go to Mrs. Wolfe, and the balance to the Red Cross. The ambiguity becomes apparent only when it is discovered that the testator possessed no real property and therefore, the "balance" to the Red Cross could only be comprised of what is generally known as personal property. Since this case does not fall into one of the three categories previously mentioned in which a latent ambiguity must fall, the court was correct in holding that there was no latent ambiguity. On the other hand, it does not seem to be a true patent ambiguity since it is not apparent on the face of the will that there is an ambiguity. However, in determining that the will contained a patent ambiguity, the court evidently reasoned that the phrase, "personal property," is in itself capable of two meanings,[23] the broader including everything which is the subject of ownership except land and interest in land, while the more restricted embraces only goods and chattels;[24] and thus, since it could not be determined which was meant by the testatrix, there was a patent ambiguity.

Although the North Carolina court's conclusions seem quite defensible, the difficulty experienced by the trial court with the distinctions between latent and patent ambiguities with the resulting questions of admissibility of extrinsic evidence serves to emphasize the nicety of the distinctions required.

It is the contention of the writer that our court should abandon these old rules and follow the more practical appoach now being adopted by many jurisdictions. This approach is to do away with the distinction between latent and patent ambiguities.[25] Under this theory extrinsic evidence may be admitted in cases involving patent ambiguities as in those involving latent ambiguities to show the intent of the testator.

[21] Moseley v. Goodman, 138 Tenn. 1, 195 S. W. 590 (1917).

[22] 243 N. C. 469, 91 S. E. 2d 246 (1956).

[23] In holding that the phrase, "personal property," in this will is a patent ambiguity, the court implies the phrase is ambiguous in itself. *Quaere:* If a testator owns stocks, bonds, and real property and leaves the personal property to A and the real property to B, does the will contain a patent abiguity?

[24] Blakeman v. Harwell, 198 Ga. 165, 31 S. E. 2d 50 (1944); Ward v. Curry, 297 Ky. 420, 180 S. W. 2d 305 (1944); 3 PAGE, WILLS § 964, 983 (3rd ed. 1941). For a discussion of what passes under the words, personal property, in a will see 137 A. L. R. 212 (1942), an 162 A. L. R. 1134 (1946).

[25] *In re* Brodersen's Estate, 102 Cal. App. 2d 122, 229 P. 2d 38 (1951); Sater v. Sater, 329 Mich. 706, 46 N. W. 2d 433 (1951); Moore v. Parrish, 38 Wash. 2d 642, 228 P. 2d 142 (1951); Fay v. Strader, 234 Minn. 444, 48 N. W. 2d 657 (1951); 4 PAGE, WILLS § 1623 (3rd ed. 1941); 57 AM. JUR., *Wills* § 1043 (1948).

The court would only determine if there was an ambiguity; if so, extrinsic evidence could be introduced allowing the jury to clear it up. Such a rule would seem to permit greater freedom in determining the testator's intent. In *Armistead v. Armistead*,[26] the court stated: "The distinction between latent and patent ambiguities, when examined, is wholly unphilosophical, and founded upon a scholastic quibble of Lord Bacon."

Another court has said: "The distinction between 'latent' and 'patent' ambiguities is now practically ignored and disregarded. The courts without regard to the distinction, endeavor to arrive by the most direct way at what the testator meant when he wrote the will."[27]

One of the chief arguments against changing to the new rule is that it would encourage interested persons to perjure themselves.[28] This type of reasoning seems to rest on the assumption that more people will be untruthful than will be truthful. While admitting that in a very few cases a witness might perjure himself, it would seem that in the far greater number of cases justice would be done by finding out the intention of the testator so that the property could be disposed of as he wished. The North Carolina Court has approached this position by admitting the "circumstances attendant" in the case of a patent ambiguity. It is submitted that the court should abandon altogether the distinction between "latent" and "patent" ambiguities and, in all cases where there is an ambiguity, admit the evidence necessary to establish the intent of the testator.

EDWIN T. PULLEN

[26] 32 Ga. 597 (1861).
[27] Haupt v. Michaelis, Tex. Com. App., 231 S. W. 706 (1921).
[28] 4 PAGE, WILLS § 1623 (3rd ed. 1941).